WORLD HABEAS CORPUS

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Habeas corpus has played an essential part in many of the great controversies that have marked major constitutional tensions throughout U.S. history. Presidential and congressional powers were tested in the Civil War period in Ex parte Merryman and Ex parte McCord. In 1908, federal judicial power to prevent unconstitutional action by state officers—of great significance to this day in assuring the supremacy of federal law over state action—emerged in what was technically a habeas corpus action in Ex parte Young. Executive branch detentions in World War II were tested not only through direct appeals, but also—and more successfully—through habeas corpus in Ex parte Endo and Duncan v. Kahanamoku. More recently, habeas has been once again invoked to resolve difficult questions of constitutional law, personal liberty, and executive and legislative powers. In the last few years, habeas corpus has assumed importance as a vehicle for litigating both U.S. constitutional claims and the application of international legal standards to foreign nationals held by or in the United States. I also want to thank my co-panelists, James Pfander and Trevor Morrison, as well as my colleagues at Georgetown and elsewhere, including Rosa Brooks, Lori Damrosch, Dan Ernst, Joseph Margulies, Judith Resnik, David Schneiderman, John Witt, Mark Tushnet, Carlos Vázquez, and others, for helpful comments and discussion.

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2. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (finding that the President lacked authority to suspend the writ of habeas corpus).

3. 74 U.S. (7 Wall.) 506 (1869) (upholding Congress's authority to strip the Court of jurisdiction to hear one kind of appeal from the denial of habeas relief).


5. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944); see also Hirabayashi v. United States, 320 U.S. 81 (1943).


engagement with what the Court has called "the world community" over legal issues has emerged as a marked point of tension. Relatively unremarked in current discussions is a proposal made more than half a century ago, in the dawn of post–World War II human-rights based legal regimes. In 1952, an American lawyer submitted a petition for a writ of habeas corpus on behalf of William N. Oatis, an Associated Press reporter being detained in Czechoslovakia, to the Human Rights Commission of the U.N.'s Economic and Social Council. And in 1954, the same lawyer published the first of dozens of articles on his idea for "world habeas corpus," or a "United Nations Writ of Habeas Corpus."

Part I of this Article describes Luis Kutner's idea for world habeas corpus and the support and opposition it attracted in the 1950s and 1960s. Kutner's proposal was situated in a period in which the Supreme Court's expansion of judicial enforcement of individual rights helped feed a "states rights" resistance to independent enforcement of national norms, a resistance that also fed opposition to efforts to give the U.N. Charter domestic effect and protect internationally defined human rights in U.S. courts. What is interesting is not so much that Kutner's proposal was never realized, but that it attracted as much support as it did in a period when the Bricker Amendment, designed in part to insulate the Constitution

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13 See LUIS KUTNER, WORLD HABEAS CORPUS 102–09 (1962).
from international human rights law, also found considerable support.¹⁵

Part II very briefly asks how far we are today from having a remedy in the nature of world habeas corpus. The short answer is very far indeed. But outside the United States there has been an extraordinary movement since 1952 toward developing institutional structures to review claims of unlawful detention at the international and transnational levels. Within the United States, anxieties prominently articulated in the 1950s about allowing courts to rely on international human rights law persist. These anxieties over the role of the international in measuring domestic legal practices came into bold conflict with commitments to the rule of law and to habeas corpus as the "Great Writ" in the case of Medellín v. Dretke.¹⁶ In Medellín, the Court was faced with a conflict between its own prior decision in Breard v. Greene,¹⁷ and the subsequent decisions of the International Court of Justice (ICJ), concerning remedies for asserted violations of the Vienna Convention on Consular Relations.¹⁸ Although resolution of that particular conflict has been postponed.¹⁹

¹⁵ For a helpful account of how fears of the domestic effects of a draft U.N. covenant on human rights led Senator John Bricker to introduce a proposed constitutional amendment to limit treaty-making authority, see Duane Tananbaum, The Bricker Amendment Controversy 1-48 (1988).


¹⁷ 523 U.S. 371, 375-76 (1998) (indicating that asserted violations of the Vienna Convention, if not properly raised in the state courts, could be barred from consideration on federal habeas).

¹⁸ Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention]. In a series of decisions culminating in Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581 (Judgment of Mar. 31, 2004), available at http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm (last visited Nov. 28, 2005) [hereinafter Avena, 43 I.L.M. 581], the ICJ concluded that the Vienna Convention's provision that domestic laws "must enable full effect to be given to the purposes for which the rights accorded under this article are intended," required consideration of treaty violation claims and their effects on underlying convictions and sentences, rejecting the proposition that such claims, if procedurally defaulted by not being raised in the initial state court proceeding, could properly be foreclosed under domestic law. See Avena, 43 I.L.M. 581, supra, at 612-20, 624-25, paras. 108-14, 120-43, 153(8), (9), (11).

¹⁹ After President Bush issued a memorandum directing state courts to give effect to the ICJ decision as a matter of comity, the Supreme Court dismissed the writ of certiorari in Medellín as improvidently granted. See 125 S. Ct. at 2090. On March 9, 2005, the United States withdrew from the Optional Protocol to the Vienna Convention, which had signaled the United States' consent to the jurisdiction of the ICJ. See Charles Lane, U.S. Quits Pact Used in Capital Cases; Foes of the Death Penalty Cite Access to Envoys, WASH. POST, Mar. 10, 2005, at A1; Adam Liptak, U.S. Says It Has Withdrawn from World Judicial Body, N.Y. TIMES, Mar. 10, 2005, at A16. Although questions have been raised about whether the notice can be effective immediately under international law, see Posting of Julian Ku to Opinio Juris, http://lawofnations.blogspot.com/2005/03/us-withdraws-from-icj-jurisdiction.html (Mar. 9, 2005, 23:13 EST), the withdrawal will at some point prevent future cases concerning U.S. obligations under the Vienna Convention from being heard under the ICJ's compulsory jurisdiction.
the U.S. legal system is increasingly likely to face decisions by other tribunals reflecting, directly or indirectly, on the legality of detentions in the United States—issues at the historic core of habeas corpus.

I

WORLD HABEAS CORPUS: HABEAS CORPUS AND THE TRANSNATIONAL ENFORCEMENT OF HUMAN RIGHTS NORMS

The idea of "world habeas corpus" or a "United Nations writ of habeas corpus" is, in essence, an internationalized version of the common law writ intended to vindicate the United Nations' commitment to individual human rights. Rather than being (as I thought initially) a fringe idea by an energetic but lone law review writer, the idea of world habeas corpus—explained below—received support from a number of judges, academics, and elected officials in the 1950s and 1960s. While it may seem remote today that such an idea should attract support from Supreme Court Justices and members of Congress, it will be helpful to current controversies to note this earlier—but, in fact, not so long ago—period.

A. The First Petition for a U.N. Writ of Habeas Corpus: The Oatis Matter

Luis Kutner, creator of the concept of a world habeas corpus writ, was a Chicago lawyer with a general practice that apparently included

20 For example, the European Court of Human Rights and the Canadian Supreme Court have both developed jurisprudence that in most (if not all) cases prohibits extradition of capital defendants to the United States without assurances that the death penalty will not be sought. See, e.g., Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989); United States v. Burns, [2001] 1 S.C.R. 283; see also Judge v. Canada, U.N. Human Rights Comm., 78th Sess., U.N. Doc. CCPR/C/78/D/829/1998 (Oct. 20, 2003) (expressing the view that Canada violated its obligations under the International Covenant on Civil and Political Rights (ICCPR) by deporting a U.S. citizen facing the death penalty to the United States without receiving assurances that the individual would not be executed).

21 Much of the account in the first part of this paper is based on the published writings of Luis Kutner, the originator and principal advocate for the idea of world habeas corpus. I have sought to find confirmation in other sources for those aspects of Kutner's account described herein, including in news reports, in collections held at the Hoover Institution, Stanford University, and the Chicago Historical Society, and also in State Department records available at the National Archives and Records Administration in College Park, Maryland (hereinafter "State Department Archives"). Although complaints sent to the U.N. Economic and Social Council were not archived before 1956 and no record could be found in the United Nation's archives in Geneva of the habeas petition on Oatis' behalf, see E-mail from Esther Trippel-Ngai, Chief, UNOG Registry, Records and Archives Sub-Unit Library, United Nations Office at Geneva, to Justin Ford, Research Assistant to Vicki C. Jackson, Professor of Law, Georgetown Univ. Law Ctr. (Apr. 8, 2005) (on file with author), confirmation has been found, and is cited below, on several points with respect to events in the 1950s and 1960s. More research would be needed, though, to offer a complete historical account.
special emphasis on unjust conviction cases.\(^{22}\) Between 1949 and


In addition to his work for prisoners, Kutner is credited with the idea of a living will. See, e.g., Jeffrey G. Sherman, Mercy Killing and the Right to Inherit, 61 U. Cin. L. Rev. 805, 808 n.23 (1993) (crediting Kutner’s 1969 article as “the genesis of the living will idea”); Melvin I. Urofsky, Leaving the Door Ajar: The Supreme Court and Assisted Suicide, 32 U. Rich. L. Rev. 313, 319 & n.26 (1998) (noting that an “illinois attorney, Luis Kutner, is given credit for proposing a formal advance directive in 1969”). For Kutner’s own writings on living wills, see, for example, Luis Kutner, Due Process of Euthanasia: The Living Will, a Proposal, 44 Ind. L.J. 539 (1969); Luis Kutner, The Living Will: Coping with the Historical Event of Death, 27 Baylor L. Rev. 39 (1975). Kutner also wrote more generally on constitutional issues, see, e.g., Luis Kutner, The Neglected Ninth Amendment: The “Other Rights” Retained by the People, 51 Marq. L. Rev. 121 (1968) [hereinafter Kutner, Neglected Ninth Amendment], and to some notice, see, e.g., Palmer v. Thompson, 403 U.S. 217, 238 (1971) (Douglas, J., dissenting) (citing Kutner’s article). Kutner has been described as involved in founding Amnesty International, see Obituary, Chi. Daily Bull., Mar. 3, 1993, at 3; ELKINS, supra note 14, and as having served as “Counsell for Ecuador” and as “Counsell General for Guatemala,” see Kutner, Neglected Ninth Amendment, supra, at 121 n.*. Kutner also taught for at least one semester at the Yale Law School. See id.; see also E-mail from Judith Miller, supra (reporting that Kutner co-taught a course in Criminal Law and Administration in the Fall of 1948). And Kutner is also described as a painter and a poet. See Chi. Historical Soc’y, supra, at 1; ELKINS, supra note 14. His personal papers are at the Chicago Historical Society Library, and his papers concerning world habeas corpus are at the Hoover Institution of Stanford University in Palo Alto, California. Some, but not all, of the Kutner papers at the Hoover Institution have been examined in connection with research for this paper, as have some, but not all, archival materials from the U.S. State Department from the early 1950s.

Although evidently a man of much energy and passion, Kutner may not have been the most effective idea entrepreneur: Available public documents, for one thing, suggest he had a tendency to become embroiled in disputes with clients and others. For example, Kutner was sanctioned once (by a divided court) for charging too high a fee in a criminal case (a fee of $5,000 agreed to in advance by the client), in an opinion that otherwise praised his career. See In re Kutner, 399 N.E.2d 963, 966 (Ill. 1979); see also Gabriel J. Chin & Scott C. Wells, Can a Reasonable Doubt Have an Unreasonable Price? Limitations on Attorneys’ Fees in Criminal Cases, 41 B.C. L. Rev. 1, 39–41 (1999) (discussing In re Kutner). In addition, Kutner evidently had a dispute with at least one other client over payment of his fees. See Chi. Historical Soc’y, supra, at 5. He was once accused of assault, see Actress Charges Assault, N.Y. Times, Nov. 26, 1966, at 33, and was a party in several lawsuits, inter alia, against another lawyer for alleged defamation, invasion of privacy, and infliction of emotional distress, see Kutner v. DeMassa, 421 N.E.2d 281 (Ill. App. Ct. 1981); against investment advisers for losses suffered in the sale of securities, see Kutner v. Gofen, No. 18690, 1971 U.S. App. LEXIS 9104 (7th Cir. July 7, 1971); and as one of several defendants in a malicious prosecution suit, see Tucker v. Kerner, 186 F.2d 79, 80 (7th Cir. 1950). See also Katlin, supra, at 461 (describing Kutner’s dramatic flair while noting that he may appear “arrogant
1952, he drafted papers on behalf of at least two dissidents held in Communist-controlled countries—Joseph Cardinal Mindszenty, sentenced to life in prison by the Hungarian government, and William N. Oatis, chief of the Associated Press bureau in Prague, Czechoslovakia—towards the idea of seeking habeas corpus relief from the United Nations to secure their release. Papers were actually submitted only in the Oatis case, which I describe below.

1. The Petition


and egoistic,” and has a tendency when championing a client or a cause to become “obsessed with the task, assuming a stance of self-righteousness”). (Katin appears to have served for a time as an assistant to Kutner. See, e.g., Luis Kutner, World Habeas Corpus: Ombudsman for Mankind, 24 U. MIAMI L. REV. 352, 352 n.* (1970) [hereinafter Kutner, Ombudsman].) (Kutner also cryptically alludes to efforts on behalf of another American, Robert Vogeler, held in Czechoslovakia. Id. at 32-33.) It is interesting, in light of current issues concerning interrogation of prisoners, to note Oatis’ account of his false confession to espionage. See William N. Oatis, Why I Confessed, LIFE, Sept. 21, 1953, at 131 (explaining how sleep deprivation and forced standing led to the false confession). Oatis was later exonerated by the Czechs, first in the 1960s by Alexander Dubcek’s reformist government (a decision reversed after the Soviet takeover), and then again in 1990. See Raynor Pike, AP Reporter William Oatis Dies, ASSOCIATED PRESS, Sept. 16, 1997, available at http://www.oatis.com/memorial/obit.html.

25 See Kutner, supra note 23, app. V at 70-71. (Kutner also cryptically alludes to efforts on behalf of another American, Robert Vogeler, held in Czechoslovakia. Id. at 32-33.) It is interesting, in light of current issues concerning interrogation of prisoners, to note Oatis’ account of his false confession to espionage. See William N. Oatis, Why I Confessed, LIFE, Sept. 21, 1953, at 131 (explaining how sleep deprivation and forced standing led to the false confession). Oatis was later exonerated by the Czechs, first in the 1960s by Alexander Dubcek’s reformist government (a decision reversed after the Soviet takeover), and then again in 1990. See Raynor Pike, AP Reporter William Oatis Dies, ASSOCIATED PRESS, Sept. 16, 1997, available at http://www.oatis.com/memorial/obit.html.

ner presented to the "United States Members of the Economic and Social Council" a request for the "United States [to] Join in as Party-Movant in the Presenting, Filing, and Prosecution of the Petition for a United Nations Writ of Habeas Corpus for William N. Oatis, a Citizen of the United States," reciting that Oatis was a citizen of the United States and that the United States was a signatory to the U.N. Charter. (I will refer to these documents together as "the petition.")

The petition asserted that the Czechoslovakian government violated Oatis's rights under the U.N. Charter and the Universal Declaration of Human Rights (UDHR) by arbitrarily arresting Oatis, denying him the right to see or communicate with his consul, and denying the American Embassy's request that it be permitted to see Oatis. The petition further accused the Czechoslovakian government of subjecting Oatis to "repeated inhuman methods of cruelty and torture, depriving him of his free will, reducing his mental state to that of a somnambulistic automaton, toward the end of compelling [him] to plead guilty to the alleged offenses which he did not commit and of which respondent was well aware." The petition asserted that the Czechoslovakian government engineered a kangaroo trial with a gov-

ring in her remarks to an earlier introduced resolution to sever diplomatic relations with Czechoslovakia if Oatis were not released (that did not pass) and a modified resolution (that did pass) threatening reductions in trade. See 98 CONG. REC. 4,957 (1952).

