FROM MUDDLED TO *MEDELLÍN*: A LEGAL HISTORY OF SOLE EXECUTIVE AGREEMENTS

Anne E. Nelson*

The legal history of sole executive agreements is muddled at best. Over the years the Supreme Court has created a confused doctrine concerning sole executive agreements through its Belmont, Pink, Dames & Moore, *and* Garamendi *decisions by making overly broad generalizations about the preemptive weight of these agreements. This Note takes a comprehensive look at sole executive agreements by reviewing the historical use of these agreements and by analyzing the Supreme Court's jurisprudence. It then argues that the analysis in the recent* Medellín v. Texas *decision helps to clarify the confusion over sole executive agreements by establishing limits on their preemptive weight.*

INTRODUCTION

Can the President of the United States unilaterally make federal law? For most students of American Government, the knee-jerk reaction to this question is an emphatic "no," as they are taught that it is the legislature's role to create laws and the President's role to see that the laws are faithfully executed.[1] Indeed, the United States' political identity depends on a delicate separation of powers that prevents the President from accumulating too much power.[2] Over time, however, the delicate separation of powers balance has shifted, and this emphatic "no" has

---

* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2010. The author would like to thank Erin McDonough and the editors of the *Arizona Law Review* for their feedback and edits, as well as her family for their constant encouragement and support.

1. *See* U.S. CONST. art. II, §§ 2–3. Schoolhouse Rock, a classic American Saturday morning cartoon, created musical educational short films on a variety of topics for school-aged children from the 1970s to the early 1990s. In 1979 Schoolhouse Rock created a cartoon called the "Three Ring Government." This video introduced millions of American schoolchildren to the separation of powers concept. *Schoolhouse Rock: Three Ring Government* (ABC television broadcast 1979).

2. The Founding Fathers certainly felt this way. In Federalist 51, Madison argued that the "separate and distinct exercise of the different powers of government" is "essential to the preservation of liberty." THE FEDERALIST NO. 51, at 251 (James Madison) (Terence Ball ed., 2004).

transformed into a more muddled "maybe," with the President's use of sole executive agreements.

Sole executive agreements present a unique challenge to traditional separation of powers principles. These agreements are legal tools the President can use to unilaterally resolve foreign disputes with other countries. The Supreme Court has upheld the President's authority to enter into sole executive agreements and has broadly held that these agreements, being analogous to treaties, are fit to preempt conflicting state law. Thus, sole executive agreements are a means by which the President can sideline the legislature and unilaterally create federal law.

Sole executive agreements have been used since the early days of the Republic.[3] Since the turn of the twentieth century and the rise of the United States as a global power, Presidents have aggressively used sole executive agreements to resolve significant matters of foreign policy. The expansive use of sole executive agreements has attracted debate amongst scholars as to their constitutional validity, why they have been held to preempt federal law, and, most importantly, how the preemptive effect of these agreements could be limited to better harmonize with the Supremacy Clause and traditional separation of powers principles.[4]

Until recently, the Supreme Court has not provided much guidance to this debate. In a series of decisions,[5] the Supreme Court has sanctioned the use of sole executive agreements and concluded that such agreements can be considered "the supreme Law of the Land."[6] In doing so, the Court has granted sweeping power to the President to effectively create federal law through sole executive agreements without any meaningful limitations.

In the recent *Medellín v. Texas*[7] decision, the Court confronted the issue of whether the President could unilaterally preempt state procedural rules and command state courts to give effect to a decision of the International Court of Justice.[8] The Court soundly rejected this claim of Executive power,[9] and in doing so, the Court refined Justice Jackson's tripartite *Youngstown*[10] standard for assessing the validity of presidential actions.[11] In addition to providing a new lens

---

3. *See infra* text notes 39–41.

4. Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1578 (2007); Michael D. Ramsey, *Executive Agreements and the (Non) Treaty Power*, 77 N.C. L. REV. 133, 219 (1998); David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963 (2003); Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1, 11 (2003).

5. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

6. U.S. CONST. art. VI, cl. 2.

7. 128 S. Ct. 1346 (2008).

8. *Id.* at 1353; Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

9. *Medellín*, 128 S. Ct. at 1371.

10. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

11. *Medellín*, 128 S. Ct. at 1371–72.

through which to assess presidential actions, this updated standard streamlines the Court's earlier muddled sole executive agreement jurisprudence and helps to establish more discernable limits on the preemptive effect of sole executive agreements.

This Note provides a unique comprehensive look at the debate over sole executive agreements. Specifically, this Note examines how the Supreme Court's decisions have pieced together a muddled doctrine that allowed the President to unilaterally create federal law through the use of sole executive agreements. This Note then argues that by revising the *Youngstown* standard, the *Medellín v. Texas* decision helped to clarify this muddled doctrine. This Note further contends that this standard should help to settle the debate over sole executive agreements by providing new limits to their preemptive force. Finally, this Note argues that these new limits help to lend more credibility to sole executive agreements by bringing them more in line with the procedural protections inherent in the Supremacy Clause, as well as with the Constitution's traditional separation of power principles.

Part I begins by explaining theories scholars have developed to define the President's authority to enter into sole executive agreements, and continues by illustrating how early Presidents cautiously used these agreements as a means to implement their express constitutional powers. Part II shows that during the twentieth century, Presidents began to use sole executive agreements more aggressively, such that they began to garner the attention of Congress and the courts. Part II then proceeds to provide a detailed analysis of the Supreme Court's decisions in *United States v. Belmont*,[12] *United States v. Pink*,[13] *Dames & Moore v. Regan*,[14] and *American Insurance Association v. Garamendi*[15] to show how these decisions haphazardly extended the unilateral authority of the President to make agreements that have the full force of federal law. Part III provides an in-depth analysis of the background leading to the decision in *Medellín v. Texas*,[16] and illustrates how the Court's decision helped establish limits on the preemptive authority of sole executive agreements. Part IV explains how the *Medellín* limitations provide legitimacy to sole executive agreements and help to reinforce the Supremacy Clause and traditional separation of power principles.

I. HISTORICAL DEVELOPMENT OF SOLE EXECUTIVE AGREEMENTS

In order to fully understand the debate over sole executive agreements and the impact of the Supreme Court's decisions, it is first important to explain the background and development of these agreements. This Part describes the various theoretical arguments scholars have developed to support the validity of these agreements and details the usage of sole executive agreements in the early history of the Republic.

---

12. 301 U.S. 324 (1937).
13. 315 U.S. 203 (1942).
14. 453 U.S. 654 (1981).
15. 539 U.S. 396 (2003).
16. 128 S. Ct. 1346 (2008).

A. Basis for Sole Executive Agreements

The Constitution, on its face, does not expressly confer authority to the President to make sole executive agreements.[17] Nevertheless, Presidents have entered into such agreements, with varying formality and importance, from the country's early history.[18] Over the years, scholars have struggled to reconcile the dearth of express constitutional authority with the Presidents' practice.[19]

One view of scholars, the "federalist position," narrowly defines the President's authority to enter into sole executive agreements.[20] Specifically, these scholars look to the distinction between "treaties" and nontreaty "agreements and compacts" in Articles I and II.[21] Article II, Section 2 gives the President the power "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[22] By contrast, Article I, Section 10 prohibits states from "entering into any Treaty," but permits them to enter into any "Agreement or Compact with . . . a foreign Power" with the "consent of Congress."[23] Federalist scholars contend that this distinction suggests that the Framers of the Constitution contemplated international agreements other than "treaties." Thus, presumably, if the States could enter into these other forms of agreements, the federal government, including the President, could as well.[24] These scholars further contend that the Framers intended the President to use nontreaty agreements for short-term or minor commitments.[25] By contrast, the use of treaties was intended to be the exclusive means for the United States to enter into significant, long-term commitments.[26]

While the "federalist position" acknowledges that the President has authority to unilaterally enter into nontreaty agreements, it does not contend that such agreements have the force of preemptive federal law.[27] Indeed, the "federalist position" argues that the explicit language in Article VI prevents nontreaty agreements from having any preemptive effect. Specifically, the "federalist

---

17. Indeed, the only international agreement the Constitution expressly permits the President to make is a treaty. U.S. CONST. art. II, § 2, cl. 2.

18. LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 215 (2d ed. 1996).

19. Wuerth, *supra* note 4, at 11; *see also* Ramsey, *supra* note 4.

20. Sloss, *supra* note 4, at 1966.

21. *See* Ramsey, *supra* note 4, at 219; Clark, *supra* note 4, at 1578; Wuerth, *supra* note 4, at 11.

22. U.S. CONST. art. II, § 2, cl. 2.

23. U.S. CONST. art. I, § 10, cl. 3.

24. Wuerth, *supra* note 4, at 11; *see also* Clark, *supra* note 4, at 1592–93; Ramsey, *supra* note 4, at 219. Ramsey analyzes the term "treaty" under Article II and concludes, based on the Framers' understanding of the term and common practice at the time, that it is not an "all encompassing" term. Thus, there must exist a class of agreements outside of "treaties" and outside the scope of Article II. Ramsey then concludes that the President's executive power is sufficiently broad to enter into these other types of agreements without legislative approval. Ramsey, *supra* note 4, at 219.

25. Ramsey, *supra* note 4, at 160–73.

26. *Id.*

27. *Id.* at 225–31.

position" contends that the only sources of law that can have preemptive effect are those approved by the Senate and listed in Article VI—the Constitution, federal law, and treaties.[28] Since the Constitution does not require Senate approval for "[a]greement[s] or [c]ompact[s]" nor list nontreaty agreements in Article VI, nontreaty agreements such as sole executive agreements cannot have preemptive effect.

By contrast, the "nationalist position" takes a broader view of the constitutionality of sole executive agreements.[29] This position relies on the explicit textual grants of power in Article II of the Constitution to define the President's authority to enter into sole executive agreements.[30] Specifically, this position finds that sole executive agreements made by the President based on his own constitutional authority have legal force as the "supreme Law of the Land."[31]

The Constitution vests the President with the "executive power," the "commander in chief" power, the power to make treaties, the power to "receive Ambassadors and other public Ministers," and the power to "take Care" that laws be "faithfully executed."[32] The "nationalist position" maintains that for the President to carry out these enumerated powers, he must have implied powers to enter into agreements without the consent of the Senate.[33] This position thus accepts John Jay's contention that "constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature."[34]

Although there are competing theories as to the basis of the President's authority to enter into sole executive agreements, scholars have almost unanimously concluded that the President has at least some power to enter into nontreaty agreements without the advice and consent of Congress.[35] There has been no consensus, however, as to what the limit or scope of this power should be.[36]

---

28. U.S. CONST. art. II, § 2, cl. 2.

29. Sloss, *supra* note 4, at 1967–68.

30. *See* HENKIN, *supra* note 18, at 226–28. The Restatement of Foreign Relations Law of the United States provides that "the President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (1987).