It is doubtful that Kutner was asked by either Oatis or his family to prepare the petition. See KUTNER, supra note 13, at 108 (stating that Lou Shainmark, "Managing Editor of the Chicago Herald-American, a member of the Hearst chain . . . , suggested to the author that action be taken to focalize attention on Mr. Oatis' plight"); id. app. X at 252 (asserting in the 1952 petition that "[t]he basic law of habeas corpus is that a petition in [sic] behalf of William Oatis can be filed by anyone, be it friend or a kin, setting up the complaining facts"). It seems likely that Oatis's wife had rejected suggestions to pursue a habeas corpus remedy. See Letter from Laurabelle Z. Oatis to Harold Vedeler, Officer in Charge, Polish, Baltic, and Czechoslovak Affairs, U.S. State Dep't (Dec. 4, 1951) (on file in the State Department Archives on William N. Oatis) (indicating that she had been approached by the "I.N.S."—possibly referring to the International News Service—about a "habeas corpus gimmick" that she would not participate in); Letter from Harold C. Vedeler, Officer in Charge, Polish, Baltic and Czechoslovak Affairs, U.S. State Dep't, to Mrs. William N. Oatis (Dec. 21, 1951) (on file in the State Department Archives on William N. Oatis) (stating that "[t]he suggestions of I.N.S. were discussed with Associated Press representatives and the general consensus was that it would not assist in efforts to free your husband"). William Randolph Hearst helped create the International News Service, see Hearst, William Randolph, MSN ENCARTA ENCYCLOPEDIA, http://encarta.msn.com/encyclopedia_761577497/Hearst_William_Randolph.html (last visited Nov. 16, 2005), which merged with United Press to become United Press International in 1959, see Hearst, KETUPA.NET MEDIA PROFILES, http://www.ketupa.net/hearst2.htm (last visited Nov. 16, 2005). It seems likely that Mrs. Oatis's reference to the I.N.S.-backed "habeas gimmick" reflects what Kutner described as Lou Shainmark's suggestion.

26 KUTNER, supra note 23, app. V at 70.

27 Id. But cf. KUTNER, supra note 14, at 420 (noting that the UDHR was "not an enforceable treaty with binding obligations").

28 KUTNER, supra note 23, app. V at 71. Czechoslovakia accused Oatis of "activities hostile to the state," "gathering and disseminating" secrets, and "spreading malicious information regarding the Czech state through illegal news organs." Id.
ernment-appointed defense counsel who cooperated in obtaining a false guilty plea from Oatis as he was held incommunicado.\(^{29}\)

The petition anticipated many of the arguments Kutner was later to advance in his academic writing. For example, the petition argued that the General Assembly had jurisdiction under Articles 55 and 56 of the U.N. Charter, which obligated the signatory powers to consider implementation of human rights an "international concern and a special responsibility of the United Nations."\(^{30}\) Moreover, the petition claimed that the General Assembly had "inherent power to create the methods, vehicles, or organs to carry out the objects and purposes of the" United Nations, including those of Charter Article I, "promoting respect for human rights and fundamental freedoms to all."\(^{31}\) The petition also invoked the authority of the Economic and Social Council under Charter Articles 62 and 68, authorizing the Council to make recommendations and set up commissions for the promotion and protection of human rights.\(^{32}\)

Apart from the Charter-based arguments, the petition argued in the alternative that the General Assembly "makes policies and is the parliament of the world" and has the responsibility of recommending any action to execute its purposes to preserve human rights; the Assembly, Kutner suggested, was the "sole judge of its own competence" to assume "jurisdictional responsibility to enforce separate and collective human rights under the Charter."\(^{33}\) Kutner also raised the possibility of invoking the jurisdiction of the ICJ, noting that Article 96 of the Charter authorizes the General Assembly to request an advisory opinion from that court "on any legal question."\(^{34}\) Although the

\(^{29}\) See id.

\(^{30}\) Id. app. V at 72.

\(^{31}\) Id. The State Department vigorously contested Kutner's claim that the General Assembly had any such power, arguing that the General Assembly had power only to debate and make recommendations but not to issue orders to any country. See Letter from Jack K. McFall, Assistant Sec'y, U.S. Dep't of State, to Sen. Everett M. Dirksen 1-2 (May 27, 1952) (on file in the Kutner Archives at the Hoover Institution at Stanford University).

\(^{32}\) See Kutner, supra note 23, app. V at 73 (citing U.N. Charter arts. 62, 68).

\(^{33}\) Id.

\(^{34}\) Id. app. V at 74 (also referencing the ICJ's compulsory jurisdiction). Anticipating concern that the relief he sought would be regarded as an unjustified intervention into domestic sovereignty (under U.N. Charter article 2(7), the so-called "domestic jurisdiction" clause, which states in part that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state"), Kutner invoked the provisions of Article 104 of the Charter, authorizing the United Nations to "enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and fulfillment of its purpose." Id. His essential argument was that human rights violations were not protected by the domestic jurisdiction clause, because such violations were not merely of domestic concern, but were also of concern to the community of nations committed to the basic human rights set forth in Article 55 and in the UDHR. See Kutner, supra note 14, at 429-30.
arguments that the General Assembly's jurisdiction extended to coercive orders to support U.N. purposes went well beyond generally accepted interpretations of the U.N. Charter, Kutner's argument that the General Assembly could refer a matter to the ICJ for an advisory opinion on whether a state's action violated international law appears to have been well-founded, though it was not repeated in the formal prayer for relief at the end of the petition.

Anticipating objections that the Charter did not create individual rights, Kutner argued that it was a legally binding document under which the individual human being is entitled to protection: "The Charter being cosmopolitan in nature requires a cosmojudicial writ for all humans on this globe." Failure to provide "direct legal action" would, he argued, "impair... the intent, purpose, and principle of the Charter and the Universal Declaration of Human Rights." Moreover, "[t]ribunals and organs within the structure of the Charter" could, he urged, act as "a human-rights court" to remedy human rights violations. According to Kutner's petition, Czechoslovakia, a signatory to the U.N. Charter, had violated Oatis's human rights and its "sovereign integrity" should not allow it to engage in human rights violations, even within its own borders.

Asserting that Oatis had no other available remedy, the petition argued that Oatis "has only the remedy of habeas corpus remaining under his rights as a citizen of a signatory state and as a subject in the world community under the Declaration of Human Rights." Kutner's focus on the absence of other available remedies presumably reflected a U.S. lawyer's familiarity with requirements for exhaustion of available state remedies in habeas corpus in the United States.

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35 See, e.g., supra note 31.
36 See U.N. Charter art. 96. The ICJ has on occasion issued advisory opinions, in response to referrals from the General Assembly, see, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion of July 9, 2004), available at http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm, and other authorized organs, including the Security Council, see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 57 (June 21) (stating, inter alia, that South Africa's racial apartheid in Namibia "constitute[s] a denial of fundamental human rights... [which the Court views as a] flagrant violation of the purposes and principles of the Charter").
37 Kutner, supra note 23, app. V at 76.
38 Id. app. V at 75.
39 Id.
40 See id. app. V at 74–75.
41 Id. app. V at 75.
The petition sought several forms of relief, asking that the General Assembly order Czechoslovakia to show cause for Oatis’s detention and (presumably if the government continued to detain Oatis) that the matter be “referred to an appropriate organ or assigned to jurisdiction of the International Court of Justice [ICJ] to render an advisory opinion.” The petition also asked that the ICJ or other tribunal seek assistance from the Human Rights Commission “to assist in the mobilization of all the facts” and that it issue an order requiring that Oatis be produced in open court to test the legality of his detention. An ICJ decision, Kutner argued, could be enforced by the Security Council: In possible tension with his suggestion that the advisory jurisdiction of the ICJ be invoked, he argued that “realistic effective methods” to enforce its judgment included either economic or military means, the cessation of diplomatic relations, and, as a last resort, “the power of world opinion.”

For Kutner, recognition of a U.N. writ of habeas corpus would contribute to the development of international law and to the institutional capacities of the United Nations itself. Without a U.N. writ of habeas corpus to test the legality of detentions, he argued, “the world [would] never know whether international substantive law is an illusion or whether it is a reality that will preserve the liberty of an individual.” As a matter of building institutional capacity, Kutner urged the United Nations to “seize its first great occasion to affirm its power of judicial review when it is alleged under oath that a human being has been wrongfully deprived of his human rights and human dignity by a nation not his own.” Other alternatives, Kutner asserted, were inadequate: “Constrained diplomacy, the payments of ransom, timidity to call a signatory state to the bar of international justice violates the concept of international due process. What counts alone is the just

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43 KUTNER, supra note 23, app. V at 76.
44 Id. Kutner also argued that the age and importance of the writ of habeas corpus supported its availability here as a method to test the legality of Oatis’s detention and that the ICJ’s earlier cases on inter-state disputes supported its authority to hear this dispute. Id. app. V at 75–77. Kutner also invoked the tentative draft Covenant of Human Rights concerning fair criminal process to support the propriety of a U.N. writ of habeas corpus. Id. app. V at 77–78.
45 Id. app. V at 76.
46 Id. app. V at 75. In his reliance on the power of world opinion to give effect to a judgment, Kutner in some respects anticipated the “shaming” strategies of modern human rights activists. See generally ROBERT F. DRINAN, THE MOBILIZATION OF SHAME: A WORLD VIEW OF HUMAN RIGHTS (2001) (discussing the development of the human rights movement in the second half of the twentieth century).
47 KUTNER, supra note 23, app. V at 78.
48 Id. app. V at 79.
action of the United Nations." Failure to so act, he argued, would lead to a decline in the United Nations’ world influence.

2. Subsequent Events and Oatis’ Release

The U.N. Human Rights Commission received the petition in May 1952 and, in accordance with procedures established by the U.N. Economic and Social Council, forwarded it to the government of Czechoslovakia. Kutner also delivered the petition to Eleanor Roosevelt at the United Nations. Yet Kutner’s petition did not procure any other action from any organ of the United Nations (apart from the action of the Human Rights Commission in forwarding the petition to Czechoslovakia). No U.N. writ of habeas corpus, or order to show cause, ever issued, nor did any other official U.N. or U.S. action take up any of Kutner’s suggestions.

Indeed, Kutner’s efforts to involve the United States in sponsoring the petition were fruitless (and evoked arguments from the State Department opposing its legal basis), leading him to seek assistance

49 Id.
50 See id.
51 According to Kutner, he was advised on May 16, 1952 that the petition had been sent to Czechoslovakia. See id. at 33. That the petition was forwarded to the Czechoslovak government is confirmed by State Department correspondence. See Letter from Ben H. Brown, Jr., Acting Assistant Sec’y, U.S. Dep’t of State, to Sen. Everett M. Dirksen (Sept. 15, 1952) (on file in the Kutner Archives at the Hoover Institution at Stanford University); Letter from Jack B. Tate, Acting Legal Advisor, U.S. Dep’t of State, to Luis Kutner (Sept. 19, 1952) (on file in the Kutner Archives at the Hoover Institution at Stanford University). The State Department letters each emphasized that the Human Rights Commission “has no power to take any action in regard to any complaint concerning human rights.” Id.
52 See Letter from Mrs. Franklin D. Roosevelt, Representative in the Human Rights Comm’n, U.S. Mission to the U.N., to Durward V. Sandifer, Deputy Assistant Sec’y of State, U.S. Dep’t of State (May 12, 1952) (on file in the State Department Archives on William N. Oatis) (reporting that Luis Kutner handed her some papers on May 9, 1952 at the United Nations, including what she described as a letter from Kutner, a Petition to the General Assembly, and a Petition to the Economic and Social Council, each listed as an enclosure to her letter).
54 See Letter from Jack K. McFall to Sen. Everett M. Dirksen, supra note 31, at 1–2 (detailing objections to Kutner’s proposal as not respecting the limitations of the U.N. Charter or the General Assembly’s lack of authority to issue orders, and stating that “this Government has not found it possible to take any official action on [Kutner’s] proposal in the United Nations”); Letter from Mrs. Franklin D. Roosevelt, Representative in the Human Rights Comm’n, U.S. Mission to the U.N., to Luis Kutner 1 (May 29, 1952) (on file in the Kutner Archives at the Hoover Institution at Stanford University) (reporting that she was advised by the State Department that the “proposal does not take account of the constitutional powers and limitations of the United Nations organs which would be called upon to act’’); Letter from Jack B. Tate, Acting Legal Advisor, U.S. Dep’t of State, to Luis Kutner 1 (copy date-stamped July 25, 1952) (on file in the State Department Archives on William N. Oatis) (asserting that there is no “legal basis upon which the United Nations or the International Court of Justice could issue a writ of habeas corpus for Mr. Oatis . . . [be-
from members of Congress\textsuperscript{55} and from other countries.\textsuperscript{56} By May 1953, there had been no action on the Oatis petition, either in the form of U.S. willingness to sponsor the petition or its claims for relief or by U.N. organs. At that time, according to Kutner, the then-ambassador from the Dominican Republic, Rafael Trujillo,\textsuperscript{57} offered through an aide to present a resolution to the U.N. General Assembly.\textsuperscript{58} The plan, according to Kutner, was for the Dominican Republic to seek to intervene to become the party-movant in prosecuting the

\textsuperscript{55} Senator Everett Dirksen, for example, queried the State Department about its position on Luis Kutner's proposal, in both May and August of 1952. See Letter from Jack K. McFall to Sen. Everett M. Dirksen, supra note 31, at 1; Letter from Ben H. Brown, Jr. to Sen. Everett M. Dirksen, supra note 51. In response, the State Department focused on the legal barriers to the entry of coercive orders by U.N. bodies. See Letter from Jack M. McFall to Sen. Everett M. Dirksen, supra note 31, at 1-2. According to the State Department, "the legal basis for [Kutner's petition] appeared very doubtful," because the General Assembly does not have "the power to issue 'orders' of any kind to any Member." Id. at 1. The General Assembly has authority only to make recommendations and therefore lacked authority to order Czechoslovakia to show cause for detaining Oatis. Id. at 1-2. As in Jack Tate's letter to Kutner, see supra note 54, McFall explained to Senator Dirksen that even if the General Assembly referred the matter to the ICJ, that court could issue only an advisory opinion and could not require the production of Oatis. Letter from Jack M. McFall to Sen. Everett M. Dirksen, supra note 31, at 2. Ultimately, the letter asserted, Kutner's proposal "unfortunately fails to take account of the actual scope of authority of United Nations bodies." Id. at 3. Although Kutner acknowledged the State Department's objections, he also asserted that the great Austrian judge and legal scholar Hans Kelsen, by then recognized as an authority on the United Nations due to his 1951 book, \textit{The Law of the United Nations}, expressed the view that under Article 56 of the U.N. Charter such a procedure was permissible. See \textit{Kutner}, supra note 23, at 33.

\textsuperscript{56} See \textit{Kutner}, supra note 23, at 33-34.

\textsuperscript{57} Trujillo, it should be noted, had been President of the Dominican Republic. See \textit{Robert D. Grassweller}, \textit{Trujillo: The Life and Times of a Caribbean Dictator} 87-121 (1966). In 1952 he had his brother installed in the presidency while he became Commander-in-Chief of the military forces and Ambassador-at-Large to the United Nations. See \textit{id.} at 261, 268. Trujillo is widely regarded as a dictator. See, e.g., \textit{id.} In a later law review article, Kutner specifically noted "the use of intimidation and terror as political weapons" by the Dominican Republic. See Luis Kutner, \textit{World Habeas Corpus: A Legal Absolute for Survival}, 39 U. Detroit L.J. 279, 310 (1962).

\textsuperscript{58} See \textit{Kutner}, supra note 23, at 33; see also Letter from Luis Kutner to Gen. Manuel de Moya, Dom. Rep. Delegation to the U.N. 1 (Mar. 2, 1953) (on file in the Kutner Archives at the Hoover Institution at Stanford University) (exclaiming "over the pending dramatic and effective step to be taken by His Excellency" and indicating that Rep. John Beamer and Rep. Edith Nourse Rogers were supportive of the anticipated efforts of the Ambassador).
petition and seeking Oatis’s discharge from wrongful incarceration. The proposed resolution was drafted to ask the General Assembly to refer the Oatis petition to the ICJ for an advisory opinion, as well as for other relief. According to Kutner, the Dominican Republic’s government notified the U.S. government of the draft resolution, and, at the request of the U.S. State Department, delayed introduction of the resolution by thirty days.

Oatis was released from custody in May 1953 (three weeks into this period, according to Kutner). Whether Kutner’s petition contributed to his release is at best unclear, although Kutner has asserted that it may have played a role. Oatis’s imprisonment was the subject of public concern and resolutions by other organizations as well. State Department records, to the extent I have been able to review them, suggest that diplomatic negotiations and agreements relating, for example, to allowing Czechoslovakian exports to the United States and permitting resumption of Czechoslovakian civil aircraft flights over West Germany, played a critical role, and that a petition to the Czechoslovakian government for commutation of sentence filed by

59 See Kutner, supra note 23, app. VI at 81–82.
60 Id.; Kutner, supra note 13, app. XII at 263–65 (reproducing a draft resolution, beginning, “Resolution by Raphael Leonidas Trujillo, Ambassador at Large and Chief of the Dominican Republic Delegation of the United Nations relating to the petition of Luis Kutner for a United Nations Writ of Habeas Corpus for and on behalf of William N. Oatis . . . ”).
61 See Kutner, supra note 23, at 33–34.
62 See id. at 33–34; Kutner, supra note 13, at 106.
63 See id. at 106–07 (“Parties may dispute as to the part played in the release of Mr. Oatis by the then pending steps toward a showdown in the United Nations. Suffice it to say that the author and many other persons believe that the pressures, which mounted steadily, for a United Nations Writ of Habeas Corpus were effective in keeping Oatis’ case before the Conscience of Mankind, and in finally securing his release . . . . [T]he action of Czechoslovakia testified . . . to totalitarian unwillingness to risk its case before a Bar of International Justice.”). But see infra, text at note 65; cf. Pike, supra note 24 (reporting that the Czech government said it released Oatis because of a “poignant plea” by his wife).
64 See, e.g., Letter to Dean G. Acheson, U.S. Sec’y of State, from Dana Converse Backus, Chairman, Comm. on Int’l Law, Ass’n of the Bar of the City of New York (Oct. 19, 1951) (on file in the State Department Archives on William N. Oatis) (transmitting resolutions and a report urging the United States to continue to work through the United Nations to secure Oatis’s release, and further urging “appropriate action to secure international acceptance of basic guarantees for the defense of accused persons”). Like Kutner’s arguments, this report relied on Articles 55 and 56 of the Charter to support its conclusion that the General Assembly has power within the field of human rights to “inquire into the Oatis case.” Comm. on Int’l Law, Ass’n of the Bar of the City of New York, Report on the Arrest and Imprisonment of William N. Oatis by the Czechoslovakian Government 9 (1951). Unlike Kutner’s early arguments, the Report recognized that General Assembly decisions “are recommendations only,” urging nonetheless that exercising the power of inquiry and recommendation “would be a useful restraint on the Czechoslovakian position,” which might “have a deterrent effect on future Communist action” and improve Oatis’ treatment during his imprisonment. Id. at 9–10.
Oatis' spouse provided the legal occasion for his release. Whatever role Kutner's petition did or did not play in building pressure for Oatis's release, the petition clearly played a role in Kutner's future efforts to spread the idea of world habeas corpus.

B. Advocating for World Habeas Corpus

As he explained in a letter to the Secretary of State shortly after submitting the Oatis petition, Kutner's legal experience was to "have improvised legal remedies time and time again to free men wrongfully imprisoned," proceeding "on the premise that for every wrong there must be a remedy," echoing a famous passage in *Marbury v. Madison*. Even after Oatis was freed, Kutner energetically advocated for the idea of world habeas corpus. In 1954, the *Tulane Law Review* published the first of many articles by Kutner detailing his proposal for world habeas corpus, and for an international court to hear claims of unlawful detention and issue such writs. The U.N. Charter, Kutner argued, created a legal obligation on the part of member states "to respect and observe human rights and fundamental freedoms 'for all.'" Drawing on contemporary sources, he strongly urged the link between protection of human rights and the preservation of world peace. The Charter, according to Kutner, was a bind-

65 See, e.g., Memorandum from Ambassador G. Wadsworth & Nat B. King, Counselor of Embassy, Am. Embassy in Prague, to Dr. Gertrude Sekaninova-Cakrtova, Acting Minister for Foreign Affairs, Czechoslovakia 2–3 (April 13, 1953) (on file in the State Department Archives on William N. Oatis) (informing the Czech government of seven "assurances" from the U.S. government of "actions which, in event of favorable Czechoslovak action on Mrs. Oatis' pending petition [for a pardon or commutation of her husband’s sentence], it would take simultaneously with, or so soon as possible immediately after, commutation of Mr. Oatis’ sentence to expulsion"); Incoming Telegram from Ambassador Wadsworth to the Sec'y of State (May 15, 1953) (providing an English translation of President Potocky's message, indicating that Mrs. Oatis’s petition of November 1952 to pardon Oatis from serving the uncompleted part of his sentence was being granted and would be announced the following morning).

66 Letter from Luis Kutner to Dean Acheson, U.S. Sec’y of State 1 (May 15, 1952) (on file in the State Department Archives on William N. Oatis). In this letter Kutner also urged that "one of the best ways to stop international kidnapping under the sham pretense of law is to establish legal techniques that will bring a sovereign signatory state to the Bar of Justice in the established international tribunal." Id. at 3.

67 See 5 U.S. (1 Cranch) 137, 163 (1803).

68 See Kutner, supra note 14.

69 See id.


71 See Kutner, supra note 14, at 423 (quoting a 1953 address by the U.S. delegate to the U.N. Commission on Human Rights).
ing document premised on the need to protect the human rights principles set forth in the Universal Declaration of Human Rights.72 Yet, he observed, the recognition of these human rights had not yet been accompanied by “effective methods for guaranteeing that obligations will be observed.”73

Without enforceable law, Kutner asserted, civilized nations cannot secure free societies.74 Insisting on the need to provide procedures for individual complaints, Kutner argued that the U.N. Charter should be interpreted “in accord with the principle of effectiveness, as allowing individuals to petition the organization for redress of denials of human rights and fundamental freedoms.”75 Without individuals’ ability to vindicate their own rights, the guarantee of respect for human rights so essential to the goals of the United Nations could not be achieved: “The principle that individuals should be allowed to petition the United Nations for effective action with regard to protecting their human rights is . . . a deeply rooted consequence of effective interpretation.”76 In so arguing, Kutner drew on the traditions of U.S. constitutionalism to emphasize the importance of individual complaint and redress to promote the rule of law.77

Responding to a potential legal objection, Kutner explained why the domestic jurisdiction clause, found in Article 2 of the U.N. Charter,78 did not preclude intervention on human rights issues.79 Al-

72 See id. at 418–20.
73 Id. at 424.
74 See Kutner, supra note 23, at 34.
75 Kutner, supra note 14, at 427. Kutner placed special weight on Articles 55 and 56 of the U.N. Charter in developing his argument. See, e.g., Kutner, supra note 23, at 33, app. V at 73. Article 55 provides in part:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

. . .

C. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N. Charter art. 55. Article 56 states that “[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.” Id. art. 56.
76 Kutner, supra note 14, at 428.
77 See id. at 428–29; supra notes 66–67 and accompanying text. On Kutner’s prior experience using the writ of habeas corpus to test the legality of detentions within the United States, see Katin, supra note 22, at 436–42. On the significance of individual access to courts in the development of effective transnational law in Europe, see Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 Yale L.J. 273, 291–92, 294–97 (1997) (noting significance of the capacity for review of individual complaints in the European Court of Human Rights and the ability of national courts to invoke the jurisdiction of the European Court of Justice in concrete cases).
78 See U.N. Charter art. 2, para. 7; supra note 34.
79 See Kutner, supra note 14, at 429–30.
though Article 2(7) states that nothing authorizes the United Nations to intervene "in matters which are essentially within the domestic jurisdiction of any state," he argued that the term "essentially" contemplated a meaning dependent on the future development of international relations. Human rights violations are not purely domestic affairs, because "denials of human rights in one country have consequences which affect the affairs and interests of other countries." International relations, in other words, had "developed to the point where 'no people can be secure unless all people are secure,'" and thus the domestic jurisdiction clause did not prohibit U.N. action to protect human rights implicitly guaranteed by the Charter.

Turning to particular human rights, Kutner argued that freedom from arbitrary arrest is of utmost importance, because arbitrary arrest "has been the cornerstone of ancient tyrannies and modern totalitarian regimes." A legal remedy, he urged, must be developed, and "no single legal remedy has played a greater role in protecting the freedom of individuals from arbitrary arrest than the writ of habeas corpus." He noted that "[c]ustoms and principles of international law" would provide the precedent for a U.N. habeas corpus procedure, habeas corpus being "widespread in civilized nations" and analogous to the procedures used for extradition from one state to another. Kutner also argued that the idea of humanitarian interven-

80 Id. at 429 (quoting U.N. Charter art. 2, para. 7).
81 See id. at 429–30.
82 Id. at 430; see also Kutner & Carl, supra note 53, at 538 (noting that the General Assembly took "jurisdiction" over South Africa's discriminatory treatment of Indian immigrants, notwithstanding objections based on the Charter's domestic jurisdiction clause). Carol Anderson argues that the U.S. government insisted on including the domestic jurisdiction clause in the U.N. Charter in order to protect the United States from having to give human rights domestic effects. See Carol Anderson, Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights 44–50 (2003). From this perspective, Kutner's efforts to persuade the State Department to his views in the 1950s appear perhaps even more utopian.
83 See Kutner, supra note 14, at 430 (quoting McDougal & Leighton, supra note 70, at 494).
84 Id. at 430–31. Kutner drew on a then-recent article by Professor Chafee, which argued that the writ of habeas corpus was the most important human right in the U.S. Constitution and that it would have been better for the United Nations to adopt a writ of habeas corpus than the many broad rights included in the draft human rights convention. Id. at 431 n.65 (citing Zechariah Chafee, Jr., The Most Important Human Right in the Constitution, 32 B.U. L. Rev. 143 (1952)).
85 Id. at 431. He elsewhere argued that the General Assembly had the power itself to act on an individual petition for habeas corpus, to create or designate an organ for taking evidence, or to refer the matter to the International Court of Justice for an advisory opinion. See Kutner, supra note 13, app. II at 211, 215.
86 Kutner, supra note 14, at 436. For an extensive and detailed survey of habeas corpus and analogous protections against unlawful detention around the world, see Kutner & Carl, supra note 53, at 474–535.
87 See Kutner, supra note 14, at 437–38.
tion, developed prior to the Charter, would support a "right of intervention where a State treats its own nationals so as to shock the conscience of mankind."  

Kutner, in 1954, urged the United Nations to enact its equivalent to the British Habeas Corpus Act of 1679, requiring that "an appropriate judicial organ issue, as a matter of right, an order to show cause why the writ should not issue where it appears that the detention is without cause or for causes which would shock the conscience of mankind." 88 A proper return to a show cause order could indicate the availability of domestic remedies or other reasons the writ should not issue, 89 but it was essential that the prisoner have a right to be heard and that where appropriate there be a mechanism for factfinding about the legality of the detention. 90 The habeas corpus procedures themselves would not require forceful compulsion, but if a state refused to deliver a prisoner to the United Nations, it would raise a question of sanctions. 91 As a mechanism to provide a hearing to determine rights under a U.N. writ of habeas corpus, Kutner initially proposed that the United Nations establish an International Court of Human Rights with authority to hear matters concerning basic human rights violations that "shock the conscience of mankind" and issue writs of habeas corpus. 92 Once established, the U.N. writ of habeas corpus would, Kutner claimed, quoting Chafee, "erect a world-wide barrier against the knock on the door at 3 A.M.,' and the paralyzing fear resulting from the existence of that fact." 93  

Kutner modified his proposal over time. By 1957 he argued for a United Nations Court of Habeas Corpus (rather than a Human Rights Court) and a United Nations Writ of Habeas Corpus. 94 In 1958, he persuaded Representative John V. Beamer, an Indiana Republican, to introduce a concurrent resolution to provide federal support to the

88 See id. at 433.
89 Id. at 435.
90 See id.
91 See id. at 434-35; Kutner & Carl, supra note 53, at 478, 488-500 (emphasizing how remedies like habeas corpus secure a hearing and provide for factfinding to prevent wrongful detentions).
92 See Kutner, supra note 14, at 437.
93 Id. at 439. Kutner proposed a new standing court, because he had concluded that, given the need for a state-party or U.N. organ to invoke the ICJ's jurisdiction, and the fact that the procedures and length of proceedings before the ICJ would create a great "time lag between the wrong and the judgment," the ICJ was impracticable for effective protection against unlawful detention. Id. at 439 nn.92-93. Kutner also contemplated that the jurisdiction of his proposed court over individual rights could expand as international law came to protect more individual rights. See id. at 439 n.95.
94 Id. at 440; see also supra note 84.
95 See KUTNER, supra note 23, at 26-34, 46-50. Kutner appeared at this time, in 1957, to contemplate that the General Assembly could create the court through its existing powers. See id. at 10 (arguing that the General Assembly possesses power to establish "subsidiary organs" needed to perform its functions).
Commission for International Due Process (a nonprofit entity Kutner had established) to "draft . . . a proposed world treaty-statute" to provide for an International Court of Habeas Corpus. In his 1962 book, Kutner included a draft of a proposed "treaty-statute" for such an international court, which provided as well for a regional system of intermediate international courts to hear habeas corpus petitions. The breadth of his idea, and the persistence of his defense, is displayed throughout many writings, all of which insist on the primacy of habeas corpus as a remedy for unlawful detention.

An interesting argument Kutner developed was that, given the diversity of legal cultures and practices, international law could not realistically impose "immediately perfect protection of all individual rights." In several articles, Kutner linked the diversity of legal cultures to his proposal to divide the world into geographic circuits, which would "correspond approximately to the main diversities in legal traditions, culture, religion and history," and be staffed by "[r]egional world attorneys general" and assisted by "amici curiae" who would "prosecute petitions for the writ." Kutner envisioned regional circuit courts composed of seven judges, at least four of whom must be nationals of states within the region—a feature of the "compromise" he saw as essential to obtaining broad participation by many countries. Appeals would lie from the regional courts to an

96 See H.R. Con. Res. 318, 85th Cong. § 7 (1958); Letter from Rep. John V. Beamer to All Members of the Foreign Affairs Committee, House of Representatives (May 14, 1958) (on file in the Kutner Archives at the Hoover Institution at Stanford University). The proposed resolution, never adopted, is also reproduced in Kutner, supra note 13, app. I at 201. On Beamer, see infra note 129.

97 See Kutner, supra note 13, app. XIII at 266–74; Kutner & Carl, supra note 53, at 544–49; Kutner, supra note 57, app. at 332. Kutner states that he presented the draft treaty-statute at a meeting in 1959 in Miami Beach. See Kutner, supra note 13, app. XIII at 266.


99 Kutner & Carl, supra note 53, at 544.

100 Id.

101 Kutner, supra note 57, at 319. For the version of Kutner's proposed Treaty-Statute of the International Court of Habeas Corpus that he said he presented at the ABA Section meeting in Miami, Florida on August 25, 1959, see id. app. 331–41. In this proposal, the International Court of Habeas Corpus would consist of two judges from each signatory state, some of whom would serve on regional circuit courts. Id.

102 See Kutner & Carl, supra note 53, at 548; see also id. at 550 (requiring exhaustion of local remedies). Kutner specifically detailed which countries would comprise each circuit, based on his analyses of "major cultural legal units in the contemporary world." See id. at 544-48, 546 n.398. Although he originally proposed seven circuit courts, see Kutner, supra note 57, app. at 332 (reprinting 1959 proposal), in later work Kutner refined the boundaries and increased the number of proposed regional courts. See, e.g., Luis Kutner, World Habeas Corpus: The Legal Ultimate for the Unity of Man, 40 Notre Dame Law. 570, 584–85 (1965) (proposing nine circuit courts of habeas corpus based on principles of "regional contiguity"); Kutner & Carl, supra note 53, at 544.
International Court of Habeas Corpus of nine justices; the regional courts would decide cases by a majority vote, but the International Court would require a vote of at least six justices to overturn a national law. This procedure, like others, would “weight the decision-making process in favor of the particular system of public order under which the petitioner is detained.” The diversity of world public orders argued against a single definition of arbitrary or illegal detention; rather, Kutner thought the circuit courts should determine whether under all the circumstances the detention was “reasonable,” using a balancing analysis designed to take into account the particularities of the legal system in question.

For enforcement, Kutner argued, resort should first be “to the appropriate regional organization,” if one had been established. If that did not work, Kutner reiterated arguments made in his Oatis petition as to the range and source of sanctions. Kutner’s proposal, then, was comprehensive and detailed, even if it sought to ignore or minimize aspects of the U.N. Charter (including the domestic jurisdiction clause) arguably designed to limit the effective international enforcement of the individual human rights Kutner sought to achieve.