31. Sloss, *supra* note 4, at 1967–68.

32. U.S. CONST. art. II, §§ 2–3.

33. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. g (1987); HENKIN, *supra* note 18, at 219–20; Clark, *supra* note 4, at 1581–82.

34. THE FEDERALIST NO. 64, at 315 (John Jay) (Terence Ball ed., 2004).

35. Wuerth, *supra* note 4, at 11–12.

36. HENKIN, *supra* note 18, at 222. Henkin is often quoted by scholars and the Supreme Court for stating that: "[T]here are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate, . . . but neither Justice Sutherland nor anyone else has told us which are which." *Id.*

B. Early Use of Sole Executive Agreements

Presidents employed sole executive agreements rather infrequently in the early years of the Republic.[37] Indeed, in the first fifty years of the country's history Presidents entered into only twenty-seven executive agreements.[38] By contrast, in the last fifty years Presidents have entered into nearly 15,000 executive agreements.[39] In the early years of the country's history, Presidents entered into sole executive agreements cautiously, restricting their use to matters that fell exclusively within the scope of the President's independent constitutional and statutory authority and frequently deferring to the legislature for consent.[40]

One of the first sole executive agreements resolved the dispute over the Wilmington Packet in 1799.[41] The Wilmington Packet, an American schooner, was seized by a Dutch Privateer in 1793 and taken to the island of St. Martin.[42] Once there, a Dutch prize tribunal condemned the cargo as a lawful prize for the Privateer. In 1799, President Adams entered into a unilateral agreement whereby the Dutch Government would pay 20,000 florins in exchange for the United States dropping all further claims concerning the cargo.[43] This early agreement represents an uncontroversial use of presidential power, as it is simply an act by the President to resolve a private claim against a foreign state on behalf of an American citizen—a function that fits within the scope of the President's independent constitutional power to receive ambassadors and conduct diplomatic relations.[44]

Another example of an early sole executive agreement occurred in the aftermath of the War of 1812 when President Monroe entered into the Rush–Bagot Pact with Great Britain to demilitarize the Great Lakes.[45] Initially, President Monroe proposed to make the agreement on his own authority through his power as "commander-in-chief."[46] A year later, he was persuaded otherwise, and he submitted the agreement to the Senate with a note asking whether it was "such an agreement as the Executive is competent to enter into by the powers vested in it by

---

37. Clark, *supra* note 4, at 1581.

38. CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION: ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES, S. DOC. NO. 108-17, at 516 (2002), *available at* http://www.gpoaccess.gov/constitution/pdf2002/012.pdf.

39. *Id.* at 516–26.

40. Clark, *supra* note 4, at 1584.

41. *See* Dames & Moore v. Regan, 453 U.S. 654, 679 n.8 (1981) (referring to the case of the Wilmington Packet to support the proposition that the President has a long standing practice of settling claims by executive agreement).

42. 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1079 (Hunter Miller ed., 1931–1948).

43. *Id.* at 1099.

44. Clark, *supra* note 4, at 1582.

45. Exchange of Notes Relative to Naval Forces on the American Lakes (Apr. 28–29, 1817), *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 645–47 (Hunter Miller ed., 1931–1948).

46. 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 647 (Hunter Miller ed., 1931–1948).

the Constitution or is such a one as requires the advice and consent of the Senate."[47] The Senate ultimately gave its consent under Article II, Section 2.[48]

There are several other examples from this period of similar sole executive agreements.[49] They all share a common theme: they were limited to expressions of the President's independent constitutional or statutory power.

II. TWENTIETH CENTURY EXPANSIVE USE OF SOLE EXECUTIVE AGREEMENTS

As the United States emerged as a world power at the turn of the twentieth century, Presidents entered into more sole executive agreements, which were increasingly aggressive in scope and effect. For example, President McKinley unilaterally reached an armistice agreement with Spain that not only ended hostilities, but also arranged for Spanish withdrawal from Puerto Rico, Cuba, and other former possessions.[50] Other examples from the early part of the twentieth century include: the Boxer Protocol of 1901;[51] the "Gentlemen's Agreement" between Japan and the United States;[52] and the Lansing-Ishii Agreement between Japan and the United States.[53]

World War II ushered in a new era where the United States found itself as the sole super power in the world.[54] Responding to this new role, Presidents began to exert themselves more forcefully in the area of international affairs.[55] One

---

47. *Id.*

48. *Id.* at 648.

49. *See, e.g.*, Cartel for the Exchange of Prisoners of War, U.S.–Gr. Brit., May 12, 1813, *reprinted* in 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 557–65 (Hunter Miller ed., 1931–1948).

50. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 817–18 (1995) (citing Protocol-Spain, Aug. 12, 1898, 30 Stat. 1742, *reprinted in* 2 WILLIAM M. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS, S. DOC. NO. 357, 61st Cong. 2d Sess. 663–64 (1910)).

51. The Boxer Protocol of 1901 ended the military intervention suppressing the Boxer rebellion. 2 WILLIAM M. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS, S. DOC. NO. 357, at 2006–12 (1910).

52. The 1907 "Gentlemen's Agreement" between Japan and the United States required Japan to stop granting passports to laborers trying to enter the United States in exchange for President Roosevelt promising to accept the presence of Japanese immigrants residing in America. *See* Kiyo Sue Inui, *The Gentlemen's Agreement. How It Has Functioned*, 122 ANNALS AM. ACAD. POL. & SOC. SCI. 188, 190 (1925).

53. Through the Lansing-Ishii Agreement of 1917, the United States and Japan pledged to uphold the Open Door policy in China. *See The Lansing-Ishii Exchange of Notes, 1917*, *in* THE IMPERIAL JAPANESE MISSION 1917 app. B (1918), *available at* http://net.lib.byu.edu/~rdh7/wwi/comment/japanvisit/JapanA2.htm.

54. *See* ARTHUR SCHLESINGER, JR., THE IMPERIAL PRESIDENCY x–xi (Houghton Mifflin Harcourt Press 2004) (1973).

55. *See* Harold Hongju Koh, *Why The President (Almost) Always Wins in Foreign Affairs: Lessons From the Iran-Contra Affair*, 97 YALE L.J. 1255, 1293 (1988); SCHLESINGER, *supra* note 54, at 122–23.

mechanism Presidents used to assert their dominance over the legislature in the arena of foreign affairs was executive agreements.[56] Indeed, since 1939 executive agreements have made up more than 90% of the international agreements to which the United States has been a party.[57] Examples of such agreements include: Roosevelt's 1940 "destroyer deal" with Great Britain exchanging fifty destroyers for leases of British air bases;[58] the 1941 agreement between the United States and Denmark whereby the United States acquired the right to occupy Greenland for purposes of defense; the Potsdam and Yalta Agreements ending the war with Germany; and the Vietnam peace settlement in 1973.[59]

The increased use and expanded scope of these agreements did not escape congressional notice. Afraid the President would use executive agreements to avoid obtaining their "advice and consent,"[60] Congress made several unsuccessful attempts to legislate the permissible scope of these agreements.[61] The only small victory Congress claimed was the Case-Zablocki Act, which requires the President to transmit to Congress all international agreements, other than treaties, within sixty days after their execution.[62]

The expanded use of executive agreements also did not escape judicial notice, as litigants began to challenge their constitutional validity in court. The Supreme Court's decisions concerning sole executive agreements have further validated their usage, and have broadened their legal effect.[63] The Sections below analyze four cases that form the basis for the Court's interpretation of sole executive agreements: *United States v. Belmont*,[64] *United States v. Pink*,[65] *Dames & Moore v. Regan*,[66] and *American Insurance Association v. Garamendi*.[67] This analysis will illustrate how the Court has haphazardly expanded executive power by allowing the President to unilaterally enter into executive agreements that have legal force as "the supreme Law of the Land."[68]

---

56. Koh, *supra* note 55, at 1261, 1293; *See* SCHLESINGER, *supra* note 54, at x–xi.

57. *See* CONG. RESEARCH SERV., *supra* note 38, at 516–26. It is important to note that this figure represents total executive agreements. Of this number, approximately 88% of the executive agreements were based on statutory authority, 6% based on treaties, and 5% based on executive authority. *Id.*

58. SCHLESINGER, *supra* note 54, at 105–09.

59. *See* CONG. RESEARCH SERV., *supra* note 38, at 516–26; RICHARD F. GRIMMETT, U.S. DEP'T OF STATE, FOREIGN POLICY ROLES OF THE PRESIDENT AND CONGRESS (1999), *available at* http://www.fpc.state.gov/6172.htm.

60. HENKIN, *supra* note 18, at 219.

61. *Id.*

62. 1 U.S.C. § 112(b) (2006).

63. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

64. 301 U.S. 324.

65. 315 U.S. 203.

66. 453 U.S. 654.

67. 539 U.S. 396.

68. U.S. CONST. art. VI, cl. 2.

A. United States v. Belmont

In 1918, the new Soviet Government issued decrees nationalizing Russian corporations and their property.[69] Many of these companies, including Petrograd Metal Works, had money deposited in New York banks.[70] The United States did not diplomatically recognize the new Soviet Government until 1933; therefore, the Soviet decrees were not accorded respect by United States courts for a period of fifteen years.[71] This created diplomatic strain between the United States and the Soviet Union, as the Soviets attempted to lay claim to their newly nationalized assets held in the United States.

In 1933, President Roosevelt entered into the Litvinov Agreement, whereby the United States recognized the Soviet Government in exchange for the Soviets "releas[ing] and assign[ing] to the United States" all amounts due to the Soviet Union from American nationals.[72] Pursuant to this agreement, the United States brought suit against August Belmont, a private banker in New York, to recover money deposited prior to 1918 by Petrograd Metal Works.[73] The district court dismissed the complaint, and the Second Circuit affirmed, concluding that the State of New York's public policy prohibited recognizing the Soviet Union's confiscatory decrees.[74]

When the Supreme Court considered the case, it addressed two questions: (1) whether the President had authority to enter into the Litvinov Agreement; and (2) if so, whether the agreement preempted the New York state policy against enforcing the decrees.[75] The Supreme Court ultimately answered both questions in the affirmative.

First, the Court noted that recognizing the Soviet Union, establishing diplomatic relations, and assigning claims were "all parts of one transaction."[76] Next, the Court stated that the President's power to enter into such an agreement "may not be doubted," as the President has independent constitutional authority to do so.[77] The Court continued:

> [I]n respect of what was done here, the Executive had authority to speak as the *sole organ* of that government. The assignment and the agreements in connections therewith did not, as in the case of

---

69. *Belmont*, 301 U.S. at 326.