Just as it had concluded that Kutner’s petition for a U.N. writ of habeas corpus on behalf of William Oatis was inconsistent with legal limitations on the General Assembly’s power, so the U.S. State De-

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103 Kutner & Carl, supra note 53, at 549.
104 Id. at 550–51.
105 Id. at 551.
106 See id. at 551–52.
107 See id. at 553–54. Kutner envisioned that under this approach, free speech in the Soviet Union could not at that time be protected but that procedural rights nominally secured by Soviet law could be, whereas a higher level of protection could be secured in Latin America, where the constitutions of most countries secured individual rights. See id.; Kutner, supra note 102, at 589–90 (emphasizing that the standard for determining whether detentions were unlawful should be situated in the jurisprudence of the area: “In the U.S.S.R.-Eastern Europe arena, the decision-makers should aim toward greater realization of human dignity within the framework of the Marxian conception of an ideal society, whereas the judges in the Arabic region should strive toward the ideal within the structure of the Islamic religious conceptions, and the judges in the North American arena should attempt to perfect the Anglo-American conceptions of ‘equality under law,’ democratic constitutionalism, etc.”).
108 Kutner & Carl, supra note 53, at 556.
109 For example, Kutner argued that the Security Council could be asked to impose economic or military sanctions, and if it did not act, the General Assembly could do so. See id. at 557; Kutner, supra note 23, app. V at 75. Kutner also contemplated that sanctions could include diplomatic or ideological measures, such as censure. See Kutner & Carl, supra note 53, at 557–58.
110 See, e.g., Anderson, supra note 82, at 48–50 (discussing reasons for domestic jurisdiction clause).
111 The State Department’s opposition to the 1952 petition was hardly surprising in light of representations that the United States had made both to other nations and to the U.S. Senate concerning the effect of the domestic jurisdiction clause of the U.N. Charter. See id. at 48–50.
partment disagreed later in the 1950s with Kutner's proposal for a treaty-statute to establish an international court of habeas corpus. The State Department objected that it would be impossible to enforce such a writ even if it were issued.\(^{112}\) Moreover, the State Department argued, the proposed international court would require the development of a "code of the substantive international law" because international due process lacked "specific canons . . . relating to the wrongful detention of persons."\(^{113}\) Kutner responded to the first objection by arguing at length that most nations comply with international law and judgments most of the time without coercive sanctions, and thus, that law in the form of a writ did not ultimately require coercion to be effective.\(^{114}\) He disputed the need for a code, urging that the proposed court could draw on international custom and general principles, human rights provisions in national constitutions, the jurisprudence of arbitral boards relating to aliens' rights, and the development of U.N. Charter-based human rights, just as the U.S. Supreme Court developed case law from simple constitutional statements of due process.\(^{115}\)

Kutner dealt with two other State Department objections more briefly. The State Department argued that the world had too many ideological differences to make it practical to seek agreement and that it was the Administration's policy to "favor methods other than treaties to encourage the international promotion of human rights."\(^{116}\) Although Kutner agreed that the world had deep ideological differences, he asserted that if the United States took a leadership role in efforts to establish effective enforcement of human rights, many addi-

\(^{112}\) See Luis Kutner, *The Case for an International Writ of Habeas Corpus: A Reply*, 37 U. Det. L.J. 605, 606 (1960) [hereinafter Kutner, *A Reply*] (summarizing State Department objections); Letter from John M. Raymond, Acting Legal Advisor, U.S. Dep't of State, to Luis Kutner 1–2 (Sept. 4, 1958) [hereinafter Letter from John M. Raymond, Sept. 4, 1958] (on file in the Kutner Archives at the Hoover Institution at Stanford University) (describing at length the State Department’s objections to proposals to establish an International Court of Habeas Corpus, arguing that it would be an impractical solution to human rights violations because the United Nations does not have the authority to enforce writs of habeas corpus); see also Letter from John M. Raymond, Deputy Legal Advisor, U.S. Dep’t of State, to Luis Kutner (Oct. 6, 1958) (on file in the Kutner Archives at the Hoover Institution at Stanford University) (regretting that his earlier letter to Kutner was "so unpersuasive" and reiterating that "whatever may be said for the concept of 'World Habeas Corpus' as a theoretical proposition, the concept is not one which can be usefully pursued as a measure for the international promotion of human rights in today's world"). For a somewhat more positive letter from the State Department in the 1960s, see Letter from Carl F. Salans, Deputy Legal Advisor, U.S. Dep’t of State, to Luis Kutner (May 9, 1967) (on file in the Kutner Archives at the Hoover Institution at Stanford University), discussed infra note 211.

\(^{113}\) See Kutner, *A Reply*, supra note 112, at 606 (summarizing State Department objections).

\(^{114}\) See id. at 606–07; see also Kutner, supra note 102, at 591–94.


\(^{116}\) Id. at 606 (summarizing State Department objections).
C. Domestic and International Supporters of World Habeas Corpus

Although the U.S. State Department decisively disagreed both with Kutner’s legal analysis of the existing authority of the United Nations and with the practicality of his vision in the foreseeable future,\(^\text{119}\) the range and stature of those who supported Kutner’s idea is noteworthy. Roscoe Pound, former Dean of Harvard Law School, wrote Kutner in 1957, saying that he had just read Kutner’s “brochure” on world habeas corpus and that, as Kutner suggested, “world law” might develop “exactly as the law of the common-law world has developed without any super-government.”\(^\text{120}\) Commending Kutner’s “general proposition that the concept of the international personality of man is growing in acceptance,” Pound concluded: “[Y]ou seem to me therefore to be moving in the right path in insisting upon a general principle of law rather than a sovereign political authority as the basis of a world legal order. Certainly not the least feature of the world legal

\(\text{117} \) See id. at 611. Kutner noted that in one year the U.N. Commission on Human Rights reported 2,118 complaints of human rights abuses, but complainants were told the Commission had no power to take action. Id. at 612. The United Nations' prestige and principles, Kutner argued, did not gain by “the frustration of victims of oppression.” Id. Kutner noted that other nations have supported plans more comprehensive than Kutner’s proposal for world habeas corpus, and that the United States could be successful in advocating for an international habeas corpus writ if it collaborated with other nations. Id. And, Kutner rhetorically questioned, “Logically, why would any nation-state which already provides safeguards against arbitrary arrest oppose an international guarantee?” Id. at 613. In response to the fear that false charges would be brought for political purposes, Kutner asserted that a well-regulated forum for international habeas corpus writs could “weed out claims without basis in fact.” See id.

\(\text{118} \) See id. at 614; cf. Kutner & Carl, supra note 53, at 541 (arguing that the United States should frame the battle as “freedom v. non-freedom” rather than “Communism v. Capitalism,” and that a “plea for human liberty would have more appeal to a nation experimenting with some type of socialized economy than the glorification of our own brand of ‘capitalism’”).

\(\text{119} \) See Kutner, A Reply, supra note 112, at 606; supra notes 51, 54, 55, 112–18 and accompanying text.

\(\text{120} \) Letter from Roscoe Pound, Harvard Law Sch., to Luis Kutner (Dec. 10, 1957) (on file in the Kutner Archives at the Hoover Institution at Stanford University). The letter is also reproduced in Kutner’s 1957 book. See KUTNER, supra note 23 (attached inside front cover). For a discussion of Pound’s intellectual journey from “sociological prophet of a rising state to bitter critic of the New Deal and its associated institutions,” and his somewhat unlikely alliance in the 1950s with trial lawyer Melvin Belli to protect “a distinctly Anglo-American tradition of individualistic liberty under law” by preserving jury trials and resisting administrative resolution of common law torts, see John Witt, The King and the Dean: Melvin Belli, Roscoe Pound, and the Common Law Nation 4, 35–45 (Sept. 15, 2005) (unpublished manuscript, on file with author).
order should be the securing of individual personality."  

Pound continued to express support for Kutner's work for several years. Other American legal academics expressed support of the idea of world habeas corpus in various writings as well. In 1962, Kutner had published an expanded book version of his 1957 brochure (also called World Habeas Corpus), which included a foreword by Roscoe Pound, and an introduction by Quincy Wright, former head of the American Society for International Law. And Kutner's edited collection published in 1970 included separate essays by Yale professors Harold D. Lasswell and Myres S. McDougal.  

Some members of Congress were also supportive, including (in the 1950s) Republican Representatives Edith Nourse Rogers, of Mas-

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121 Letter from Roscoe Pound to Luis Kutner, supra note 120.
123 See Letter from Erwin N. Griswold, Dean, Harvard Law Sch., to Luis Kutner (Oct. 16, 1967) (on file in the Kutner Archives at the Hoover Institution at Stanford University) ("You have done great work for World Habeas Corpus. I hope that you can keep nursing this idea along.").
125 See Pound, Foreword, supra note 122, at v.
sachusetts, and John Beamer, of Indiana. In January 1958, Representative Beamer inserted in the Congressional Record a long letter he wrote to the New York Times, commending Kutner’s idea of world habeas corpus. And as noted earlier, Beamer also introduced a proposed concurrent resolution, for the “United States Government [to] assume the leadership in establishing an International Court of Habeas Corpus to extend legal protection under due process of law to the life and liberty of individual persons everywhere.” Representative Beamer explained that the resolution “proposes that our Government cooperate in the work of the Commission on International Habeas Corpus, a not-for-profit organization established under Illinois law by the Honorable Luis Kutner, author of the concept of world habeas corpus and who is a practicing attorney in Chicago.” Representative Beamer also credited Kutner’s petition for a U.N. writ of habeas corpus as being “greatly instrumental in assisting me in speeding Oatis’ release.” In the 1960s, Senators Estes Kefauver and Strom Thurmond also expressed support, as described below.

128 See supra note 25. In her remarks in the House of Representatives, Rogers echoed Kutner’s arguments in the petition, asserting that the United Nations has jurisdiction by virtue of the human rights provisions of the U.N. Charter and the UDHR, that Czechoslovakia as a signatory had assumed good faith obligations to enforce human rights, and that Oatis as a human being and a citizen of the United States was entitled to collective action from the United Nations to protect his human rights. See 98 Cong. Rec. 4,957 (1952). Under the petition, Rogers argued, the United Nations could order the immediate release of Oatis into its custody, pending final determination by the ICJ. Id. Describing the petition as “set[ting] a precedent in international judicial procedure,” that, if successful, would establish “a magna carta for the world,” Rogers inserted the actual petition into the Congressional Record. See id. at 4,957–62.


131 See supra note 96 and accompanying text. Beamer’s proposed concurrent resolution was opposed by the State Department. See, e.g., Letter from John M. Raymond, Sept. 4, 1958, supra note 112. For the State Department’s objections to Kutner’s proposed international court of habeas corpus and Kutner’s response to those objections, see supra notes 112–18 and accompanying text.

132 104 Cong. Rec. 7,130 (1958) (statement of Rep. Beamer). The Concurrent Resolution would have provided financial support for the drafting of “a proposed world treaty-statute which should provide for establishment of an International Court of Habeas Corpus competent to issue an international or a United Nations writ of habeas corpus to any government which is sufficiently charged to be wrongfully detaining a person . . . in violation of the specific canons of international due process of law.” H.R. Res. 318, 85th Cong. § 7 (1958).

133 Id.

134 Id. at 7,131. But see supra notes 63-65 and accompanying text (discussing the uncertainty about whether the petition had any effect on Oatis’s release).
In 1962, Justice William Brennan gave an address to the Law and Laymen Conference of the American Bar Association, later published as an article in the *University of Virginia Law Review*, arguing for treaty protection of criminal trial rights and habeas corpus. Justice Brennan praised Kutner and his work, describing his idea of implementing an international writ of habeas corpus through a treaty statute as a "concrete program whereby the now only morally binding Universal Declaration of Human Rights would be made, by the voluntary consent of the nations of the world, a legally binding commitment enforceable in an International Court of Habeas Corpus which would function through appropriately accessible regional courts." Acknowledging that Kutner's plan might not be "the only or the best plan," Justice Brennan argued that it showed the "obvious utility of world habeas corpus as a tool for the avoidance of the dangers of the police state, and its great promise as a contribution toward preserving and furthering world peace by repudiating, through an enforceable international rule of law, systematic and deliberate denial of human rights." Justice Brennan's speech generated additional support, including from Senator Estes Kefauver, who praised the idea of an international writ of habeas corpus, as Justice Brennan described it, and had Justice Brennan's remarks reprinted in the *Congressional Record*. The *New York Times* also endorsed the idea of an international court of habeas

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136 See id. at 1260 ("Why should we not internationalize the writ of habeas corpus along these lines to enforce the guarantees of the Universal Declaration of Human Rights? The research of Professor Luis Kutner and others has demonstrated that it can be done. Professor Kutner has performed an invaluable service for the world in blueprinting a plan for world habeas corpus including a judicial structure and a procedure.").
137 Id. at 1260–61.
corpus in an editorial of August 9, 1962. The Times editorial discussed the history of habeas corpus and noted its unavailability in Communist countries and in some “so-called democracies.” The editorial continued, “Even the best-intentioned government may sometimes find the practice of preventive detention convenient, so that a man is punished for the crimes he might commit if he were at liberty.” For this reason, the Times agreed with Justice Brennan that the proposal would not “secure immediate and universal acceptance.” Nonetheless, the Times editorialized,

Something could be done . . . by setting up a new court through treaties among the nations. Such a tribunal, once established, might give the individual citizen in any member country a new appeal to mankind’s sense of justice. If the system worked even with a limited number of nations, it might influence countries where individual rights are not now respected.

This task will some day have to be attempted. Why not now under the auspices of the United States?

In 1967, support for the idea of world habeas corpus came from two public officials holding quite different political perspectives. Arthur J. Goldberg, former Supreme Court Justice and then-Ambassador to the United Nations, lauded “[t]he idea of worldwide habeas corpus, internationally recognized and enforceable in an appropriate international court” as advancing the rule of law and “lasting peace.” While he cautioned against “utopian dreams” because “there is not yet universal agreement on the content and extent of international rights, much less on the form of the necessary guarantees,” Goldberg also said that “a beginning is being made, in the efforts of international organizations to define and categorize human rights, and in the work of private bodies such as the Commission for International Due Process of Law,” a body founded by Kutner. That same year, Senator Strom Thurmond argued that world habeas corpus was an appropriate response to Algeria’s detention of Moïse Tshombe, former secessionist and political leader in the Congo.

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141 Id.
142 Id.
143 Id.
144 Goldberg, supra note 138, at 1–2 (reprinting Goldberg’s speech).
145 Id. at 2.
146 See Katin, supra note 22, at 400–01.
147 See 113 CONG. REC. 24,426 (1967) (statement of Sen. Thurmond). Tshombe had been the political leader and President of Katanga, a secessionist province of the Congo, who also served briefly as Premier of the Congo after the Congo reacquired control of Katanga. See Katin, supra note 22, at 414; Tshombe Is Dead, Algeria Reports, N.Y. TIMES, June 30, 1969, at 1. Involved in what the news story called a “power struggle” with President Kasavuba, Tshombe fled into exile (for a second time) and received asylum in Spain. See
Tshombe’s wife had retained Kutner to prepare a petition for world habeas corpus to secure the release of her husband;\textsuperscript{148} the petition, which Kutner reportedly sent to the United Nations and to the governments of Algeria, Spain, the Congo, and the United Kingdom, was not successful.\textsuperscript{149}

Kutner also garnered support from abroad for his ideas, which he on occasion presented in international legal gatherings.\textsuperscript{150} The former Chief Justice of the Supreme Court of Japan and a member of the International Court of Justice, Kotara Tanaka, reportedly endorsed Kutner’s proposal.\textsuperscript{151} The idea was also discussed at international meetings in Mexico City in 1961 and in Edinburgh in 1962, according to Kutner.\textsuperscript{152} A 1970 collection edited by Kutner included essays contributed by authors from around the world, including Gebhard Müller, who served as chief justice of the well-respected German Constitutional Court, and jurists from Italy, Uganda, Cambodia, Taiwan, Colombia, Tunis, and Ecuador.\textsuperscript{153}

Although I have found fewer references to the idea of world habeas corpus by others after 1970, Kutner’s own writing on the idea extends into the early 1990s and addresses the plight of Soviet Jewry.


\textsuperscript{149} See Kutner, \textit{Ombudsman}, \textit{supra} note 22, at 354 (describing Tshombe’s death after petition for world habeas corpus was filed). The petition referred to both the General Assembly’s jurisdiction and that of the ICJ, as had the Oatis petition, and asked the Human Rights Commission to create an ad hoc tribunal to deal with the question. See Katin, \textit{supra} note 22, at 415–16. Kutner questioned Algeria’s report that Tshombe had died of natural causes. Kutner, \textit{Ombudsman}, \textit{supra} note 22, at 354.

\textsuperscript{150} See, e.g., Paul P. Kennedy, \textit{Lawyers Abroad Seek Safeguards}, \textit{N.Y. Times}, Aug. 2, 1964, at 20 (reporting on Kutner’s call for study of the possibility of international habeas corpus during the Tenth Conference of the International Bar Association in Mexico City).

\textsuperscript{151} See Kutner, \textit{supra} note 57, at 279 (quoting Letter from Kotara Tanaka, Justice, Int’l Court of Justice, to Luis Kutner (July 9, 1960)).

\textsuperscript{152} See id. at 279, 281.