70. Clark, *supra* note 4, at 1639 (citing People v. Russian Reinsurance Co., 175 N.E. 114, 115 (N.Y. 1931)).

71. *Id.* (citing Lehigh Valley R.R. Co. v. Russia, 21 F.2d 396, 400 (2d Cir. 1927)).

72. *Belmont*, 301 U.S. at 326; United States v. Pink, 315 U.S. 203, 212 (1942).

73. *Belmont*, 301 U.S. at 325–26.

74. *Id.* at 326–27.

75. *Id.* at 330–33.

76. *Id.* at 330.

77. *Id.* That is, the President had the independent constitutional authority to recognize a foreign government and establish diplomatic relations. The Court, thus, recognized the broader agreement, including the assignment of claims, based on a finding that part of it was within the President's exclusive constitutional authority. *See id.*

> treaties, as that term is used in the treaty making clause of the Constitution . . . require the advice and consent of the Senate.[78]

In reaching this conclusion, the court affirmed its contentious[79] earlier holding in *United States v. Curtiss-Wright Corporation*.[80] In *Curtiss-Wright*, the Court drew a distinction between the President's powers in domestic and foreign affairs.[81] The *Curtiss-Wright* Court agreed with the proposition that the executive branch could "exercise no powers except those specifically enumerated in the Constitution . . . is categorically true only in respect of our internal affairs."[82] Within the realm of foreign affairs, the Court contended that the powers of the President did not rest on affirmative grants from the Constitution, but were rather the "necessary concomitants of nationality."[83] From this, the Court deduced "the very delicate, plenary and exclusive power of the president as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."[84]

In *Belmont*, the Court chose to continue its broad language from *Curtiss-Wright*, finding the Litvinov Agreement constitutional based on the President's inherent authority as the "sole organ" in the realm of foreign affairs. In doing so, the Court, in essence, provided the President with unlimited authority to enter into any sole executive agreement relating to general foreign policy.[85] The *Belmont* Court could have chosen to find the Litvinov Agreement constitutional with much more limited language and on a more narrow ground. Specifically, the Court could have upheld the agreement as being a constitutional exercise of the President's power to recognize foreign states. If the Court did so, *Belmont* would be a narrow decision standing for the proposition that only the President's specific and exclusive powers (here, the authority to establish diplomatic relations) can form the basis for such sole executive agreements.

Turning to the issue of whether the President's agreement had the authority to preempt New York state policy, the *Belmont* Court held that the Supremacy Clause provided preemptive weight to all international compacts and

---

78. *Id.* (emphasis added).

79. The decision in *Curtiss-Wright* has been lambasted as "represent[ing] the most extreme interpretation of powers of the national government. It is the furthest departure from the theory that [the] United States is a constitutionally limited democracy." David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 493 (1946).

80. 299 U.S. 304 (1936). The *Curtiss-Wright* decision addressed whether Congress made an unlawful delegation of its authority to the President when it authorized him to impose an embargo on the sale of arms to Bolivia and Paraguay. *Id.* at 314.

81. *Id.* at 315–16.

82. *Id.*

83. *Id.* at 317–18.

84. *Id.* at 320.

85. Parties have relied on this broad interpretation of the Court's "sole organ" statement to validate the President's sole executive agreements and actions. *See* Reply Brief for Petitioner at 10, Medellín v. Texas, 128 S. Ct. 1346 (2008) (No. 06-984), 2007 WL 2886606.

agreements, not just treaties.[86] The Court emphasized that the complete power over international affairs, including the making of international agreements, vested in the national government and could not be curtailed by the states.[87] This ruling was unprecedented at the time[88] and has subsequently been cited for the proposition that sole executive agreements have the same legal effect as treaties.[89]

Belmont is an important decision that stands for two significant propositions: (1) the President can enter into executive agreements without the Senate's advice and consent; and (2) the Supremacy Clause provides sole executive agreements and all international agreements preemptive weight.[90] These propositions provide a sweeping authority to the President to unilaterally create "the supreme Law of the Land."[91]

B. United States v. Pink

The controversy in *United States v. Pink*[92] concerned the same Litvinov Agreement at issue in *United States v. Belmont*. In *Pink*, the United States sued the Superintendent of Insurance for the State of New York to recover assets belonging to the New York branch of the First Russian Insurance Company, which had been nationalized under the 1918 Soviet confiscatory decrees.[93] Ruling in the United States' favor, the Supreme Court found the decision in *Belmont* to be controlling.[94] The *Pink* Court relied on the same line of analysis as the *Belmont* Court in determining the President's authority to enter into the Litvinov agreement.[95] The *Pink* Court did, however, provide an extra scintilla of substance to its analysis, concluding that the President, as the "sole organ of the federal government in the field of international relations,"[96] had the express authority, without the consent of the Senate, to determine the public policy of the United States with respect to recognizing the new Russian Government.[97] This extended the *Belmont* analysis by recognizing that the President's authority extended beyond deciding whether a government should be recognized to include determining the particular policies, such as the assignment of claims, that would govern the question of recognition.[98]

---

86. United States v. Belmont, 301 U.S. 324, 331 (1937). This broad interpretation of the treaty clause has been scrutinized by scholars. For further reading, see Ramsey, *supra* note 4.

87. *Belmont*, 301 U.S. at 331.

88. Ramsey, *supra* note 4, at 153.

89. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416–17 (2003); United States v. Pink, 315 U.S. 203, 223 (1942) (quoting *Belmont*, 301 U.S. at 331).

90. *Belmont*, 301 U.S. at 330–33.

91. U.S. CONST. art. VI, cl. 2.

92. 315 U.S. 203.

93. *Id.* at 210.

94. *Id.* at 226.

95. *Id.* at 229–32.

96. *Id.* at 229 (citing United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936)).

97. *Id.* at 229–30.

98. *Id.*

As in *Belmont*, the *Pink* Court ultimately concluded that New York state law must yield to the federal foreign policy evidenced in the President's agreement.[99] The Court concluded that New York's action was a rejection of the policy underlying the United States' recognition of the Soviet Union and that "such power is not accorded [to] a State in our Constitutional system."[100]

The *Pink* decision gives the President even greater authority than the *Belmont* decision to enter into sole executive agreements. A narrow interpretation of *Belmont* could find that the President's authority to enter into sole executive agreements was based on his express constitutional grants of power. The *Pink* decision does away with any hope of interpreting *Belmont* narrowly, by authorizing the President as the "sole organ of the federal government in the field of foreign affairs" to enter into agreements that exceed his express powers. This authorization in a sense opened the gates for the President to enter into whatever agreement he saw fit without the consent of Congress and with full preemptive weight. This broad analysis of sole executive agreements continued until 1981, when the Supreme Court considered the *Dames & Moore v. Regan*[101] case.

C. Dames & Moore v. Regan

On November 4, 1979, Iranian revolutionaries seized the American Embassy in Tehran, capturing and holding diplomatic personnel hostage.[102] The ensuing hostage crisis lasted for more than a year and consumed the remainder of President Carter's term in office. On the last day of his presidency, President Carter concluded a sole executive agreement with Iran, known as the "Algiers Accords."[103] Under the agreement, the Americans held hostage were released[104] and the United States was "obligated to 'terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran . . . to nullify all attachments and judgments . . . [and] to prohibit all further litigation based on such claims.'"[105] Additionally, the United States was required to transfer all Iranian assets held in the United States by American banks to the Iranian Government.[106] To implement the agreement, President Carter issued a series of executive orders that: (1) required banks holding Iranian assets to transfer them to the Federal Reserve Bank of New York[107] and (2) declared that all U.S. claims covered by the agreement "shall have no legal effect in any action now pending in any court of the United States."[108]

During this period, Dames & Moore brought suit against Iran, the Atomic Energy Organization of Iran, and a number of Iranian banks for alleged breach of

---

99. *Id.* at 230–31.
100. *Id.* at 233.
101. 453 U.S. 654 (1981).
102. *Id.* at 662.
103. Clark, *supra* note 4, at 1608.
104. *Dames & Moore*, 453 U.S. at 664.
105. *Id.* at 665 (quoting Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 20, 1981, 20 I.L.M. 224).
106. *Id.*
107. Exec. Order No. 12,279, 46 Fed. Reg. 7,919 (Jan. 19, 1981).
108. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 24, 1981).

contract.[109] In December 1979, the district court issued orders of attachment against the defendants' property to secure any judgment that might be rendered against them.[110] Two years later, on February 18, 1981, the district court granted summary judgment in Dames & Moore's favor.[111] The court later decided on May 28, 1981 to stay the judgment's execution, pending appeal, in light of President Carter's executive orders.[112]

On April 28, 1981, Dames & Moore filed a separate action against the United States, seeking to prevent the executive orders from implementing President Carter's sole executive agreement with Iran.[113] The district court dismissed the complaint, but enjoined the United States, pending appeal, from transferring any property subject to any writ of attachment issued in favor of Dames & Moore.[114] The Supreme Court then granted certiorari to answer two questions: (1) whether the President had the authority to revoke attachments of Iranian assets and to direct custodians of such assets to transfer them to the Federal Reserve bank; and (2) whether the President had the authority to suspend claims of Americans against Iran.[115]

The Court was very cautious in answering both questions and sought to frame its holdings as narrowly as possible in order to limit its decision to the specific facts of the case.[116] The Court was also conscientious not to use the expansive "sole organ" reasoning from *Belmont* and *Pink* to interpret the President's authority to enter into the Algiers Accords.[117] Instead, the court relied on Justice Jackson's tripartite taxonomy of executive action from the concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* as the basis for determining the President's authority.[118]

An understanding of Justice Jackson's *Youngstown* taxonomy is critical to appreciating the impact of the *Dames & Moore* decision on executive power and the use of sole executive agreements. In *Youngstown*, the Court held that President Truman's attempt to invoke "emergency powers" to seize domestic steel mills that were under a nationwide strike was unconstitutional.[119] Justice Jackson's famous concurrence analyzed President Truman's action using a three-part taxonomy.[120]

---

109. *Dames & Moore*, 453 U.S. at 663–64.

110. *Id.* at 664; Brief for Petitioner at 3, Dames & Moore v. Regan, 453 U.S. 654 (1981) (No. 80-2078), 1981 WL 390300.

111. Brief for Federal Respondents at 5, Dames & Moore v. Regan, 453 U.S. 654 (1981) (No. 80-2078), 1981 WL 390302.

112. *Dames & Moore*, 453 U.S. at 666.

113. *Id.* at 666–67.

114. *Id.* at 667.

115. *Id.* at 660; *see also* Clark, *supra* note 4, at 1609.

116. *Dames & Moore*, 453 U.S. at 661. Indeed, Justice Rehnquist stated at the outset "the necessity to rest [the] decision on the narrowest possible ground capable of deciding the case." *Id.* at 660.

117. United States v. Pink, 315 U.S. 203, 229 (1942) (citing United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936)).

118. 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

119. *Id.* at 587–89 (majority opinion).

120. *Id.* at 635–38 (Jackson, J., concurring).

Jackson's first category placed the President at the height of his authority when he acted "pursuant to an express or implied authorization of Congress."[121] Jackson explained that in this situation the President is acting with all the authority "he possesses in his own right plus all that Congress can delegate."[122]

The second category is when the President lacks a congressional grant of authority, but has some independent constitutional authority to act.[123] In this category, a "zone of twilight" exists wherein the President and Congress may have concurrent authority.[124] In situations like this, Jackson stated that lack of congressional action might "enable, if not invite," executive action.[125] Additionally, Jackson noted that the exercise of executive power in the "zone of twilight" would "depend on the imperatives of events and contemporary imponderables" instead of "abstract theories of law."[126]

The third category in Jackson's taxonomy showed the President's power at its "lowest ebb" when he "takes measures incompatible with the expressed or implied will of Congress."[127] Jackson explained that the President's power in this category would be weak because the Court could sustain executive action in such a case "only be [sic] disabling the Congress from acting upon the subject."[128]

Jackson then applied his taxonomy to the facts in *Youngstown*. He quickly eliminated the first category, finding that Congress had not expressly authorized President Truman's action.[129] Jackson also eliminated the second category, finding that since Congress passed three statutes relating to seizure of private property, the President's inconsistent actions were not "necessitated."[130] Jackson then concluded that the third category would apply and found no basis for President Truman's action to override Congress' express disapproval in this area of domestic law.[131]

Justice Rehnquist, writing for the Court in the *Dames & Moore* decision, applied an altered version of Justice Jackson's tripartite taxonomy to analyze the validity of President Carter's Algiers Accords.[132] Applying Justice Jackson's first category, the Court held that the President had the authority to revoke any attachment of Iranian assets and to direct custodians of Iranian assets to transfer

---

121. *Id.* at 635.
122. *Id.*
123. *Id.* at 637.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 637–38.
129. *Id.* at 638.
130. *Id.* at 639.
131. *See id.* at 639–50.
132. Several scholars have critiqued Rehnquist's application of *Youngstown*. *See, e.g.*, Koh, *supra* note 55, at 1311 (arguing that Dames & Moore "undercuts Youngstown's vision of a balanced national security process"); Rebecca A. D'Arcy, Note, *The Legacy of* Dames & Moore v. Regan: *The Twilight Zone of Concurrent Authority Between the Executive and Congress and a Proposal for a Judicially Manageable Nondelegation Doctrine*, 79 NOTRE DAME L. REV. 291, 293–94 (2003) (arguing that *Dames & Moore* was a "politically motivated legal aberration" rather than a "clear application of Youngstown").

funds to the Federal Reserve Bank.[133] This was because the Court found that through the passage of the International Emergency Economic Powers Act (IEEPA),[134] Congress specifically authorized the President to nullify judicial attachments and order the transfer of Iranian assets out of the country.[135] Thus, acting pursuant to an express authorization from Congress, the President acted within the height of his authority to nullify the attachments and order the transfer of assets out of the country.[136]

Next, the Court turned to the more difficult question of whether the President was able to suspend Americans' claims against Iran. The Court found that Jackson's first category would not apply as neither of the potentially applicable statutes, the IEEPA or the Hostage Act,[137] specifically authorized such an action.[138] The Court instead placed the suspension of claims issue into the second "zone of twilight" category, where Congress and the Executive have concurrent authority. In determining whether Congress "enable[d]" or "invite[d]"[139] the President to act, the Court reasoned that the IEEPA and the Hostage Act represented a broad general grant of authority that Congress delegated to the President in times of national emergency.[140] Further, the Court acknowledged that Congress had long acquiesced to the President's ability to settle claims against foreign sovereigns without its advice and consent.[141] On this point, the Court stressed the fact that Congress had implicitly approved the practice of foreign claim settlement via executive agreement by enacting the International Claim Settlement Act.[142] Thus, by stringing together a variety of ambiguous

---

133. Dames & Moore v. Regan, 453 U.S. 654, 675 (1981).

134. 50 U.S.C. § 1702(a)(1)(B) (2006). This statute provides the President the power to "nullify, void, prevent or prohibit . . . any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States." *Id.*

135. *Dames & Moore*, 453 U.S. at 675.

136. *Id.*

137. 22 U.S.C. § 1732 (2006). This statute authorizes the President to "demand the release" of a U.S. citizen who "has been unjustly deprived of his liberty by or under the authority of any foreign government." Further, the statute authorizes that "if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release." *Id.*

138. *Dames & Moore*, 453 U.S. at 677.

139. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

140. *Dames & Moore*, 453 U.S. at 677–78.

141. *Id.* at 678–80. The Court illustrates this by pointing to the fact that such agreements have been entered into since 1799 with the Wilmington Packet and that in the early period of 1817–1917 no fewer than eighty executive agreements were entered into by the United States with regard to the claims of its citizens. *Id.* at 679 n.8. Further, the Court points out that it is clear that the practice of settling claims continues in modern day, as the President has entered into at least ten binding settlement agreements with foreign nations since 1952. *Id.* at 680.

142. 22 U.S.C. § 1622 (2006); *Dames & Moore*, 453 U.S. at 680.

congressional actions and inactions, the Court concluded that the President was free to act independently to suspend domestic claims against Iran.

The *Dames & Moore* decision was staggering. From a practical standpoint, the Court's ruling allowed the President to unilaterally remove jurisdiction from domestic courts for claims settlement proceedings. It also allowed the President to revoke all rights of U.S. citizens to property claimed against the Iranian Government.[143]

Additionally, the decision established a new standard to analyze sole executive agreements. The Court in *Dames & Moore* rejected the broad "sole organ" language from *Belmont* and *Pink* in favor of the more restrictive *Youngstown* tripartite framework. The Court's application of this framework, however, ended up being broad and far-reaching when it came to analyzing the second "zone of twilight" category. Under the Court's reasoning, when considering whether the President can pursue a specific action under the "zone of twilight," a court may consider congressional inaction or legislation in a related area as congressional approval for the challenged executive action.[144] By treating ambiguous congressional action or inaction as "approval" for presidential action, a court would be able to manipulate almost any presidential action into Jackson's first category.[145] Once there, the President's action would be incontrovertible. Thus, through a very flexible application of *Youngstown*—a decision that restricted presidential power—the *Dames & Moore* Court expanded presidential power.

D. American Insurance Association v. Garamendi

Despite their broad principles, some scholars have narrowly interpreted the Court's decisions in *Belmont*, *Pink*, and *Dames & Moore*. Scholars view these cases as identifying only specific instances where sole executive agreements may be used and when they may preempt state law and policy.[146] In *Belmont* and *Pink*, the authority to enter into the Litvinov agreement was based on the President's exclusive constitutional power to recognize foreign governments.[147] In *Dames & Moore*, President Carter's agreements were deemed constitutional based on a long history of congressional acquiescence to presidential claim settlement and Congress's implied consent to the agreement at issue.[148] Twenty-two years later, the Court dealt a swift blow to the idea that these cases should be interpreted narrowly in *American Insurance Association v. Garamendi*.[149] This decision expanded the permissible scope and preemptive effect of sole executive

---

143. *See Dames & Moore*, 453 U.S. at 686–87.

144. *See id.* at 677–80; Koh, *supra* note 55, at 1311.

145. Koh, *supra* note 55, at 1311.

146. *See* Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 919–20 (2004).

147. *See* United States v. Belmont, 301 U.S. 324, 330 (1937); United States v. Pink, 315 U.S. 203, 229–30 (1942).

148. 453 U.S. 654, 678–80 (1981).

149. 539 U.S. 396 (2003).

agreements so much so that it called into question the continuing validity of the treaty clause.[150]

The controversy in *Garamendi* stemmed from the Nazi Government's confiscation of insurance policies issued to Jews before and during World War II.[151] The policies were either paid over to the Nazi Government or never paid at all when requested by their owners.[152] After the war, efforts to obtain the value of these policies were often frustrated by insurance companies that claimed that the policies had lapsed or that the benefits were already paid.[153] Further, survivors were not able to pursue their claims in German or American courts due to the London Debt Agreement, which barred Holocaust-era claims.[154] After the reunification of East and West Germany, the London Debt Agreement's moratorium was lifted and claims against insurance companies doing business in Nazi-era Germany began pouring into U.S. courts.[155]

Responding to the cries of the courts and insurance companies, President Clinton entered into a sole executive agreement with Germany. Under this agreement, Germany agreed to enact legislation establishing a foundation to be used to compensate all those who suffered at the hands of German companies during the Nazi era.[156] In return, President Clinton agreed that whenever a German company was sued on a Holocaust-era claim in an American court, the Executive would submit a statement that "it would be in the foreign policy interests of the United States for the [German] Foundation to be the exclusive forum and remedy for the resolution of all asserted claims"[157] and that "U.S. policy interests favor dismissal on any valid legal ground."[158] Further, President Clinton promised that the Executive would use its "best efforts, in a manner it considers appropriate" to get state and local governments to respect the foundation as the exclusive forum.[159]

While these agreements were underway, the State of California passed the Holocaust Victims Insurance Relief Act (HVIRA),[160] which was designed to aid Holocaust victims or their heirs in bringing insurance claims.[161] The law required any insurer doing business in the state to disclose the details of "insurance policies

---

150. *See id.* at 420–24; Denning & Ramsey, *supra* note 146, at 913–15.
151. *Garamendi*, 539 U.S. at 402.
152. *Id.*
153. *Id.*
154. *Id.* at 403–04.
155. *Id.* at 405.
156. *Id.*
157. *Id.* at 406 (citing Agreement Concerning the Foundation "Remembrance, Responsibility, and the Future," U.S.–F.R.G., Annex B, ¶ 1, July 17, 2000, 39 I.L.M. 1298, 1303).
158. *Id.* (citing Agreement Concerning the Foundation "Remembrance, Responsibility, and the Future," U.S.–F.R.G., Annex B, ¶ 3, July 17, 2000, 39 I.L.M. 1298, 1303).
159. *Id.* (citing Agreement Concerning the Foundation "Remembrance, Responsibility, and the Future," U.S.–F.R.G., art. 2, ¶ 2, July 17, 2000, 39 I.L.M. 1298, 1300).
160. CAL. INS. CODE §§ 13800–13807 (West 2003).
161. *Garamendi*, 539 U.S. at 410.