\textsuperscript{153} See \textit{The Human Right to Individual Freedom}, \textit{supra} note 122. Foreign contributors apart from Müller included Silvio Tavolaro, Chief Justice, Supreme Court of Cassation, Italy, \textit{id}. at 31; Udo Uduma, described as Chief Justice of Uganda, \textit{id}. at 35; Norodom Sihanouk, described as Head of State of Cambodia, \textit{id}. at 47; Ku Cheng-Kang, President of the Asian Peoples’ Anti-Communist League of the Republic of China (Taiwan), \textit{id}. at 49; Samuel Barrientes Restrepo, a Colombian judge (described by the title “Magistrado de la Sala de Casación Penal de la Corte Suprema de Justicia”), \textit{id}. at 51; Raoul Benattar, of the law faculty of Tunis, \textit{id}. at 55; and Gustavo Salgado, of the law faculty of the Central University in Quito, Ecuador, \textit{id}. at 189.
and of the Tamils in Sri Lanka. His work included an additional effort to deploy an international writ of habeas corpus before the United Nations to secure the release of American hostages in 1989.

D. Countercurrents: Anti-Habeas and Anti-Human Rights Movements in the United States

Kutner's proposal for a world habeas corpus writ took seriously the idea of international human rights as a form of judicially enforceable law, an idea that, in the 1950s, was being aggressively resisted by the American Bar Association, Southern Congressmen, and potent political forces. And Kutner's views of the legal force of the U.N. Charter went well beyond those of the State Department, as discussed above, or the U.S. courts. Indeed, U.S. courts were at best hesitant to embrace arguments based on the U.N. Charter. Although a lower court in California relied on the U.N. Charter (and referred to the


I should note that Kutner made stronger claims about himself in his later writings than he did in his earlier works. Compare Kutner, Soviet Jewy, supra, at 495 n.* (describing himself, in 1984, as having been a "Professor of Law, Yale Law School"), with Kutner, Ombudsman, supra note 22, at 352 n.* (describing himself, in 1969, as a "former visiting Associate Professor, Yale Law School"). See also E-mail from Judith Miller to author, supra note 22 (noting that Yale Law School "found only one mention of [Kutner]: he co-taught Criminal Law and Administration in the fall of 1948 with Professor George Dession" but also noting that seminars were not listed in the bulletin at that time). For another possible example, compare Kutner, supra note 102, at 571-72 (asserting, in 1965, that he first proposed the idea of world habeas corpus in response to Hitler's Mein Kampf in 1931), with Kutner, supra note 14, at 418 n.6 (stating, in 1954, that it was at the time of Cardinal Mindszenty's arrest in 1949 "that the idea for the United Nations Writ of habeas corpus was conceived"). Particular caution may be needed in evaluating factual claims on other topics that Kutner made in later writings. For example, a 1967 New York Times story quoted Kutner as saying, "'For the last 15 years, . . . it has been the unanimous consensus of civilized nations that the General Assembly . . . has the inherent power to set up ad hoc tribunals to process writs of world habeas corpus in cases in which individuals have been denied due process of law.' U.N. to Get Petition for Tshombe Today, supra note 148. But, as the story went on to note, "[n]ot all the experts agree," id. and the U.S. State Department had quite plainly and vehemently disagreed with Kutner. See supra notes 31, 54, and 112-18 and accompanying text.

155 Sen. Moynihan inserted a press release into the Congressional Record that described a petition for a writ of world habeas corpus that Kutner (then over eighty years old) prepared on behalf of Terry Anderson and other hostages held in Lebanon and submitted to the General Assembly and the Commission on Human Rights. See 135 CONG. REC. S15,225 (daily ed. Nov. 8, 1989) (statement of Sen. Moynihan).

156 See Anderson, supra note 82, at 213-35; Tananbaum, supra note 15, at 1-31.
UDHR) in striking down a racially discriminatory state law,\(^{157}\) it was overruled on this point by the California Supreme Court in *Sei Fujii v. State*,\(^ {158}\) holding that the U.N. Charter was not a self-executing treaty.\(^ {159}\) In the U.S. Supreme Court, while individual Justices referred to the U.N. Charter as authority in *Oyama v. California*,\(^ {160}\) the Court itself remained relatively silent on the relationship between the United States’ international commitments and the protection of individual rights in the United States. This was not from want of briefing: From the late 1940s through the mid-1950s, lawyers urged arguments on the Supreme Court based on the U.N. Charter in support of civil rights claims.\(^ {161}\) While this briefing did not provoke much in the way of overt references, the “silent dialogue” with the transnational, described by Professor Judith Resnik, suggests that developing human rights standards, against the spectre of totalitarian abuses in World War II, may have left some imprint on the cases.\(^ {162}\) The Court’s hesi-

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\(^{158}\) 242 P. 2d at 620–22.

\(^{159}\) See id. (concluding that U.N. Charter Articles 55 and 56, concerning human rights and equality, were “promise[s] of future action” rather than justiciable rights). While concluding that the U.N. Charter did not of its own force invalidate the alien land law at issue, the court found the state law unconstitutional under the Fourteenth Amendment. *Id.* at 630. And the court appeared to leave open the possibility that the U.N. Charter might influence interpretation, stating, “The humane and enlightened objectives of the United Nations Charter are, of course, entitled to respectful consideration by the courts and legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities. The charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs.” *Id.* at 622. One member of the California Supreme Court wrote separately to emphasize the importance of the U.N. Charter to the issue before the court. See *id.* at 632 (Carter, J., concurring) (noting U.N. Charter as an additional reason to closely scrutinize racial classifications); see also *Perez v. Lippold*, 198 P.2d 17, 29 (Cal. 1948) (Carter, J., concurring) (referring to the U.N. Charter’s guarantees of human rights for all in support of the court’s conclusion that a state law prohibiting interracial marriages was unconstitutional).

\(^{160}\) See 332 U.S. 633, 649–50 (1948) (Black, J., joined by Douglas, J., concurring) (noting the U.S. commitment to the U.N. Charter and its purpose of advancing human rights without regard to distinctions of race as an additional reason to invalidate a state alien land law that worked in a racially discriminatory manner); *id.* at 673 (Murphy, J., joined by Rutledge, J., concurring) (noting alien land law’s inconsistency with the Charter as “one more reason why the statute must be condemned”). For an early citation to the UDHR, see *American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538, 550 n.5 (1949) (Frankfurter, J., concurring).


tation to overtly rely on the Charter is perhaps not surprising, given the explosive political dynamics of Cold War anti-communism, McCarthyism, and segregationism that, Carol Anderson argues, also led the NAACP to abandon its efforts to rely on human rights, such as those expressed in the UDHR, and to emphasize the narrower set of civil rights expressed in the U.S. Constitution.163

As Professors Anderson, Resnik, and others suggest, the Court's hesitation overtly to refer to international human rights commitments must be understood in the context of political backlash and opposition.164 The late 1940s and early 1950s saw the birth of the United Nations and the adoption of the UDHR, with significant U.S. participation, but it was in this same period that virulent opposition to the idea of international human rights emerged.165 Indeed, almost simultaneous with the emergence of the idea of world habeas corpus was the emergence of an anti-human rights movement in Congress and the American Bar Association166 and an anti-federal habeas corpus movement in the state courts.167 In light of these countertrends, the amount of support Kutner was able to muster is perhaps even more noteworthy.


Congressional resistance to the application of transnational human rights norms in the United States was epitomized by the efforts led by Senator John Bricker to amend the Constitution to limit the

161, at 948–49 (concluding that the U.N. Charter was an important, if silent, influence on the judiciary during the civil rights movement); see also Mary L. Dudziak, Cold War Civil Rights 79–114 (2000) (discussing the influence of Cold War politics on the Supreme Court's desegregation decisions); Richard A. Primus, The American Language of Rights 197–213 (1999) (discussing various Supreme Court cases of the post–World War II era that demonstrate the influence of anti-Nazism and anti-Sovietism on the Court). Traces of the Court's concern for the U.S. position in the world community may be read into the Court's reference to the "American ideal of fairness" in explaining why the Fifth Amendment was now being read to prohibit racial segregation in the District of Columbia schools. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Lockwood, supra note 161, at 943–44 (noting this passage in Bolling). It is only in the context of a community beyond our shores that reference to an "American ideal" would have the kind of reverberation that was obviously intended, whether this is understood as a reference to international human rights law or rather to the more political divisions of the Cold War.

163 See Anderson, supra note 82, at 6–7, 273–75.

164 See id. at 254–55; Resnik, supra note 162 (manuscript at 125, 141–44).

165 See Anderson, supra note 82, at 6–7; Tananbaum, supra note 15, at 16–17.


domestic effects of international conventions and agreements.\textsuperscript{168} Although a number of arguments in favor of various proposed versions of the Bricker Amendment were made, many supporters sought to limit the effect of treaties on U.S. law in order to prevent international human rights law from interfering with domestic conditions—for example, to prevent Congress from enacting anti-lynching legislation to implement the U.N. Charter, or to avoid courts giving domestic effect to the international human rights covenants then being drafted within the United Nations.\textsuperscript{169} Fears that the U.N. Charter, to which the United States was already a signatory, would be treated as domestically enforceable law were specially palpable in the South where the Charter's stated commitment to the equality of all persons was correctly seen as a threat to the system of racial segregation.\textsuperscript{170}

The premises of this opposition were utterly incompatible with the premises of Kutner's concept for world habeas corpus. Kutner argued that Articles 55 and 56 of the U.N. Charter should be treated as a legal basis for his proposed world writ of habeas corpus.\textsuperscript{171} Article 55 provides that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."\textsuperscript{172} It was this provision that was relied on by several Justices in the \textit{Oyama} case,\textsuperscript{173} which in turn fueled efforts to amend the Constitution. Southern Senators were particularly concerned about inter-

\textsuperscript{168} There is now an extensive literature on the Bricker Amendment movement. See, e.g., \textit{Anderson}, supra note 82, at 218–56; \textit{Tananbaum}, supra note 15; Natalie Hevener Kaufman \& David Whiteman, \textit{Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment}, 10 \textit{Hum. RTS. Q.} 309 (1988). This political movement was encouraged by the position of the American Bar Association, which in 1952 recommended a constitutional amendment to provide that a treaty conflicting "with any provision of this Constitution shall not be of any force or effect," and that a treaty could "become effective as internal law . . . only through legislation [that Congress] could enact under its delegated powers in the absence of such treaty." \textit{Tananbaum}, supra note 15, app. B, at 222. There were multiple versions of a proposed amendment introduced in the Senate. See id. apps. A–M at 221–27. The version that came closest to Senate passage, the so-called George Substitute, would have provided that a treaty provision "which conflicts with this Constitution shall not be of any force or effect," and that a treaty could "become effective as internal law . . . only through legislation [that Congress] could enact under its delegated powers in the absence of such treaty." \textit{Tananbaum}, supra note 15, app. B, at 222.

\textsuperscript{169} See, e.g., \textit{Anderson}, supra note 82, at 221–23; Kaufman \& Whiteman, supra note 168, at 323–24.

\textsuperscript{170} The NAACP's complaint to the United Nations about racial discrimination within the United States, see \textit{Anderson}, supra note 82, at 93–112, no doubt fed some of the backlash that gave momentum to the Bricker Amendment.

\textsuperscript{171} See supra note 75.

\textsuperscript{172} U.N. Charter art. 55.

national treaties’ effects on the “‘sovereign rights of the States’”;\textsuperscript{174} state sovereignty in this period was closely associated with defense of segregation and resistance to federal anti-lynching laws.\textsuperscript{175}

Although the Bricker Amendment failed to receive the requisite votes in the Senate, “[t]o help defeat the amendment, the Eisenhower administration promised that the United States would not accede to international human rights covenants or conventions.”\textsuperscript{176} That one of the concerns behind the Bricker Amendment was to prevent use of the U.N. Charter as a legal basis for outlawing racial segregation might have been thought to discredit resistance to international human rights norms. Instead, the controversy surrounding the Bricker Amendment persisted, contributing to the United States’ failure to agree to major human rights conventions for many years and then doing so only subject to extensive reservations and understandings.\textsuperscript{177}

2. State Opposition to Federal Habeas Corpus

During the same time period, resistance by state courts and state prosecutors to the growth of federal constitutional criminal law and the use of federal habeas corpus as a tool to review state court convictions increased.\textsuperscript{178} The Conference of State Court Chief Justices (the Chief Justices Conference), formed in 1949, focused considerable att-

\textsuperscript{174} See TANANBAUM, supra note 15, at 4 (quoting the minority report by Southern Senators opposing the Fair Employment Practices bill); see also Kaufman & Whiteman, supra note 168, at 315.

\textsuperscript{175} See, e.g., ANDERSON, supra note 82, at 4 (discussing Eleanor Roosevelt’s efforts to insert a “federal-state” clause in the draft Covenant on Human Rights, to mollify Southern opposition and fears of federal interference with “the sacred troika of lynching, Southern Justice, and Jim Crow schools”).


\textsuperscript{178} See Francis A. Allen, The Supreme Court and State Criminal Justice, 4 WAYNE L. REV. 191, 201 (1958) (noting that state courts’ opposition to federal habeas corpus jurisdiction “involve[d] something more than considerations of comity . . . . The fervor with which the movement [was] supported reveal[ed] very substantial opposition to and dissatisfaction with the new role of the Supreme Court as supervisor of state criminal procedure”); see also Granor v. Gonzalez, 226 F.2d 83, 93 n.7 (9th Cir. 1955) (stating, with respect to federal habeas review of state court convictions, that “this jurisdiction thus vested in the federal courts . . . has given rise to much agitation on the part of the Conference of Chief Justices,
tention in its first fifteen years on the existence and scope of federal habeas corpus review of state court criminal convictions. The concerns of the Chief Justices Conference are reflected in a 1952 resolution opposing review of state court judgments by courts other than the Supreme Court. In 1955, the Chief Justices Conference (acting jointly with a committee of the U.S. Judicial Conference) recommended a statute that would have substantially limited federal habeas jurisdiction to review state court convictions, a proposal that passed the House in 1956 but was blocked in the Senate in part by the opposition of civil rights proponents. In 1957, the Chief Justices Conference issued a long and controversial report on federalism and judicial decisions that was pointedly critical of the Supreme Court (though without mentioning Brown v. Board of Education)—at a time when some Southern politicians were calling for “massive resistance” to the Supreme Court’s desegregation decisions. The Federalism Report’s timing and evident hostility to the Supreme Court provoked the Association of State Attorneys General and other groups for a revision of Section 2254 of Title 28”).

179 See Saker, supra note 167, at 131–33. As Saker reports, the statute governing federal habeas review of state court convictions, 28 U.S.C. § 2254, was enacted into law in 1948; the Chief Justices Conference was organized in 1949. See id. Although initially the Chief Justices Conference was concerned both with judicial efficiency (manifested in efforts to improve state postconviction review) and state sovereignty (manifested in efforts to “reduce federal district judges’ discretion to review state rulings on constitutional claims”), by later in the 1950s “the states’ rights element came to dominate the [Conference] leadership, its committee on habeas corpus, and its legislative proposals.” Id. at 133.

180 See id. at 134. At least one scholar has implied that hostility to any lower federal court habeas review was reflected in the Chief Justices Conference’s refusal in 1953 to adopt the recommendation of its own committee on habeas corpus—that the lower federal courts’ powers to issue habeas corpus be limited to those cases in which the Supreme Court, on review of state court proceedings, “expressly reserved to the prisoner the right to apply for habeas corpus.” See Walter V. Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 18–19 (1956) (noting that the Chief Justices Conference rejected this recommendation “and reaffirmed its earlier resolution”); but cf. Saker, supra note 167, at 134 (offering another explanation). (The Court’s practice of noting the availability of habeas review was newly developed in the 1950s and, according to one scholar, was viewed (especially by civil rights lawyers) as a positive signal of the merits of the petitioner’s claims. See Robert Jerome Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869, 906–08 (1994).

181 See Schaefer, supra note 180, at 19; Saker, supra note 167, at 135–36 (noting objections by, inter alia, Thurgood Marshall, then special counsel to the NAACP). The ABA Section on Judicial Administration also lent its support to this proposed legislation. See Saker, supra note 167, at 135; see also Cranor v. Gonzalez, 226 F.2d at 93 n.7 (noting that a proposed amendment to the federal habeas statute, having the approval of the various “objecting groups, was drafted by a committee of the Judicial Conference of the United States and has been introduced in Congress as House Bill 5649 and Senate Bill 1753”).