issued to persons in Europe which were in effect between 1920 and 1945."[162] After its passage, the President expressed opposition to the bill, as it would possibly derail the German Foundation Agreement.[163] The State of California was not dissuaded, and the State Insurance Commissioner announced that he would enforce HVIRA to its fullest.[164]

After this show of brinkmanship, the American Insurance Association and several American and European insurance companies filed suit for injunctive relief against the California insurance commissioner, challenging the constitutionality of HVIRA.[165] The district court issued a preliminary injunction, finding HVIRA unconstitutional based on the federal foreign affairs power and the Commerce Clause.[166] The Ninth Circuit reversed, and the Supreme Court granted certiorari to resolve the issue of whether HVIRA was constitutional.[167]

The Supreme Court held that HVIRA was invalid because it was preempted by the foreign policy goals implicit in the President's executive agreement with Germany.[168] In reaching this conclusion, the Court cited *Belmont*, *Pink*, and *Dames & Moore* for the proposition that the President had the authority to enter into the German Foundation Agreement without the advice and consent of the Senate.[169] More specifically, the Court noted that the German Foundation Agreement was an example of a long-standing presidential practice of settling claims of American nationals against foreign governments.[170] The Court acknowledged, however, that the German Foundation Agreement differed from past agreements in that it attempted to settle claims against corporations rather than foreign governments.[171] Nevertheless, the Court concluded that such a "distinction [did] not matter" because if it were to reject executive power to enter into such agreements, the Court "would hamstring the President in settling international controversies."[172]

After upholding the authority of the President to enter into the German Foundation Agreement, the Court turned to the agreement's preemptive weight. The Court made a broad proclamation based on the holdings in *Belmont* and *Pink*, that "valid executive agreements are fit to preempt state law, just as treaties are."[173] But there was a problem with the German Foundation Agreement—unlike the Litvinov Agreement in *Belmont* and *Pink*, or the Algiers Accords in *Dames & Moore*, it did not expressly state that it was intended to preempt state law or policy.[174] The Court did not find this overly problematic, as there was "evidence of

---

162. *Id.* at 409 (citing CAL. INS. CODE § 13804(a) (West 2003)).
163. *Id.* at 411.
164. *Id.* at 411–12.
165. *Id.* at 412.
166. *Id.*
167. *Id.* at 412–13.
168. *Id.* at 415, 420.
169. *Id.* at 415.
170. *Id.*
171. *Id.* at 415–16.
172. *Id.* at 416.
173. *Id.*
174. *Id.* at 416–17.

a clear conflict between the policies" adopted by the President and the State of California.[175] Thus, the Court ultimately held that the federal policy embodied in the German Foundation Agreement was enough to require the contrary state law to yield.[176] In concluding its decision, the Court briefly stated that Congress had several opportunities to enact similar HVIRA laws or address its opposition to the President's agreements, but refused to act.[177] In making this observation, the Court was likely implying that under *Youngstown*'s "zone of twilight" category, such congressional silence amounted to approval of the President's agreement.

The *Garamendi* decision invalidated a state law because the law conflicted with the *policy* underlying an executive agreement. In doing so, the decision endorsed a broad view of sole executive agreements and provided the President with greater unilateral power to preempt state law.[178]

First, the Court's decision endorsed a sweeping view of sole executive agreements by holding that "valid executive agreements are fit to preempt state laws, just as treaties are."[179] This holding represented a definitive and controversial shift from the Court's previous doctrine concerning the preemptive weight of sole executive agreements.[180] In *Belmont*, *Pink*, and *Dames & Moore*, the Court pieced together a doctrine which would accord an executive agreement preemptive weight if it was either: (1) based on an express grant of Constitutional power to the President[181] or (2) expressly approved or acquiesced to by Congress.[182] By adopting a broad view on the preemptive weight of sole executive agreements without recognizing the limits established in *Belmont*, *Pink*, and *Dames & Moore*,

---

175. *Id.* at 421. Evidence of the conflict between the two policies was quite interesting. The Court relied on the negotiations surrounding the German Foundation Agreement and statements by high-level executive branch members concerning the Agreement. The Court did not rely on statements or letters by the President himself. From the evidence it had, the Court gleaned that the President was trying to resolve several matters of national concern through the agreement, including: "the national interest in maintaining amicable relationships with current European allies; survivors' interests in a 'fair and prompt' but nonadversarial resolution of their claims; . . . and the companies' interest in securing 'legal peace' when they settle claims in this fashion." *Id.* at 422–23.

176. *Id.* at 417, 420.

177. *Id.* at 429.

178. *See* Clark, *supra* note 4, at 1653; Denning & Ramsey, *supra* note 146, at 924.

179. *Garamendi*, 539 U.S. at 416.

180. *See* Denning & Ramsey, *supra* note 146, at 921–24.

181. In *Belmont* and *Pink*, the Litvinov agreement was based on the President's power to recognize other countries. United States v. Belmont, 301 U.S. 324, 330 (1937); United States v. Pink, 315 U.S. 203, 229–32 (1942). Such agreements based on matters of plenary power may warrant preemptive effect from Article VI of the Constitution. Further, *Belmont* and *Pink* may be read as standing for the proposition that the act of recognizing a foreign country triggers the act of state doctrine and that doctrine preempts state law. *See* Clark, *supra* note 4, at 1648–54; Denning & Ramsey, *supra* note 146, at 863.

182. In *Dames & Moore*, the executive agreement was approved and given preemptive effect due to a finding that Congress had approved or acquiesced to the President's settlement of claims. Dames & Moore v. Regan, 453 U.S. 654, 678–80 (1981). The preemptive effect may be due to the fact that, like statutes, such executive agreements reflected the will of Congress. *See* Denning & Ramsey, *supra* note 146, at 863.

the *Garamendi* Court potentially granted the President unfettered power to unilaterally make federal law.

Another problem with the *Garamendi* decision was that the Court creatively deemed California's law preempted based not on the President's agreement but rather on the *policy* behind the agreement as evidenced by Congressional committee reports. By stretching its analysis to accommodate this conclusion, the *Garamendi* Court seemed to find that the executive agreement in question drew its preemptive power from the President's role as the "sole organ" in foreign affairs.[183] This is problematic because it would allow the President to adopt any foreign policy, which could alter the rights of individuals and preempt state law.

III. *MEDELLÍN V. TEXAS*

Garamendi's wide-ranging view of sole executive agreements was brought to an abrupt end in the Supreme Court's recent *Medellín v. Texas* decision.[184] In this 2008 decision, the Supreme Court considered whether President Bush had the authority to instruct State courts to give effect to a decision of the International Court of Justice.[185] While this matter did not involve a sole executive agreement, the Supreme Court analyzed its previous jurisprudence on sole executive agreements when considering the validity of President Bush's actions.[186] The Court's analysis helped streamline its earlier muddled jurisprudence and established limits on the preemptive authority of sole executive agreements. The following discussion first details the background of the *Medellín* case to show how it was well positioned to allow the Court to continue its expansive view of executive agreements. The discussion then proceeds to explain the Court's decision and show how it restricted the preemptive effect of executive agreements.

A. Consular Notification and the International Court of Justice

In 1969, the United States, upon the advice and consent of the Senate, ratified the Vienna Convention on Consular Relations (VCCR)[187] and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention (Optional Protocol).[188] The VCCR and Optional Protocol were drafted to "facilitate the exercise of consular functions."[189] To that end, Article 36 of the VCCR provides that if a person detained by a foreign country "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of

183. *See Garamendi*, 539 U.S. at 429; Clark, *supra* note 4, at 1654; Denning & Ramsey, *supra* note 146, at 863.

184. *See* Medellín v. Texas, 128 S. Ct. 1346 (2008).

185. *Id.* at 1353.

186. *Id.* at 1371.

187. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

188. Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter Optional Protocol].

189. Vienna Convention, *supra* note 187, art. 36(1).

his righ[t]" to request assistance from the consul of his own state.[190] The Optional Protocol provides that disputes arising out of the interpretation or application of the VCCR shall be heard at the International Court of Justice (ICJ).[191]

The central issue in all of the *Medellín* cases[192] was Jose Medellín's claim that he was not provided his rights under Article 36 of the VCCR. In June 1994, Medellín was arrested for the rape and murder of two teenage girls in Houston, Texas.[193] Medellín told the arresting officers that he was born in Mexico; however, the police did not inform him of his VCCR right to seek assistance from the Mexican consulate.[194] In September 1994, Medellín was convicted and sentenced to death.[195] Mexican authorities did not learn of Medellín's case until 1997.[196] Shortly thereafter, the Mexican consulate assisted Medellín in seeking a writ of state habeas corpus based on the violation of his VCCR rights.[197] The Texas trial court denied the writ, finding that since Medellín failed to raise the issue at the state criminal trial, he was procedurally barred from raising it in the habeas petition.[198] Medellín then filed a habeas petition in federal court.[199] The district court and the Fifth Circuit both held that Medellín was procedurally defaulted from raising the VCCR claim.[200]

While Medellín's application for a certificate of appealability was pending in the Fifth Circuit, the ICJ issued its decision in the *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.)*.[201] In this case, Mexico alleged that the United States violated the VCCR rights of several individual Mexican nationals, including Medellín.[202] After extensive briefing and a week-long hearing,[203] the ICJ held that the United States violated its obligations under the VCCR[204] in the fifty-one cases involving Mexican nationals, including Medellín.[205] The ICJ ruled that, based on these violations, the United States was obligated to "provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals."[206] The ICJ indicated that

---

190. *Id.* art. 36(1)(b).
191. Optional Protocol, *supra* note 188, art. I.
192. Medellín v. Dretke, 544 U.S. 660 (2005); Medellín v. Dretke, 371 F.3d 270 (5th Cir. 2004); *Ex parte* Medellín, 223 S.W.3d 315 (Tex. Crim. App. 2006).
193. Medellín v. Texas, 128 S. Ct. 1346, 1354 (2008).
194. Brief for Petitioner Jose Ernesto Medellín at 6–7, Medellín v. Texas, 128 S. Ct. 1345 (2008) (No. 06-984), 2007 WL 1886212 [hereinafter Petitioner's Brief].
195. *Id.*
196. *Id.*
197. *Id.*
198. *Medellín*, 128 S. Ct. at 1355.
199. *Id.*
200. *Id.*
201. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).
202. *Id.* at 19.
203. *Id.*
204. *Id*. at 53–55.
205. *Id.*
206. *Id.* at 72.

such a review was required, without regard to state procedural default rules.[207] The Fifth Circuit ultimately denied the certificate of appealability,[208] following Supreme Court precedent,[209] which held that, contrary to the ICJ's decision, VCCR claims were subject to procedural default rules.[210]

The Supreme Court then granted certiorari in *Medellín v. Dretke*[211] to review the Fifth Circuit's decision. Just before the Court was scheduled to hear oral argument, President Bush issued a Memorandum to the Attorney General, directing state courts to provide the required review and reconsideration to the fifty-one Mexican nationals named in the *Avena* judgment, including Medellín.[212]

The President's Memorandum declared:

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the 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.[213]

In deference to the President's determination directing claims for review and reconsideration to the state courts, Medellín filed a motion to stay the Supreme Court case and filed a petition for a writ of habeas corpus in the Texas Court of Criminal Appeals.[214] On May 23, 2005, the Supreme Court dismissed the writ of certiorari as improvidently granted due to "the possibility that the Texas courts [would] provide Medellín with the review he seeks pursuant to the *Avena* judgment and the president's memorandum."[215]

Medellín, and the United States as amicus curiae, argued before the Texas Court of Criminal Appeals that the *Avena* judgment and the President's determination to comply with it constituted binding federal law that preempted any inconsistent Texas law provisions.[216] The Texas court found this argument unpersuasive and ruled that neither the President's determination nor the *Avena* judgment constituted binding law that could displace the State's procedural default rules.[217] Ultimately, the Texas court dismissed the application for habeas corpus as

---

207. *Id.* at 56–57.

208. Medellín v. Dretke, 371 F.3d 270, 281 (5th Cir. 2004).

209. Breard v. Greene, 523 U.S. 371, 375 (1998).

210. *Id.*

211. 544 U.S. 660 (2005).

212. *See* Medellín v. Texas, 128 S. Ct. 1346, 1355 (2008); George W. Bush, *Memorandum on Compliance with the Decision of the International Court of Justice in Avena* (Feb. 28, 2005), *available at* http://www.unhcr.org/refworld/publisher,USPRES429c2fd94,0.html [hereinafter *President's Memorandum*].

213. *President's Memorandum*, *supra* note 212.

214. *Ex parte* Medellín, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006).

215. *Medellín*, 544 U.S. at 666–67.

216. Brief for the United States as Amicus Curiae Supporting Petitioner at 19–34, *Ex parte* Medellín, 223 S.W.3d 315 (Tex. Crim. App. 2006) (No. AP-75207), 2005 WL 3142648.

217. *Ex parte Medellín*, 223 S.W.3d at 352.

abuse of the writ,[218] and the Supreme Court granted certiorari in *Medellín v. Texas*.[219]

B. The President's Memorandum

When the Court took up the Medellín case for the second time, the two primary issues were: (1) whether the ICJ's *Avena* judgment was directly enforceable as domestic law in state court;[220] and (2) whether the President's Memorandum, directing state courts to give effect to the *Avena* decision was a valid exercise of power.[221] While the bulk of the Court's decision addressed the first issue,[222] this Note will focus only on the issue of the President's Memorandum.[223] The following discussion illustrates that the Memorandum could have easily been interpreted as preemptive under *Garamendi*.

The President's Memorandum was issued at the same time Medellín's case first reached the Supreme Court.[224] The Memorandum's purpose, according to the solicitor general, was twofold: first, the Memorandum served as the President's determination that the United States would comply with its obligations under Article 94 of the U.N. Charter[225] and give effect to the ICJ's *Avena* decision;[226] and second, it served to order state courts to "recognize the *Avena* decision" and provide the required review and reconsideration of the fifty-one Mexican nationals named in the *Avena* judgment.[227] By ordering state courts to provide review and reconsideration, the Memorandum also intended to preempt any state procedural default rules that would prevent giving effect to the President's determination.[228]

The *Garamendi* decision seems to support the argument that the President's Memorandum has preemptive weight. In *Garamendi*, the Court

---

218. *Id.*

219. Medellín v. Texas, 128 S. Ct. 1346, 1353 (2008).

220. *Id.*

221. *Id.*

222. *See id.* at 1356–67.

223. For further discussion of the Court's decision regarding the legal effect of the *Avena* decision, see Frederic L. Kirgis, *International Law in the American Courts—The United States Supreme Court Declines to Enforce the I.C.J.'s* Avena *Judgment Relating to a U.S. Obligation Under the Convention on Consular Relations*, 9 GERMAN L.J. 5 (2008); John F. Murphy, Medellín v. Texas: *Implications of the Supreme Court's Decision for the United States and the Rule of Law in International Affairs*, 31 SUFFOLK TRANSNAT'L L. REV. 247 (2008).

224. *See* Medellín v. Dretke, 544 U.S. 660 (2005); *President's Memorandum*, *supra* note 212.

225. The language of the U.N. Charter states that the United States has an international law obligation to comply with the "decision" of the ICJ. U.N. Charter art. 94, para. 1.

226. Brief for the United States as Amicus Curiae Supporting Respondent at 9, Medellín v. Dretke, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 504490. The United States argued that compliance served to "protect the interests of United States citizens abroad, promotes the effective conduct of foreign relations, and underscores the United States' commitment in the international community to the rule of law." *Id.*

227. *Id.* at 42.

228. *Id.* at 43.

recognized that the President had the authority, without the consent of Congress, to enter into a sole executive agreement between the United States and Germany to resolve Holocaust-era claims.[229] Further, the Court concluded that "[t]he exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two."[230] The Court found that the California disclosure law clearly conflicted with the foreign policy behind the German Foundation Agreement and that the law "compromise[d] the very capacity of the president to speak for the Nation with one voice" to resolve claims arising out of World War II.[231]

In *Medellín*, the President's action to comply with the *Avena* decision was different from the executive agreement in *Garamendi* because it was not a bilateral agreement between the United States and Mexico, but was instead a unilateral executive determination. The United States presented two arguments to the Supreme Court for affording the President's Memorandum preemptive weight. First, the United States argued that the Optional Protocol and U.N. Charter authorized the issuance of the Memorandum.[232] Specifically the United States argued that since both treaties "create an obligation to comply with *Arena* [sic]" they "implicitly g[a]ve the President authority to implement that treaty-based obligation" pursuant to his "established constitutional and statutory powers."[233] Second, the United States argued that the *Belmont*, *Pink*, *Dames & Moore*, and *Garamendi* decisions granted the President independent foreign affairs authority under Article II of the Constitution to resolve disputes with foreign countries.[234]

Thus, acting according to power delegated by Congress and his own Article II powers to resolve disputes with foreign nations, the President determined that it would be in the foreign policy interests of the United States for state courts to give effect to the *Avena* order.[235] This foreign policy determination was in direct conflict with state procedural rules that barred reconsideration of Medellín's case in Texas courts. According to the *Garamendi* decision, this direct conflict should be resolved by the state rules yielding to the President's determination in order to afford the President authority to speak for the nation "with one voice."[236]

---

229. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003).

230. *Id.* at 421.

231. *Id.* at 424 (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000)).

232. Brief for the United States as Amicus Curiae Supporting Petitioner at 11, Medellín v. Texas, 128 S. Ct. 1346 (2008) (No. 06-984), 2007 WL 1909462 [hereinafter United States Brief].

233. *Id.* If the President was found to be taking this action pursuant to congressional approval in the form of 22 U.S.C. 287(a) (2006), which authorizes the President to "direct" all functions in connection with the United States' participation in the United Nations, then according to Justice Jackson's tripartite formula, his authority would be at its maximum and the action would have the force of law. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring).

234. United States Brief, *supra* note 232, at 13.

235. *Id.* at 16–17.

236. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 429 (2003).

C. The Court's Decision

Based on the *Garamendi* decision, the Court could have easily afforded the President's Memorandum preemptive weight and required the Texas court to reconsider Medellín's case. The Court, however, chose not to continue its *Garamendi* precedent and followed the advice of the respondent and amici[237] in concluding that the President's Memorandum lacked authority to direct state courts to give effect to the *Avena* decision.[238]

To prove that the President's Memorandum had preemptive effect, the United States and Medellín first argued that the Senate had ratified the treaties, giving the ICJ authority to adjudicate disputes, and as such the ICJ's decision in *Avena* was a binding legal obligation on the United States.[239] They recognized that although the ICJ's decision would ordinarily have no domestic legal application due to the Supreme Court's decision in *Sanchez-Llamas v. Oregon*,[240] the President acting as the "sole organ" in deciding foreign affairs can choose whatever appropriate means to satisfy the obligations of the *Avena* decision.[241] Further, they contended that because the *Avena* obligation originated from Senate-ratified treaties, the President's choice of action fit within either the first[242] or second[243] *Youngstown* categories, and, thus, he was well within his authority to order state courts to give effect to the *Avena* decision and set aside conflicting state laws.[244]

---

237. Both sides in this case garnered support from many *amici*. The respondent—the State of Texas—had the support of two very esteemed groups: constitutional and international law scholars (including: Erwin Chemerinsky, John Eastman, Thomas Lee, Michael Ramsey, Michael Van Alstine, Arthur Mark Weisburd, John Yoo, and Ernest Young), *see* Amicus Curiae Brief of Constitutional and International Law Scholars in Support of Respondent State of Texas, Medellín v. Texas, 128 S. Ct. 1346 (2008) (No.06-984), 2007 WL 4983975 [hereinafter Constitutional Scholar Brief], and former senior officials of the Department of Justice (which included: Edwin Meese III, Dick Thornburgh, Charles Fried, Timothy Flanigan, Douglas W. Kmiec, and Charles Cooper), *see* Brief Amicus Curiae of Former Senior Officials of the Department of Justice in Support of Respondent, Medellín v. Texas, 128 S. Ct. 1346 (2008) (No. 06-984), 2007 WL 2428384.

238. Medellín v. Texas, 128 S. Ct. 1346, 1371 (2008).

239. Petitioner's Brief, *supra* note 194, at 16; United States Brief, *supra* note 232, at 8.

240. 548 U.S. 331 (2006) (holding that state courts could admit evidence against defendants even if the evidence was obtained in violation of Article 36 of the VCCR).

241. Petitioner's Brief, *supra* note 194, at 16, 34; United States Brief, *supra* note 232 at 11–12.

242. United States Brief, *supra* note 232, at 11. The first category is when the President acts pursuant to an express or implied authorization of Congress. Here, his authority is at its maximum. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636 (1952) (Jackson, J., concurring).

243. United States Brief, *supra* note 232, at 11. The second category is the "zone of twilight" category which is when the President acts in absence of either a congressional grant or denial of authority. *Youngstown*, 343 U.S. at 636 (Jackson, J., concurring).