183 For a description of the resistance to the Court’s school desegregation decision, see Michael J. Klarman, From Jim Crow to Civil Rights 320–24, 334–35 (2004) (noting, inter alia, the “Southern Manifesto,” signed in 1956 by most Southern members of Congress, condemning Brown as a “clear abuse of judicial power” and pledging the South to resist the decision). Saker credits Alex Bickel with pointing out the Federalism Report’s “cardi-
criticism of it "as a surreptitious attack on Brown," costing its organizational author some credibility, although the Chief Justices Conference's efforts to procure amendments to the federal habeas corpus statute persisted well into the 1960s.\textsuperscript{184}

In the early 1950s, there was also an effort by a large contingent of state attorneys general to prevent inferior federal courts from hearing habeas corpus petitions from state prisoners. In \textit{United States ex rel. Elliott v. Hendricks,} the attorneys general of forty other states signed on to the brief of the State of Pennsylvania challenging the constitutionality of review of state prisoners' habeas claims by inferior federal courts.\textsuperscript{186} The en banc Court of Appeals decisively and unambiguously rejected the challenge, which seems to have consisted of three elements: a claim (on which the court spent little time) that the statute violated the Seventh Amendment by having a federal court reexamine state court factfinding;\textsuperscript{187} an argument that habeas corpus is a suit against the sovereign and thus barred by the Eleventh Amendment;\textsuperscript{188} and finally, an implicit claim that having inferior federal courts review state court proceedings was unconstitutional.\textsuperscript{189} In responding to the claim that habeas corpus was barred as a suit against a state, the Third Circuit discussed the "well-settled line" of federal cases upholding the availability of habeas corpus relief for state court prisoners.\textsuperscript{190} The court also reasoned,

\begin{quote}
[T]o argue that the habeas corpus proceeding is a suit against Pennsylvania is not an accurate way to describe its nature. From the beginning habeas corpus has been the means by which one who claims to have been held in illegal custody of another has the right to have the legality of his custody determined. The writ proceeds against the custodian. If it is found the custody is illegal, the custodian is directed to discharge the person detained.\textsuperscript{191}
\end{quote}

On the last point, the court acknowledged the "not unnatural irritation that the review of state courts comes at the inferior federal court

\begin{\footnotesize}
\begin{enumerate}
\item Saker, \textit{supra} note 167, at 140; see \textit{id.} at 139-45.
\item 213 F.2d 922 (3d Cir.) (en banc), \textit{cert. denied}, 348 U.S. 851 (1954).
\item \textit{id.} at 924; see also \textit{Schaefer}, \textit{supra} note 180, at 18 (noting the objections of the National Association of Attorneys General to the habeas corpus jurisdiction of the federal courts and specifically noting that "the attorneys general of forty-one states" had joined in the brief arguing the unconstitutionality of the federal habeas corpus state).
\item \textit{Hendricks}, 213 F.2d at 925-26.
\item \textit{id.} at 926-28; \textit{see} U.S. \textit{CONST. amend. XI}; \textit{Hans v. Louisiana}, 134 U.S. 1, 10-11 (1890).
\item \textit{See} \textit{Hendricks}, 213 F.2d at 928.
\item \textit{See id.} at 926-28.
\item \textit{id.} at 926. The court's description of the writ as outside the scope of rules barring suits against the sovereign is consistent with historic understandings of the writ. \textit{See, e.g., Ex parte Young}, 209 U.S. 123, 167-68 (1908); United States v. Lee, 106 U.S. 196, 220 (1882).
\end{enumerate}
\end{\footnotesize}
level," but noted that enactment of the Fourteenth Amendment was intended and understood to increase federal power to review state processes:

The battle against federal interference with some of these state processes was lost when the Fourteenth Amendment was adopted. The Amendment, as every high school boy knows, forbids states to deprive a person of life, liberty or property without due process of law. That necessarily confers federal power to prevent states from doing the forbidden thing. Then the Amendment goes on and by express terms gives the Congress the power to enforce the provisions by appropriate legislation. Although the Third Circuit's decision may have discouraged similar constitutional challenges, resistance to the scope of federal habeas review of state court convictions continued.

The assertion of federal judicial power to entertain petitions for writs of habeas corpus on behalf of state-sentenced prisoners, then, coexisted uneasily with a virulent form of state sovereignty. In the 1950s and 1960s, from Brown v. Allen, to Fay v. Noia, and Henry v. Mississippi, the Supreme Court's willingness to reconsider convictions and to ignore procedural failures in state courts in order to provide relief for perceived violations of the Federal Constitution remained controversial. These extensions of federal habeas corpus

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192 Hendricks, 213 F.2d at 928.

194 344 U.S. 443 (1953).
197 For a well-known article objecting to the use of habeas corpus for open-ended relitigation of criminal convictions, see Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441 (1963).
received considerable support as well as opposition, in part because of the relationship of the movement for racial equality to the issues or facts in several key cases, and in part because of the perceived gulf between the federal and state courts in the quality of justice and independence of judging.

E. World Habeas Corpus: Only for Others?

As we have seen, there was support from some leading public figures for the idea of world habeas corpus in the 1950s and 1960s. According to some scholars, this support might reflect an understanding that world habeas corpus would have an effect only on persons held by other countries, not by the United States. Justice Brennan’s argument in the University of Virginia Law Review drew an analogy between what the United States already had in the way of federal habeas corpus for state court prisoners and world habeas corpus; the implication plainly was that the world should develop a remedy like that which exists in the United States to prevent and redress unlawful detentions. This implication is also reflected in Representative Rogers’s comments in 1952 in support of a world habeas corpus petition: “I feel the petition points the way to the extension on a world scale of our Anglo-Saxon and democratic forms of justice which guarantee a fair and impartial trial to all people.” There does appear to be a belief underlying the support of some American proponents of Kutner’s ideas that international law and international habeas corpus would primarily constrain other countries—not because they would not apply to the United States in principle, but because of a self-conception of the United States as a leader in human rights and the development of international law. Arthur Goldberg, for example, wrote, “It is peculiarly fitting that we in the United States should heartily support the movement for international habeas corpus,” because we “have had long domestic experience with the ‘great writ,’ and experience in which we take a good deal of pride.” It is no doubt easier to

198 See generally Glennon, supra note 180, at 905–18 (discussing the role expanded federal habeas jurisdiction played in the civil rights movement).

199 See generally Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977) (arguing that institutional differences between federal and state trial courts make federal courts a preferable forum for litigating constitutional claims like those raised by prisoners and criminal defendants).

200 See, e.g., Jed Rubenfeld, Commentary, Unilateralism and Constitutionalism, 79 N.Y.U. L. Rev. 1971, 1988–89 (2004) (suggesting that given existing U.S. constitutional protections, American supporters of international human rights protections after World War II assumed that it “was more for the rest of the world than it was for us... Americans imagined international law applying to the world, but not applying—or not applying in exactly the same way—to America”).

201 See Brennan, supra note 135, at 1260.


203 Goldberg, supra note 138, at 1.
advance a particular commitment to law when we believe we already embody it, and it is possible that some of the political support for world habeas corpus reflected a Cold War ideology that far more readily envisioned its use for those held in Communist-bloc countries than for those held in the United States.

Yet in the end it is too facile to say that the proponents of human rights—or this particular idea of an international writ of habeas corpus—did not intend or foresee their possible application in the United States. Controversy over the development of human rights covenants and the application of the U.N. Charter as domestic law had been fueled in part by concerns of some to avoid, and the efforts by others to generate, a U.N. investigation of racial segregation and racial injustice in the United States. And from his earliest writings Kutner noted that the United States, and other countries that generally protected individual rights, had at times departed from international human rights standards, plainly implying that an international remedy might be helpful, and applicable, in those situations. Indeed, he devoted several pages in his 1962 book to explaining why U.S. participation in an international habeas corpus court

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204 Cf. Oona A. Hathaway, The Cost of Commitment, 55 STAN. L. REV. 1821, 1856 (2003) (suggesting that a nation's likelihood of joining a human rights treaty is based on the cost of commitment and that countries may consider how much change would be needed from existing practices to ratify a treaty, and predicting that when less change is required ratification would be more likely).

205 Cf., e.g., Editorial, supra note 140 (suggesting that even the “best-intentioned government” might resort to “preventive detention,” plainly implying that an international writ of habeas corpus might be an appropriate remedy in such a case). Although the antecedent for the New York Times’s reference to the acts of a well-intentioned government is unclear, it should be noted that the United States had employed a form of preventive detention against Japanese-American citizens in World War II. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944).


207 See, e.g., Kutner, supra note 23, at 15 (stating in 1957 that “even the United States, Britain and France were not above violating the human rights provisions of the Charter after World War II had come to an end,” and specifically noting U.S. transfers of German prisoners of war to France for forced labor in apparent violation of the Charter and the Geneva Convention); Kutner, supra note 57, at 315–14 (making the same observation in 1962); Luis Kutner, World Habeas Corpus and International Extradition, 41 U. Det. L.J. 525, 533 (1964) (noting with apparent concern that the United States has no procedures for a person subject to extradition to have recourse to a supranational judicial body to test the validity of extradition, detention, or arrest); see also Kutner, supra note 14, at 421 & n.22 (stating that, in light of the critical reception of claims for the self-executing character of the Charter (including in Sei Fuji), “[h]ope for effective national implementation of international commitments within the immediate future seems now too optimistic . . . [and] contemporary counter-reactions and traditional judicial cautiousness require that the proponents of effective human rights now look elsewhere for their realization”).
would not be inconsistent with U.S. sovereignty. Comments like those of Justices Brennan and Goldberg may mirror the considerations that led the Supreme Court, in *Miranda v. Arizona*, to discuss foreign countries' approaches to custodial interrogation and to conclude that the United States should "give at least as much protection to . . . rights grounded in a specific requirement of the Fifth Amendment" as other jurisdictions gave based on principles of justice "not so specifically defined." The U.S. Constitution, these comments reflect, should be in the vanguard of protecting individual rights relating to liberty. Thus, one could say, an optimistic faith that the United States was in the vanguard of individual rights protection was coupled, at least on occasion, with a determination that it should remain there when judged by international comparative standards.

II

Where Is "World Habeas Corpus" Today?

Kutner's vision of a United Nations Writ of Habeas Corpus, or an International Court of Habeas Corpus, did not come to fruition. Perhaps the idea was simply too utopian, given State Department reluctance even to authorize the U.N. to receive petitions from nonstate parties; perhaps it was too impracticable to contemplate that a U.N. body could require the production of a prisoner (as domestic courts did in habeas corpus proceedings) or that a U.N. body could actually handle the number of cases such an international writ of habeas corpus could produce. Perhaps the (limited) political support that existed for the idea was primarily linked to its value as an ideological

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208 See Kutner, supra note 13, at 161–66.
210 Id. at 489–90 (emphasis added).
211 Cf. Letter from Carl F. Salans to Luis Kutner, supra note 112 (acknowledging that the worldwide availability of habeas corpus would be "a giant stride forward" in the effort to advance international human rights and that "[t]he United States should be in the forefront of efforts to open states up to international scrutiny on human rights issues"). But cf. id. ("However, there are, as you know, some groups in this country which continue to resist strenuously the notion that protection of certain basic human rights is a proper subject for the exercise of our treaty power"). Salans also noted that U.S. failures to ratify human rights treaties limited its efforts to achieve international progress, and that there was still much "educational spade work" to be done. Id. See generally Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003) (discussing how American exceptionalism in maintaining "double standards" and failing to participate in some international legal regimes interferes with the United States' capacity to provide exceptional leadership on human rights).
212 See Anderson, supra note 82, at 78–79 (describing the State Department's desire to prevent the U.N. Commission on Human Rights from reviewing individual petitions).
213 In other respects, as Mark Tushnet has pointed out to me, Kutner's international writ of habeas corpus was inadequate to remediate or deter state-sponsored "disappearances" of persons, a form of human rights abuse that might be better remedied through criminal prosecutions of the guilty and/or damage awards to the victims or their families.
tool in the Cold War;\textsuperscript{214} perhaps the concept itself failed sufficiently to cabin the proposed remedy in light of Charter commitments to national state control over matters of “domestic jurisdiction”; or perhaps Kutner, despite his energy and creativity, was not the right proponent to build a broad political coalition for implementation of the idea.\textsuperscript{215}

Yet some elements of his vision have been realized, albeit in other ways. At the same time, habeas corpus in the United States has been cabined and limited in some rather dramatic ways. Transnational developments, however, may be leading to a renewed understanding within the United States of the importance of the writ as a check on executive power.

A. Habeas Corpus and International Human Rights Outside the United States

Although there is no mechanism for the issuance of writs of habeas corpus as a speedy test of the legality of detentions around the world,\textsuperscript{216} other aspects of Kutner’s vision have moved forward: his insistence that the U.N. Charter’s commitments to the protection of individual human rights be realized as law, that treating international human rights as law requires that those rights be afforded effective remedies at the international or regional as well as national levels, and that those remedies be available at the behest of individuals. These elements of Kutner’s vision may be found in the possibility of filing individual complaints under the optional protocols to some human rights conventions, the implications of the new International Criminal Court and ad hoc criminal tribunals, and the trend in some countries towards incorporating international human rights conventions as enforceable domestic law.

1. Optional Protocols for Individual Complaints

In 1966, two major international accords—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—were

\textsuperscript{214} I thank Dan Ernst for his helpful comment on this possibility.

\textsuperscript{215} See supra note 22.

\textsuperscript{216} That is, there is no mechanism that extends to all prisoners, wherever held and under any government’s authority (although in special circumstances the ICJ’s jurisdiction has been invoked by a state-party to attempt to remedy unlawful detention, e.g., of diplomatic personnel, see United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 5 (May 24)). In Rasul v. Bush, 542 U.S. 466 (2004), the Court upheld the jurisdiction of federal courts to consider habeas corpus petitions from prisoners held under U.S. authority in Guantanamo. Aspects of the Court’s reasoning (concerning jurisdiction over the custodian) could extend to prisoners held by U.S. military officials anywhere in the world, see id. at 478–79, see also id. at 498–500 (Scalia, J., dissenting), though the breadth of Rasul remains to be determined, especially in light of its discussion of the particular status of Guantanamo, see id. at 480–82.
opened for signature and, by 1976, enough countries had signed on to these Covenants for them to enter into force.217 Perhaps more importantly, the Optional Protocol to the ICCPR, providing for individual complaints to be made to the Human Rights Committee, entered into force in 1976,218 and has been adopted by 104 nations.219 One of the key elements of Kutner's vision—the importance of allowing individuals to make claims directly under international law and before tribunals outside their own countries if no internal remedies exist or available internal remedies have been exhausted—has thus come partly to fruition through the optional protocol procedure. A number of the claims made under the Optional Protocol involve assertedly unlawful detention.220

This procedure, however, suffers from many defects, from Kutner's point of view as well as that of contemporary scholars. The proceedings are lengthy, and the Human Rights Committee is not authorized to issue binding judgments, but rather only its "views."221 Some countries have quite good records of compliance with these views, though compliance may take several years;222 however, one study finds that states provided remedies in only a small percentage of the individual cases in which a violation was shown.223

223 Bayefsky, supra note 222, at 7 ("[I]n only 20% of individual cases disclosing a violation, have state parties been prepared to provide a remedy.").
The ICCPR is not the only human rights treaty to have an optional protocol permitting individual complaints to be received and reviewed, although typically there are considerably fewer signatories to the optional protocols or provisions permitting individual complaint than to the treaties themselves. For example, the United States finally ratified the ICCPR in 1992, but not its Optional Protocol. And of the 177 signatories in 2004 to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), only sixty had signed on to its Optional Protocol permitting individual complaints. Nevertheless, the capacity of individuals to file complaints alleging human rights violations by national states and for those complaints to be heard by some official body with recognized jurisdiction has increased since Kutner’s time.

2. International Criminal Tribunals

Another key development has been the growth of international criminal tribunals, both on an ad hoc basis, as in the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, and in the establishment—without participation by the United States—of the International Criminal Court (ICC). In some respects these tribunals are the converse of Kutner’s idea for world habeas corpus, focusing not on providing a direct remedy to individuals held in unlawful detention in violation of basic rights, but rather on providing a criminal sanction with the possibility of imprisonment against those accused of some of the most serious breaches of human rights and humanitarian law. But these standing international tribunals re-

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225 See OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, supra note 219, at 11.
227 OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, supra note 219, at 11.
228 Rome Statute of the International Criminal Court, opened for signature, July 17, 1998, 2187 U.N.T.S. 90 (English version) (entered into force July 1, 2002) [hereinafter Rome Statute]. The ICC can exercise jurisdiction only over acts occurring within a territory that has joined the treaty, or against nationals of states that have joined the treaty; its territorial jurisdiction extends to nationals of nonparticipating states (like the United States) who commit covered criminal acts within a signatory party’s territory. See International Criminal Court, About the Court, ICC at a Glance, Jurisdiction, http://www.icc-cpi.int/about/ataglance/jurisdiction.html (last visited Oct. 16, 2005). The ICC’s jurisdiction is limited to “the most serious crimes of concern to the international community as a whole . . . [including] the crimes of genocide, crimes against humanity and war crimes,” as more fully defined in the Rome Statute. Id.
229 See supra note 228. Kutner, it should be noted, advocated in favor of an international criminal court as well. See, e.g., Luis Kutner, Politicide: The Necessity of an International Court of Criminal Justice, 2 DENV. J. INT’L L. & POL’Y 55 (1972).
present a further extension of the idea that international law directly reaches the rights and conduct of individuals, which cannot always be sheltered by claims of state sovereignty. The international criminal tribunals may also be a more practical, manageable response: Even if the world community is not in a position to provide individual redress to the many persons being unlawfully detained (or otherwise subjected to human rights abuses), it can prosecute the worst human rights offenders, perhaps thereby achieving more deterrence than would be possible through an individually oriented, but practically unavailable human rights remedy.230

3. Regional Human Rights Protection

Kutner praised the European Convention on Human Rights and the European Court of Human Rights (ECHR) as models of regional human rights enforcement.231 In the years since Kutner's first writings on this subject, the influence of the ECHR has grown, as more countries have joined the European Convention and as the ECHR's decisions have come to be referred to by courts beyond its geographic reach, including the U.S. Supreme Court.232 Although the ECHR, in its first case, rejected a challenge to an assertedly unlawful detention,233 the court has subsequently addressed and upheld claims of unlawful detention as well as many other asserted violations of the human rights protections of the European Convention.234

230 While the turn in international human rights law from remedies for individuals to punishment for wrongdoers may seem in tension with Kutner's emphasis on protecting human liberty from wrongful detentions, the new international criminal tribunals aspire to fair procedures and clear standards of liability in ways that respond to Kutner's demand for international "due process of law." For a discussion, see Patricia M. Wald, ICTY Judicial Proceedings: An Appraisal from Within, 2 J. INT'L CRIM. JUSTICE 466 (2004), and Kelly D. Askin, Reflections on Some of the Most Significant Achievements of the ICTY, 37 NEW ENG. L. REV. 903, 914 (2003). Cf. Allison Marston Danner, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, 97 AM. J. INT'L L. 510, 515–16 (2003) (praising provisions for judicial review of prosecutorial decisions and for judicial and prosecutorial independence).

231 See, e.g., Kutner, supra note 13, at 138; cf. id. app. VIII at 234 (reprinting statute of the Council of Europe); Kutner, Ombudsman, supra note 22, at 377 (describing how the European Convention on Human Rights broadly grants rights of petition).


233 See Doolan, supra note 1, at 194 (discussing Lawless v. Ireland).

Although European regional enforcement of human rights is the strongest of its kind, the Inter-American system has been strengthened through the American Convention on Human Rights. At least twenty countries in the Americas have accepted the compulsory jurisdiction of the Inter-American Court of Human Rights. Both a commission and the court help enforce this convention. Individuals may complain to the commission, and the commission may prosecute complaints before the court. Regional human rights enforcement is weaker (to nonexistent) in other parts of the world. The African Charter on Human and Peoples’ Rights was adopted in 1981 and came into force in 1986, and although it did not at that time establish a court, it did establish a commission that may consider individual complaints.

ECHR authorize “interim measures,” Eur. Ct. H.R. R. 39, available at http://www.echr.coe.int/NR/rdonlyres/D1EB31A4-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf (last visited Oct. 16, 2005), which the ECHR has recently treated as having real force, see Mamatkulov & Askarov v. Turkey, Nos. 46827/99, 46951/99, paras. 92–129 (Eur. Ct. H.R. Feb. 4, 2005), http://cmiskp.echr.coe.int/tkp197/search.asp?skin=HU&doc-en (holding that Turkey’s failure to implement the ECHR’s suggested interim measures, by extraditing the defendants to Uzbekistan prior to resolution of their challenges in the ECHR, led to a violation of Article 34 of the European Convention, which secures to individuals the right to petition the ECHR, by disrupting the petitioners’ ability to communicate with their lawyers and the ECHR and that court’s ability to resolve the case through its normal procedures).

See Grossman, supra note 236. For a helpful treatment of the complexities of the Inter-American human rights regimes, in which the commission has authority over two different human rights instruments (only one of which, the American Declaration, applies to the United States) and the jurisdiction of the court applies to the American Convention, see Jo M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights 1–13, 340–46 (2003).

See Grossman, supra note 236. Grossman reports that in several cases the court has issued interim relief measures, although there have also been cases in which countries withdrew from the Convention because they did not want to comply with the court’s judgments. See id.

4. National Law Incorporating International Human Rights as Binding

In addition to the development of international and transnational enforcement mechanisms, in recent years some countries have incorporated international human rights treaties into their domestic law, sometimes treating them as superior to ordinary statutes or of constitutional stature. Argentina, for example, has incorporated several named human rights treaties into its constitution; Norway has incorporated the European Convention, the ICCPR, and the ICESCR into its domestic law as superior to ordinary statutes. Other national courts or constitutions have treated international law as binding or relevant to domestic adjudication of individual rights issues. Israel's High Court has in several cases treated international humanitarian law as judicially enforceable. And South Africa's 1996 Constitution requires the courts to consider international law in interpreting the South African Constitution's bill of rights. Domestic courts in some nations thus may function to provide for legal enforcement of international human rights and, to the extent that the courts function independently, they may provide some of the kind of check on unlawful detentions that Kutner sought to locate in an international tribunal.

B. Habeas Corpus in the United States

In the United States, the availability of the habeas corpus remedy has gone through dramatic shifts since the 1950s—expansion in the 1960s and contraction in more recent decades. It is now, as a result of statutory change, a more cabined, limited remedy within the United States than in the 1960s, when habeas corpus was one of many vehicles through which federal courts sought to enforce nationally protected rights against state and local officials. Today, the habeas corpus remedy is under increasing pressure to serve as a vehicle for protecting


241 See CONST. ARG. [Constitution] § 75(22), available at http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf (in English) (specifying ten international human rights accord, including the UDHR and the ICCPR, as of “constitutional hierarchy,” and providing that other treaties can attain that status on a two-thirds vote of all members of each house and that a treaty can only lose its constitutional stature with the same kind of vote).


244 S. AFIR. Const. 1996 art. 39.
human rights not only from errors in the ordinary criminal process, but also from executive overreaching.

1. Habeas Corpus and Federal Review of State Criminal Convictions

In the 1960s, under the influence of the civil rights movement and the mistrust of state courts it helped engender, the Supreme Court dramatically expanded the availability of habeas corpus, extending it even to some constitutional claims waived in the trial courts. Indeed, some members of the Court came to see habeas corpus review as a substitute for full federal appellate review of most state court convictions involving federal constitutional claims. But by the mid-1970s, the tide of mistrust of state courts had turned. In *Stone v. Powell*, the change was palpable; the Court there held that Fourth Amendment exclusionary rule claims could not be heard on federal habeas corpus, unless the state courts denied a full and fair opportunity to litigate them. Justice Powell, writing for the Court, stated that there was no reason “now” to think that state courts would be hostile to federal claims. In the years that followed, the Supreme Court led the way in retrenching the scope of federal habeas in cases such as *Teague v. Lane*.

Dissatisfaction with the use of habeas corpus to review state court convictions—especially in capital cases, in which habeas petitions were viewed by some as efforts to delay and avoid execution of death sentences, whether by vacating the punishment or obtaining clemency—led to further Supreme Court decisions restricting the scope

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246 See Stone v. Powell, 428 U.S. 465, 511–12 (1976) (Brennan, J., dissenting) (arguing that it was a “settled principle that for purposes of adjudicating constitutional claims Congress, which has the power to do so under Art. III of the Constitution, has effectively cast the district courts sitting in habeas in the role of surrogate Supreme Courts” reviewing state court judgments).
248 Id. at 494.
249 Id. at 493 n.35 (“Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States.” (emphasis added)).
250 489 U.S. 288 (1989) (holding that new rules of constitutional law developed after a conviction becomes final on direct review generally cannot be considered as a basis for habeas corpus relief); see also, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977) (tightening procedural default rules).
of review in federal habeas,252 and then to a legislative response re-
writing the rules for federal habeas petitions in cases arising out of
state court convictions.253 The federal Antiterrorism and Effective
Death Penalty Act of 1996 (AEDPA) for the first time imposed a stat-
ute of limitations on the availability of federal habeas corpus,254 at
odds with conceptions of the “Great Writ” as an ever-available check
on unjust detention.255 In addition, AEDPA bars federal habeas
 corpus relief if a state court has adjudicated the same claim (even if
the state court decision may be erroneous under the law as it exists
when the federal habeas petition is decided), unless that state court’s
decision was “contrary to, or . . . an unreasonable application of,
clearly established” Supreme Court precedents.256 Other procedural
limitations were also imposed, and many have concluded that navigat-
ing the path to habeas corpus relief on meritorious claims has become
considerably more difficult, even for well-trained lawyers and certainly
for the pro se nonlawyer prisoner.257

2. Habeas Corpus, Executive Detentions, and Treaty Obligations

If the availability of habeas corpus review of criminal convictions
has been increasingly restricted by procedural and other require-

252 See, e.g., Herrera v. Collins, 506 U.S. 390 (1993) (holding that the petitioner’s
claim of actual innocence, absent an independent constitutional violation, did not consti-
tute a ground for habeas relief); Coleman v. Thompson, 501 U.S. 722 (1991) (holding that
a “cause and prejudice” standard must be met before a federal habeas court may consider
a claim defaulted in the state courts and treating Fay v. Noia, 372 U.S. 391 (1963), as over-
ruled); McClesky v. Zant, 499 U.S. 467 (1991) (limiting availability of habeas corpus relief
when a petitioner raises a claim in a successive habeas petition that was not raised in a
prior habeas petition).

generally Larry W. Yackle, A Primer on the New Habeas Corpus Statute, 44 BUFF. L. REV. 381
(1996) (explaining the provisions of the then-recently passed AEDPA).

254 See 28 U.S.C. § 2244(d); James Liebman, An “Effective Death Penalty”? AEDPA and

255 To be sure, prior law permitted the respondent in a habeas corpus proceeding to
seek dismissal on grounds of prejudicial delay, but this essentially judge-made rule had
considerably more flexibility to it than the new statutory limitations period. See, e.g., Vaz-

ute also restricts federal reconsideration of claims of factual error. See 28 U.S.C.
§ 2254(d)(2).

257 At this writing, legislation is pending that would further restrict the availability of
federal habeas corpus relief for those challenging detentions resulting from convictions in
3035, 109th Cong. (2005); see also Letter from Leonidas Ralph Mecham, Sec’y, Judicial
Conference of the United States, to Sen. Arlen Specter 2 (Sept. 26, 2005) (on file with
author) (expressing opposition to provisions that would “undermine the traditional role of
the federal courts to hear and decide the merits of claims arising under the Constitu-
tion . . . [and] prevent the federal courts from reaching the merits of habeas corpus petitions
by adding procedural requirements that may complicate resolution of these cases”).
ments, habeas corpus has nonetheless thus far survived as a means of testing the legality of executive detentions. Many, though not all, of these cases arise in proceedings involving aliens—situations in which the interests of the “world community,” or the interests of particular nations in the treatment of their nationals, may be heightened. In *INS v. St. Cyr*, the Supreme Court affirmed the availability of habeas corpus review of refusals to waive deportation. In *Rasul v. Bush*, the Court upheld the lower courts' federal habeas jurisdiction over challenges, asserted by noncitizen detainees, to the legality of their detentions by the U.S. military in Guantanamo. And in *Hamdi v. Rumsfeld*, the Court insisted that war was not a “blank check” for the President to determine which individuals to detain and held that a federal habeas court could examine the factual basis for a determination that a U.S. citizen was an enemy combatant to be held for the duration of hostilities. *Hamdi* specifically rejected the government’s argument that as long as “some evidence” could be identified in support of the classification, a U.S. citizen classified as an “enemy combatant” could be indefinitely detained on this basis by the executive without any judicial review.

Unresolved at present are the availability and scope of habeas review of alleged violations of U.S. treaty obligations arising in the course of a state or local criminal investigation, prosecution or trial. *Medellín v. Dretke* involved claims arising from an international treaty designed to protect foreign nationals from abusive or unlawful detention by guaranteeing them access to their consular representatives.

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259 See id. at 300–01 (refusing to read new statutes restricting judicial review over waiver of deportation decisions to preclude habeas corpus in order to avoid serious questions under the Suspension Clause); see also, e.g., *Clark v. Martinez*, 125 S. Ct. 716 (2005) (holding that habeas corpus relief should be granted to inadmissible aliens who have been detained beyond an authorized period of time).
261 See id. at 483–84.
263 See id. at 532–36 (plurality opinion).
264 See id. at 537–38. Cf. id. at 538 (leaving open the possibility that an appropriate military tribunal could meet requirement for review). *Hamdi* also, in important respects, sanctioned an expansion of presidential power, upholding the President’s authority to classify U.S. citizens as enemy combatants and to detain them for extended periods in order to prevent their return to the battlefield, pursuant to a congressional resolution authorizing “necessary and appropriate force” against “nations, organizations, or persons” responsible for the terrorist attacks of September 11, 2001 on the United States. See id. at 518. Although the power to detain citizens based on their status as members of enemy forces was upheld in World War II, see *In re Territo*, 156 F.2d 142 (9th Cir. 1946), in that case the prisoner’s status as a member of the Italian Armed Forces was uncontested, the court reviewed the merits of the petition, and a declared war among sovereign nations existed. See also *Hamdi*, 542 U.S. at 572 (Scalia, J., dissenting) (noting that in *Ex parte Quirin*, 317 U.S. 1 (1942), it was uncontested that the defendants were all enemy invaders).
In 1969, near the end of the period of most attention to Kutner's proposal for world habeas corpus, the United States ratified the Vienna Convention on Consular Relations.\textsuperscript{266} Reflecting the position of the U.S. government in the Oatis case (that the Czechoslovakian government should allow U.S. consular officials to visit),\textsuperscript{267} the Vienna Convention provides that a foreign national who is "arrested, in prison, custody or detention" has rights to be notified that he may communicate with and receive assistance (if offered) from his own nation's consular officers and to communicate with them and receive such assistance.\textsuperscript{268} The United States also ratified the Optional Protocol to the Vienna Convention, which provides for the submission of disputes "arising out of the interpretation or application of the Convention" to the "compulsory jurisdiction of the International Court of Justice."\textsuperscript{269}

Although the Vienna Convention is widely regarded as self-executing,\textsuperscript{270} compliance by state and local law enforcement has been at best sporadic.\textsuperscript{271} Violations of the treaty's provisions have led to par-

\textsuperscript{266} See Vienna Convention, supra note 18; 115 Cong. Rec. 30,997 (1969).

\textsuperscript{267} State Department records reflect that Oatis was arrested on April 23, 1951 and that on April 26, 1951, the "Embassy sen[t] note requesting consular access and American lawyer" for Oatis. U.S. Dep't of State, Confidential Briefing Material on the Oatis Case (undated) (on file in State Department Archives on William N. Oatis) (describing events between April 23, 1951 and July 1951); see also 98 Cong. Rec. 4,957 (1952) (statement of Rep. Rogers) (noting in early May, 1952 that the U.S. Ambassador had been allowed to see Oatis one week earlier). Consular access issues were of more general concern, arising in cases other than William Oatis'. For example, according to an amicus brief written by Joseph Margulies, of the MacArthur Justice Center of the University of Chicago Law School, in 1954 the United States brought an action in the International Court of Justice against Hungary and the Soviet Union, accusing them of violating international law by failing to allow consular access to U.S. airmen brought down over Hungary (in late 1951), tried in secret and sentenced to prison. See Brief Amicus Curiae of Ambassador L. Bruce Laingen et al. in Support of Petitioner at 10–14, Medellín, 125 S. Ct. 2088 (No. 04-5928). The ICJ rejected the case because Hungary and the Soviet Union had not consented to its jurisdiction. See id. at 13–14 (citing, inter alia, Application Instituting Proceedings and Pleadings (U.S. v. Hungary; U.S. v. U.S.S.R), 1953 I.C.J. Pleadings (Treatment in Hungary of Aircraft and Crew of United States of America) annex I at 36 (Feb. 16, 1954)).

\textsuperscript{268} Vienna Convention, supra note 18, art. 36(1).

\textsuperscript{269} Optional Protocol Concerning the Compulsory Settlement of Disputes art. 1, done Apr. 24, 1968, 21 U.S.T. 325, 596 U.N.T.S. 487. The United States has since withdrawn from this Optional Protocol. See supra note 19.