244. Petitioner's Brief, *supra* note 194, at 38; United States Brief, *supra* note 232 at 10–11.

The Court was not persuaded by this argument.[245] The Court dismissed the argument that the President's action fit within the first category because it held that the treaties on which the President relied were not self-executing and, thus, by definition, were ratified with the understanding that they were not to have domestic effect.[246] The Court went on to state that such "understanding precludes the assertion that Congress has implicitly authorized the President–acting on his own–to achieve the same result."[247] Next, the Court rejected the contention that the President's action fell within the second *Youngstown* category because the Court did not believe there was a history of Congressional acquiescence to the specific type of presidential action at issue.[248] The Court then concluded that the President's action fit into the third *Youngstown* category—and was therefore invalid—because it was an assertion of authority in direct conflict with the "implicit understanding" of the Senate.[249]

The Court's holding in response to this argument provided an essential limit to presidential power and the permissible scope of sole executive agreements. If the Court had upheld the United States' and Medellín's theory, then the President would have the power to preempt state laws based on the assertion that his action or agreement somehow relates to a valid treaty. Given the multitude of treaties the United States is party to, this power would be far-reaching and practically unlimited.

The United States and Medellín next argued that the President issued the Memorandum through his independent authority to resolve disputes with foreign nations. They argued that the *Belmont*, *Pink*, *Dames & Moore*, and *Garamendi* decisions established the "President's power to settle disputes with foreign governments as a component of his constitutional authority to conduct the Nation's foreign affairs."[250] They continued that those decisions allowed the President to exercise this "dispute resolution authority without seeking the consent of the Senate or approval from Congress" and that the exercise of this authority preempts conflicting state law.[251] The United States and Medellín argued that the President's determination to accept and implement the ICJ's decision was an exercise of his valid "dispute resolution power" in that his Memorandum "resolve[d] the dispute between the United States and Mexico over the ability of 51 individuals to secure review and reconsideration of their convictions"[252] and should trump conflicting state laws.

The Court did not agree with the United States' and Medellín's interpretation of its decisions in *Belmont*, *Pink*, *Dames & Moore*, and *Garamendi*.

---

245. *Medellín*, 128 S. Ct. at 1368–69.
246. *Id.*
247. *Id.* at 1369.
248. *Id.* at 1370.
249. *Id.* at 1369–71.
250. Reply Brief for Petitioner at 10, Medellín v. Texas, 128 S. Ct. 1346 (2008) (No. 06-984), 2007 WL 2886606.
251. United States Brief, *supra* note 232, at 12–13.
252. *Id.* at 15.

Instead, the Court adopted a narrow interpretation of those decisions and limited the power of the President to create preemptive sole executive agreements.

The Court began its analysis by recognizing that the *Belmont*, *Pink*, *Dames & Moore*, and *Garamendi* decisions did grant the President the authority to settle foreign claims pursuant to an executive agreement without the advice and consent of Congress.[253] The Court pointed out that these cases demonstrated that a pervasive history of congressional acquiescence could be treated as a "gloss on 'Executive Power' vested in the President by §1 of Art. II."[254]

Further, the Court explained that these decisions "involve[d] a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals."[255] Most importantly, the Court showed that the President's authority to enter into the sole executive agreements in those cases, and the agreements' preemptive authority, stemmed from the "systematic, unbroken, executive practice" of claims settlement "long pursued to the knowledge of the Congress and never before questioned."[256]

In view of this narrow interpretation of its previous decisions, the Court turned to examine the President's Memorandum. The Court found that unlike the agreements at issue in *Belmont*, *Pink*, *Dames & Moore*, and *Garamendi*, the President's Memorandum was "not supported by a 'particularly longstanding practice' of congressional acquiescence"[257] but rather was an "unprecedented action."[258] The Court continued that the Government itself had failed to identify a "single instance in which the President has attempted (or Congress has acquiesced in) a presidential directive issued to state courts, much less one that . . . compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws."[259] Thus, due to its unprecedented nature, the Court held that the President's Memorandum could not be valid under the President's "narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement."[260]

IV. POST-*MEDELLÍN* SOLE EXECUTIVE AGREEMENTS

The sole executive agreement cases are prone to what Brannon Denning and Michael Ramsey call "doctrine creep."[261] Doctrine creep occurs when new principles of law are justified on the basis of prior cases, but where the new principles ignore the limiting language crucial to those previous decisions.[262] Indeed, looking back at the cases just discussed, one can see that the Supreme

253. *Medellín*, 128 S. Ct. at 1371.
254. *Id.* (quoting Dames & Moore v. Regan, 453 U.S. 654, 686 (1981)).
255. *Id.*
256. *Id.* at 1371–72 (quoting *Dames & Moore*, 453 U.S. at 686).
257. *Medellín*, 128 S. Ct. at 1372 (quoting Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003)).
258. *Id.* (quoting Brief for the United States as Amicus Curiae Supporting Respondents at 29–30, Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (No. 04-10566)).
259. *Id.*
260. *Id.*
261. Denning & Ramsey, *supra* note 146, at 869.
262. *Id.*

Court indiscriminately increased the power of the President to enter into sole executive agreements. In *Belmont* and *Pink*, the Court held that the President could enter into sole executive agreements to recognize the Soviet Union and dictate the policy that governed recognition, based on the idea that he was the "sole organ" in foreign affairs.[263]

Building on the proposition from *Belmont* and *Pink* that the President can enter into preemptive agreements without the consent of Congress,[264] the *Dames & Moore* Court upheld the President's agreement to strip domestic courts of jurisdiction and transfer assets held by Americans to a foreign country based on a rather ambiguous history of congressional acquiescence to presidential claim settlement.[265] In *Garamendi*, the Court went even further by directly comparing sole executive agreements to treaties and according the policy implicit in an executive agreement preemptive authority.[266] The *Medellín v. Texas* decision hopefully has put an end to the dangerous doctrine creep of its predecessors by establishing limitations on the permissible scope of sole executive agreements.

This Part will show how the *Medellín* decision streamlined the *Belmont*, *Pink*, and *Dames & Moore* decisions and has effectively silenced any further citations to *Garamendi* for the proposition that presidential foreign policy, without more, can preempt state law. This Part continues by analyzing the limits on sole executive agreements laid out by the *Medellín* decision and illustrating how these limitations bring sole executive agreements more in line with the understanding of the Supremacy Clause and traditional separation of power principles.

A. Effect on Prior Cases

The *Medellín* Court's brief analysis of *Belmont*, *Pink*, *Dames & Moore*, and *Garamendi* effectively limited those cases' otherwise broad holdings about the authority of the President to enter into sole executive agreements. This important feat was accomplished by the Court explaining that the "narrow and strictly limited"[267] authority of the President to enter into executive agreements in those cases was based on a pervasive history of congressional acquiescence which the Court chose to treat as a "gloss on 'Executive Power' vested in the President" by Section 1 of Article II of the Constitution.[268] This analysis effectively stripped the *Belmont*, *Pink*, *Dames & Moore*, and *Garamendi* decisions of the idea that the President's authority to enter into executive agreements derived from his position as the "sole organ" in foreign affairs.

Additionally, the Court's analysis revised the *Youngstown* tripartite categories of presidential actions. Specifically, the *Medellín* Court made the

---

263. United States v. Pink, 315 U.S. 203, 229–32 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937).

264. *Pink*, 315 U.S. at 229–32; *Belmont*, 301 U.S. at 330.

265. Dames & Moore v. Regan, 453 U.S. 654, 665, 678–80 (1981).

266. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415–17, 420 (2003).

267. Medellín v. Texas, 128 S. Ct. 1346, 1372 (2008).

268. *Id.* at 1371.

assessment of presidential action under *Youngstown*'s second "zone of twilight"[269] category much more stringent.[270] The *Medellín* decision effectively stated that in order to uphold a presidential action where the President lacks congressional approval but has some independent constitutional authority,[271] the action would have to be part of a "systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned."[272] This new standard is a definitive shift from Justice Jackson's initial formulation. Justice Jackson initially noted that the "zone of twilight" would be a more flexible standard and would largely depend on "the imperatives of events and contemporary imponderables."[273] Further, the Court's application in *Dames & Moore* illustrates that the Court treated the "zone of twilight" as a flexible standard.[274] In that case, the Court stretched to approve the President's action under the "zone of twilight" by considering congressional silence and legislation in a related area as approval for the challenged executive action.[275]

The new "zone of twilight" standard expressed in *Medellín* shows a higher degree of deference to the legislature when considering the validity of a President's actions in the "zone of twilight." It will likely force the President in the future to only enter into a sole executive agreement when he has independent Constitutional authority or explicit congressional authorization.

Further, the Court's analysis put an end to speculation over whether the *Garamendi* decision actually granted all executive agreements the authority to preempt state laws.[276] Indeed, prior to the Court's ruling in *Medellín*, scholars were concerned that the *Garamendi* decision would lead to the swift decline of the treaty.[277] Preeminent constitutional scholars expressed this fear to the Court as amici curiae[278] in the *Medellín* case, arguing that the *Garamendi* decision "watered down" constitutional safeguards by "analogizing a sole executive agreement to a treaty."[279] Further, amici argued that since the President's Memorandum did not constitute settlement of civil claims acquiesced to by Congress, the Court could not provide it preemptive weight without eliminating all constitutional safeguards preventing the President from unilaterally making supreme federal law.[280]

---

269. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

270. *See Medellín*, 128 S. Ct. at 1368–72.

271. *Id.* 1371–72.

272. *Id.*

273. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

274. Dames & Moore v. Regan, 453 U.S. 654, 669 (1981).

275. *See id*. at 677–78.

276. As discussed previously, the *Garamendi* Court, without recognizing the limiting principles of prior precedent, announced, "[V]alid executive agreements are fit to preempt state laws, just as treaties are." Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416 (2003). For discussion of the potential drastic consequences of this proclamation, see Denning & Ramsey, *supra* note 146, at 831.

277. Denning & Ramsey, *supra* note 146, at 831.

278. Constitutional Scholar Brief, *supra* note 237, at 1–2.

279. *Id.* at 10.

280. *Id.* at 9–11.

By rejecting the notion that the President's Memorandum was preemptive, the *Medellín* Court thankfully heeded the amici's cautions.[281] In making this determination, the Court illustrated that only "valid executive agreements," defined as being (1) based on an express grant of power accorded by the Constitution; (2) made in light of a long standing history of congressional acquiescence; or (3) made pursuant to a power expressly delegated by Congress, have preemptive authority.[282] The *Medellín* decision, thus, effectively puts an end to further citations to *Garamendi* for the proposition that presidential foreign policy, without more, can preempt state law.

B. Limits on Sole Executive Agreements

After *Medellín*, the President's authority to create sole executive agreements that may preempt state law is limited to three contexts: (1) the President may enter into an executive agreement that implements his constitutional powers under Article II;[283] (2) the President may enter into an executive agreement when he is expressly delegated authority to do so by an Act of Congress;[284] and (3) the President may enter into an executive agreement when there is a pervasive history of congressional acquiescence to the President's unilateral action.[285]

The first criterion is the most rational, as the President should have the authority to enter into agreements to implement his express Article II powers. Without this authority, the President would be hamstrung and would not be able to carry out his constitutional duties without the consent of the legislature. The second criterion is similarly sound, as agreements based on this criterion have the express sanction of Congress, and thus avoid the separation of powers problems created by sole executive agreements. Further, this criterion is identical to Justice Jackson's first category in his *Youngstown* formula, which places the President at the height of his authority when he acts "pursuant to an express or implied authorization of Congress."[286] The third criterion, on its face is the most suspect, in that it leaves open to clever lawyering what constitutes a "pervasive history" or "congressional acquiescence." On closer inspection, however, this criterion represents the *Medellín* Court's effort to redefine Justice Jackson's second "zone

---

281. *See* Medellín v. Texas, 128 S. Ct. 1346, 1371–72 (2008).

282. *See id.*

283. This first criterion was conclusively established in *Belmont* and *Pink*, where the Court held that the President's power to "appoint and receive ambassadors" provided him the authority to enter into the agreement recognizing the Soviet Union. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

284. The second criterion was established in Justice Jackson's *Youngstown* formula, which states that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). It was also recognized in *Dames & Moore v. Regan*, where the Court held that the IEEPA and the Hostage Act authorized the President's action. 453 U.S. 654, 677–78 (1981).

285. This last criterion, while discussed in *Dames & Moore*, 453 U.S. at 686, and Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003), became crystallized in the *Medellín* case. *Medellín*, 128 S. Ct. at 1371–72.

286. *Youngstown*, 343 U.S. at 635–36 (1952) (Jackson, J., concurring).

of twilight" category and is, thus, much more restrictive than past precedent. Prior to *Medellín* this criterion was truly a "twilight zone," which was flexible and easily manipulated. Indeed, through the *Dames & Moore* decision, the Court endorsed the view that congressional inaction or legislation in a related area was sufficient "acquiescence" to allow the President to act.[287] Now under the *Medellín* standard, the President must show a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned" akin to the 200 year claim settlement practice to justify their agreement under this criterion."[288]

C. Benefits of Limitations

These three limitations establish safeguards to prevent the President from unilaterally making federal law. Additionally, they provide legitimacy to sole executive agreements by requiring presidential action to conform more closely to what the Constitution requires and what the Framers intended. Two chief beneficiaries of these limitations are the Supremacy Clause[289] and the separation of power principles inherent in the Constitution.

1. The Supremacy Clause

Sole executive agreements pose a direct danger to the Supremacy Clause, as they have the legal effect of being the "supreme Law of the Land" without satisfying the democratic procedural safeguards implicit in the Supremacy Clause.[290] Thus, scholars were right to fear after the *Garamendi* decision that sole executive agreements could make, at the very least, the use of the treaty irrelevant.[291] The three criteria, post-*Medellín*, limiting the scope of sole executive agreements that have preemptive weight, directly benefit the Supremacy Clause by helping to uphold its implicit democratic procedural safeguards.

The Supremacy Clause identifies three sources of law that are fit to preempt state law as "the supreme Law of the Land:" the Constitution, treaties, and federal statutes.[292] The Constitution prescribes specific procedures that govern the adoption of each source of law. All of these procedures require the participation and assent of the states or their representatives in the Senate acting together with either the President or the House of Representatives.[293] These exclusive procedures help to safeguard federalism and the separation of powers by imposing difficult barriers to adopting "the supreme Law of the Land" and by providing the states or

---

287. *Dames & Moore*, 453 U.S. at 677–80.

288. *Medellín*, 128 S. Ct. at 1371–72 (quoting *Dames & Moore*, 453 U.S. at 686).

289. U.S. CONST. art. VI, cl. 2.

290. *Id.*

291. *See* Denning & Ramsey, *supra* note 146, at 908–10.

292. U.S. CONST. art. VI, cl. 2.

293. Clark, *supra* note 4, at 1597. Indeed, the Constitution was submitted to the people for ratification, and any amendments require a similar ratification process by voters in each state. *See* U.S. CONST. pmbl.; U.S. CONST. art. V. Federal statutes require a vote by a majority of popularly elected representatives, and approval by the President or a two-thirds vote by the Senate. *See* U.S. CONST. art. I, § 7. And treaties, though originally introduced to Congress by the President, cannot become law without the advice and consent of the Senate. *See* U.S. CONST. art. II, § 2, cl. 2.

their representatives a voice in the process by allowing them to vote on measures or providing them a veto power.[294]

The limitations on sole executive agreements mirror the procedural safeguards in the Supremacy Clause. The first criterion, which allows the President to enter into a sole executive agreement that implements his other constitutional powers under Article II, clearly requires there to first be a constitutional power, which was approved by the citizens when the Constitution was ratified, for the President to exercise. This directly mirrors the procedural safeguards of the Supremacy Clause. Thus, when the President enters into a sole executive agreement under this criterion, there should be no Supremacy Clause difficulties.

The second criterion—that the President may enter into an executive agreement when he is expressly delegated authority to do so by an act of Congress—is similar to the procedural safeguards behind the enactment of statutes, as it requires congressional action and presidential approval. Since this criterion requires the involvement of both Congress and the President, it would satisfy the procedural safeguards of the Supremacy Clause.

The third criterion, which allows the President to enter into an executive agreement when there is a pervasive history of congressional acquiescence to the President's unilateral action, has the most tenuous link to the Supremacy Clause's procedural safeguards, as it is based on the idea that congressional acquiescence or silence equals congressional approval. Prior to *Medellín*, the Court's loose requirements for sufficient proof of congressional acquiescence led to the approval of the executive agreements in *Dames & Moore* and *Garamendi* and caused scholars to fear for the future of the treaty.[295] The *Medellín* decision, however, sets up stringent requirements for proof of congressional acquiescence by requiring the President to prove that the agreement represents a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned."[296] By requiring knowledge and participation by the Congress, this high threshold provides some procedural safeguards to the executive agreements entered into according to this criterion. Further, since the proof required by this criterion is so stringent, the President will effectively be forced to only enter into executive agreements under the first two criteria, which have even greater procedural safeguards.

By mirroring the procedural safeguards of the Supremacy Clause, the three limitations inject greater democratic accountability into sole executive agreements, which in turn increases their legitimacy and bolsters the view that they are fit to preempt state law.

2. Separation of Powers

Sole executive agreements run contrary to the traditional separation of powers principles inherent in the Constitution because the President can enter into

294. Clark, *supra* note 4, at 1597.

295. *See* Denning & Ramsey, *supra* note 146, at 913–15.

296. Medellín v. Texas, 128 S. Ct. 1346, 1372 (2008) (quoting Dames & Moore v. Regan, 453 U.S. 654, 686 (1981)).

one with the full force of preemptive federal law without any check by the legislature. These agreements have proven to be a necessary constitutional compromise in order for the President to fully exercise his role as chief diplomat, and to be able to respond quickly to foreign crises. As *Belmont*, *Pink*, *Dames & Moore*, and *Garamendi* illustrate, there is a danger that these agreements will become so broad in scope that they will sideline the legislature and turn the President into the tyrant or king the founding fathers feared.[297]

The post-*Medellín* limitations on the scope of sole executive agreements help to assuage these fears, and bring these agreements more in line with the traditional separation of powers principles.

First, the limitations help to maintain the idea that the legislature, and not the President, is responsible for making laws. The Founders, in creating the constitutional structure, were very keen to keep legislative powers out of the hands of the President.[298] In Federalist Papers number 47, James Madison warned, "the accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."[299] Further, Madison noted that by maintaining a separation of different powers, the Constitution would avoid this tyranny because "[t]he magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law, nor administer justice in person, though he has the appointment of those who administer it."[300] The limits on sole executive agreements help to prevent the tyranny Madison and others were afraid of by maintaining the separation of powers. This is because the limits restrict the ability of the President to make preemptive sole executive agreements to instances where he is implementing his underlying constitutional powers or instances where Congress has approved of the type of agreement.

Second, the post-*Medellín* limitations help to ensure that the legislature maintains what James Madison called a "will of its own"[301] and assures that the legislature maintains the "necessary constitutional means . . . to resist encroachment[]" by the executive branch.[302] The limitations accomplish this by authorizing sole executive agreements that are made pursuant to an express act of Congress or pursuant to a pervasive history of congressional acquiescence. These limitations thus help to prevent the President from having unfettered unilateral power, and help to ensure that the legislature has an effective check on, and oversight over, presidential actions.

---

297. *See* THE FEDERALIST NO. 47, at 234 (James Madison) (Terence Ball ed., 2004).

298. *See id.*; U.S. CONST. art. I, § 1.

299. THE FEDERALIST NO. 47, at 234.

300. *Id.* at 235.

301. THE FEDERALIST NO. 51, at 252 (James Madison) (Terence Ball ed., 2004). Indeed, Madison envisioned the legislature as being the most powerful branch of government, stating: "In republican government, the legislative authority necessarily predominates." *Id.*

302. *Id.*

CONCLUSION

The legal history of sole executive agreements has been muddled at best. Indeed, scholars and the Supreme Court have struggled to develop what could best be described as a constitutional compromise to provide the President the requisite flexibility to conduct agreements with foreign countries without the advice and consent of Congress. Unfortunately, the Supreme Court fumbled the details of this compromise in its *Belmont*, *Pink*, *Dames & Moore*, and *Garamendi* decisions by providing overly broad generalizations about the power of the President to enter into sole executive agreements as well as incomplete analysis on the preemptive weight of the agreements. The muddled analysis by the Supreme Court led to greater confusion among scholars about the constitutional basis for sole executive agreements and raised questions about the continuing validity of the Supremacy Clause.

In the recent *Medellín v. Texas* decision, the Supreme Court in several concise paragraphs helped put an end to the confusion surrounding the constitutional basis for sole executive agreements. The Court accomplished this by narrowly construing the decisions in *Belmont*, *Pink*, *Dames & Moore*, and *Garamendi* and by identifying limitations on the use and preemptive weight of sole executive agreements. These limitations not only helped clarify that sole executive agreements are based on the President's own constitutional powers, as well as based on Congress' express consent to the President's action, but also helped to establish procedural safeguards to protect the intent of the Supremacy Clause.

Going forward, there may still be debate over whether the President should have the authority to enter into sole executive agreements and whether the Founders would have intended that the President's sole executive agreements would, in some instances, be afforded preemptive weight. Regardless of the position one takes on either of those points, it is at least agreed that the *Medellín* decision established specific bases for sole executive agreements—some deriving from the text of the Constitution, some from a judicial gloss on the Constitution—and that only those limited bases provide those agreements the force of the "supreme Law of the Land."[303]

303. *See* U.S. CONST. art. VI, cl. 2.