\textsuperscript{270} See, e.g., Torres v. Mullin, 540 U.S. 1035, 1039 (2003) (Breyer, J., dissenting) (noting that the State Department and lower courts have treated the Vienna Convention on Consular Relations as self-executing in the sense that it did not require implementing legislation to have legal effect).

\textsuperscript{271} See, e.g., Avena, 43 I.L.M. 581, supra note 18, at 621, para. 149 (noting that despite good faith efforts on behalf of the U.S. federal government since 1998 to inform state and local authorities of U.S. obligations under the Vienna Convention on Consular Relations, "there remain a substantial number of cases of failure" to fulfill the treaty obligations of consular notification and access); Brief of Former United States Diplomats as Amici Curiae in Support of Petitioner at 17, Medellín, 125 S. Ct. 2088 (No. 04-5928) [hereinafter Former Diplomats Brief] (referring to "the states' persistent practice of violating the Vienna Convention").
ticular tensions in capital cases, as world opinion shifted against the death penalty and foreign embassies' efforts to assist their nationals charged with capital offenses were thwarted by failures to notify the defendants of their consular rights. In *Breard v. Greene*, the Supreme Court upheld the permissibility of a state's reliance on its procedural default rules to bar consideration of Vienna Convention violations. And notwithstanding the request of the ICJ that the United States "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings," neither the Supreme Court nor the federal government sought to require the state to refrain from executing the defendant pending final resolution of the ICJ proceedings brought by Paraguay on behalf of Breard.

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272 See, e.g., Brief of Amici Curiae Bar Associations and Human Rights Organizations in Support of Petitioner at 23–24, *Medellín*, 125 S. Ct. 2088 (No. 04-5928) (describing Mexico's efforts to provide assistance to its nationals detained in the United States, particularly when a severe penalty may be imposed); Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner at 1, *Medellín*, 125 S. Ct. 2088 (No. 04-5928) (urging that petition for certiorari be granted and noting that the EU's position "in securing compliance" with Article 36 of the Convention "has been expressed to the Government of the United States through specific demarches in cases involving individual foreign nationals who have been deprived of their rights under Article 36"); Former Diplomats Brief, supra note 271, at 15–16 (noting that "our allies have strenuously requested review and reconsideration of the convictions and sentences of their citizens" when Vienna Convention rights have been violated in capital cases and that both Mexico and Canada have said that the failure of U.S. states to comply with these obligations has "strain[ed]" bilateral relations) (alteration in original).

273 523 U.S. 371, 375–76 (1998) (per curiam). Written quickly and in an unusual procedural posture on the eve of Breard's execution, the Court's opinion rests on a number of grounds, including a federal statutory bar to the holding of an evidentiary hearing found in the AEDPA, see id. at 376–77, and the unlikelihood that Breard could show prejudice, id. at 377, and thus caution in characterizing its holding is required. *Breard* pre-dated the ICJ's conclusion that in some cases the Vienna Convention requires judicial consideration and review, notwithstanding procedural default at trial. See infra note 274. The Court has recently granted certiorari in two cases that may provide an opportunity to reconsider aspects of *Breard*. See infra note 285.

274 *Breard*, 523 U.S. at 374 (quoting the ICJ order). In the years following *Breard*, the ICJ held that it had power to issue interim relief ("provisional measures") with which parties to the Optional Protocol were bound to comply, and concluded that U.S. procedural default rules could not be applied to bar consideration of certain Vienna Convention claims as a matter of treaty interpretation. See LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 497, 501-03, 515–16 (June 27); *Avena*, 43 I.L.M. 581, supra note 18, at 613, 617–18, 619–20, 624–25, paras. 113, 133–34, 139–40, 153. The ICJ essentially held that although the consular access treaty recognizes that each state may follow its own procedural rules in implementing the consular notification and access rights, it could not use those rules to refuse to give "full effect" to the treaty. See Vienna Convention, supra note 18, art. 36(2) (stating that the rights established in Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended").

275 The U.S. government at the time took the position that it could only request, not require, the state to comply with the request of the ICJ. See Brief for the United States as Amicus Curiae at 51, *Breard v. Greene*, 523 U.S. 371 (1998) (Nos. 97-1390 (A-738), 97-8214
Medellín v. Dretke, like Breard, presented issues arising out of a state's failure to notify a capital defendant of his consular rights.\footnote{276} Six weeks after Medellin's conviction and death sentence were affirmed on appeal, Mexican consular officials became aware of his arrest and conviction and began to offer assistance.\footnote{277} Mexico also invoked the jurisdiction of the ICJ against the United States under the

\footnote{(A-792)) ("The 'measures at [the United States'] disposal' under our Constitution may in some cases include only persuasion—such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution—and not legal compulsion through the judicial system. That is the situation here."). A year later, in Federal Republic of Germany v. United States, 526 U.S. 111 (1999), the Court denied leave to file an original suit against the United States or the governor of Arizona by Germany, which sought to prevent the execution of its national Walter LaGrand, in light of the asserted failure of Arizona authorities to provide the required consular notifications. In LaGrand's case, as in Breard's, the ICJ had "issued an order 'indicating' that the 'United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these [ICJ] proceedings.'" \textit{Id.} at 113 (Breyer, J., dissenting) (quoting ICJ order) (alterations in original). Once again, the position of the United States was to oppose a stay. According to Justice Breyer, the Solicitor General by letter indicated "his view [that] the 'Vienna Convention does not furnish a basis for this Court to grant a stay of execution,' and 'an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief.'" \textit{Id.} In Torres v. Mullin, 540 U.S. 1035 (2003), Justice Breyer dissented from denial of certiorari in yet another case in which a foreign national (from Mexico) was prosecuted in a capital case by a state (Oklahoma) that failed to provide the required consular notifications. Since the decision of the U.S. Court in Federal Republic of Germany, the ICJ, in an action brought on behalf of LaGrand, held that its own provisional orders were—contrary to the prior view of the U.S. Solicitor General—binding on parties to the Optional Protocol. \textit{See} Torres, 540 U.S. at 1038–40 (Breyer, J., dissenting from denial of certiorari). And in the then-pending Avena case brought by Mexico in the ICJ on behalf of its nationals (including Torres), Justice Breyer asserted, the ICJ had issued a provisional order indicating that the United States should not proceed with execution of Mexican nationals who did not receive consular notifications prior to being sentenced to death. \textit{Torres}, 540 U.S. at 1040. Justice Breyer argued that the claims made by Torres were substantial enough that depending on what the ICJ did in Torres's case, he might vote to grant certiorari, and thus he would have deferred disposition of the writ pending the ICJ decision. \textit{Id.} at 1041. The Court, however, simply denied certiorari. \textit{Id.} at 1035.  

\footnote{276} Medellin, a Mexican national living in the United States, was sentenced to death following his conviction in 1994 of the brutal rape-murders of two minors committed when the defendant himself was eighteen years old. \textit{See Medellín}, 125 S. Ct. at 2089; Brief for Petitioner at 5, \textit{Medellin}, 125 S. Ct. 2088 (No. 04-5928). The police did not advise Medellin of his rights under the Vienna Convention to have his consul notified or to communicate with his consul. Brief for Petitioner, \textit{supra} at 5. Mexico was unaware of the prosecution against Medellin and thus did not communicate with, visit, or offer legal representation to its national, as it was entitled to do under the Vienna Convention. \textit{See id.} 5–6; Vienna Convention, \textit{supra} note 18, art. 36(1)(c). Medellin's court-appointed attorney did not object to the Vienna Convention violation during the course of the state court trial proceedings, or on direct review of the conviction. \textit{See Brief for Petitioner, supra}, at 7. Indeed, according to the Petitioner's Brief, Medellin's trial court lawyer was suspended from the practice of law for an ethical violation during the period of trial preparation for Medellin's case, called no witnesses during the guilt phase, and presented so little evidence in the penalty phase that it lasted less than two hours. \textit{Id.} at 6 n.5. Mexico's practice in capital cases involving its nationals, petitioner explained, was to provide substantial legal assistance. \textit{Id.} at 5–6 & n.4.  

\footnote{277} Brief for Petitioner, \textit{supra} note 276, at 6.
Optional Protocol to the Vienna Convention, on behalf of Medellín and more than fifty other Mexican nationals who, it asserted, had been sentenced to death in the United States without having been timely notified of their rights to consular assistance.\textsuperscript{278} In \textit{Avena}, the ICJ found that the United States had violated the Vienna Convention rights of fifty-one Mexican nationals—including Medellín.\textsuperscript{279} As to remedy, the ICJ rejected Mexico’s argument that the violations required vacatur and annulment of the convictions and sentences without regard to prejudice.\textsuperscript{280} Likewise, however, the ICJ rejected the United States’ argument that application of ordinary procedural rules to bar consideration of Vienna Convention claims not raised at trial was consistent with Article 36(2) of the Vienna Convention.\textsuperscript{281} Rejecting the United States’ further argument that executive clemency was an adequate remedy,\textsuperscript{282} the ICJ held that the required remedy was judicial review and reconsideration of the claims,\textsuperscript{283} notwithstanding procedural default at trial, of whether a Treaty violation so prejudiced the trial or sentence to warrant further relief.\textsuperscript{284}

Medellín was unsuccessful in state postconviction proceedings and in the federal district court on habeas review. The Fifth Circuit denied a certificate of appealability, concluding \textit{inter alia} that, the ICJ decisions in \textit{LaGrand} and \textit{Avena} notwithstanding, the controlling law was that of the U.S. Supreme Court in \textit{Breard}.\textsuperscript{285} The Supreme Court granted certiorari on whether the \textit{Avena} judgment and the United States’ treaty obligations or principles of comity required U.S. courts to give effect to the \textit{Avena} judgment.\textsuperscript{286} After the petitioners’ briefs were filed, the case took an unexpected turn: The President of the United States signed a Memorandum for the Attorney General, on “Compliance with the Decision of the International Court of Justice in \textit{Avena},” declaring that “the United States will discharge its interna-

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\textsuperscript{278} See \textit{Avena}, 43 I.L.M. 581, \textit{supra} note 18, at 591, para. 14.
\textsuperscript{279} See \textit{id.} at 623, para. 153(4).
\textsuperscript{280} See \textit{id.} at 614–16, paras. 115–27.
\textsuperscript{281} See \textit{id.} at 617–18, paras. 131–34.
\textsuperscript{282} See \textit{id.} at 619–20, paras. 142–43.
\textsuperscript{283} See \textit{id.} at 619, 624–25, paras. 138–40, 153(11).
\textsuperscript{284} See \textit{id.} at 613, 615, 617–18, paras. 113, 121, 133–34.
\end{flushleft}
tional obligations under the [ICJ] decision [in Avena] . . . by having State courts give effect to the decision in accordance with general principles of comity” in the fifty-one specific cases before the ICJ, including Medellín’s. In response, Medellín filed a new habeas petition in state court and the Supreme Court dismissed the writ of certiorari as improvidently granted, thus avoiding for the time a judicial decision on whether the ICJ judgment would be given effect.

Although the Court did not reach the merits, several of the opinions in the case suggest that the application of the ICJ judgment raised difficult questions, including whether procedural barriers based on either state law or the federal habeas corpus statute would require the federal courts to refuse relief. For example, among the

287 The Memorandum, dated February 28, 2005, reads in full:

The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.

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 the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena), 2004 ICJ 128 (Mar. 31), 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.

Memorandum from President George W. Bush to the Attorney General (Feb. 28, 2005), Brief for the United States as Amicus Curiae Supporting Respondent, app. 2, at 8a, Medellín, 125 S. Ct. 2088 (No. 04-5928) [hereinafter Brief for the United States in Medellín].

288 Medellín, 125 S. Ct. at 2092 & n.4. Among the reasons given in the per curiam opinion for the five to four vote in favor of dismissal were that (1) Medellín might obtain relief on his claims in his new state court petition (filed four days before oral argument, based on the President's Memorandum), and (2) there were a number of possible "hurdles" to reaching the merits of the claims concerning the effect of the ICJ judgment, including (a) whether Reed v. Farley, 512 U.S. 339 (1994) (holding that statutory claims are not cognizable on federal habeas unless they amount to a fundamental defect in the proceedings), bars consideration of the treaty claim; (b) whether 28 U.S.C. § 2254(d), which bars habeas relief on claims adjudicated in state court unless the state court decision was contrary to or an unreasonable application of Supreme Court decisions, would bar federal habeas review; (c) whether the Court's "new rule" case law, of Tongue v. Lane, 489 U.S. 288 (1989), which limits federal habeas corpus relief on "new" claims, bars consideration of the claim; (d) whether a treaty violation could meet the standard for the certificate of appealability now necessary under 28 U.S.C. § 2253(c), which requires "a substantial showing of the denial of a constitutional right"; and (e) whether Medellín could show exhaustion of state court remedies. Medellín, 125 S. Ct. at 2089-92.

289 See supra note 288. Justice Ginsburg noted in her separate concurrence that she would have stayed the Fifth Circuit proceedings while Medellín pursued his claim in the Texas state courts, but that this result did not garner sufficient votes. See Medellín, 125 S. Ct. at 2093 (Ginsburg, J., concurring). Absent a stay, Justice Ginsburg (joined in her discussion on this point by Justice Scalia) rejected arguments for an immediate remand, concluding that the claims should go forward in the state courts, followed by an opportunity for the Court to rule "definitively" on the merits of the treaty claim unencumbered by the procedural limitations on federal habeas corpus referred to in the per curiam opinion. Id.
many issues left unresolved was whether the AEDPA would preclude appellate review of Medellín’s treaty-based claims. One of the new statutory limitations on federal habeas, enacted as part of AEDPA, prohibits appeals from the district courts in habeas challenges to state court criminal convictions without a certificate of appealability. And it provides that a certificate of appealability “may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” This language, the state and federal governments argued in their Medellín briefs, did not allow for appeals of treaty-based claims, even though the federal district courts have habeas jurisdiction over such claims. The logical implication of this executive branch interpretation is that the statute would allow the more than

Justice O’Connor, dissenting (and joined by Justices Stevens, Souter, and Breyer), would have remanded the case to the Fifth Circuit for consideration of the issues in light of the President’s determination, arguing that it was “unsound to avoid questions of national importance when they are bound to recur,” and noting that states’ noncompliance with the Vienna Convention has been a “vexing problem . . . especially worrisome in capital cases.” Id. at 2096 (O’Connor, J., dissenting). Her dissent argued, inter alia, that Texas had waived objection to the certificate of appealability as not involving a constitutional question under § 2254(c)(2), id. at 2099; that the Texas courts’ decisions were plainly contrary to prior Supreme Court law on the question of whether individuals could assert treaty claims, and thus such claims were not barred by § 2254(d). id. at 2099–2100; that the denial of the certificate of appealability should be vacated because the question of the binding effect of the ICJ determination raises an important issue on which reasonable jurists could disagree, id. at 2102; and that the question whether comity should extend to the judgment raised two other fairly debatable questions that were grounds for a certificate of appealability: “whether the Vienna Convention creates judicially enforceable rights and whether it sometimes trumps state procedural default rules,” id. (Justice Ginsburg questioned whether the comity claim put in issue these two questions. See id. at 2094 n.2 (Ginsburg, J., concurring); id. at 2102 n.2 (O’Connor, J., dissenting.).) Justices Souter and Breyer also wrote separate dissents. See id. at 2105–07 (Souter, J., dissenting); id. at 2107–08 (Breyer, J., joined by Stevens, J., dissenting).

28 U.S.C. § 2253(c) (2000). According to Justice O’Connor’s dissent, however, Texas did not raise the issue either in the Fifth Circuit or in opposition to certiorari, though there is a question whether the limitation is waivable. See Medellín, 125 S. Ct. at 2098 (O’Connor, J., dissenting).

28 U.S.C. § 2253(c)(2) (emphasis added). Note that the pre-AEDPA statute did not state the standard for obtaining a certificate of probable cause to appeal (the predecessor to the certificate of appealability), which had been judicially interpreted to require a substantial showing that a “federal right” had been denied. See Slack v. McDaniel, 529 U.S. 473, 480 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

Respondent’s Brief at 8–11, Medellín, 125 S. Ct. 2088 (No. 04-5928); Brief for the United States as Amicus Curiae in Medellín, supra note 287, at 11–15.

28 U.S.C. § 2253(c)(2) was in contrast to other portions of the federal habeas statutes, which explicitly refer to the availability of habeas corpus where a federal treaty has been violated. See Brief for the United States in Medellín, supra note 287, at 15; § 28 U.S.C. § 2254(a) (“The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”).
600 district court judges294 in the United States each to have the final word on whether treaty rights, raised in a federal habeas petition, were violated—a somewhat implausible understanding of likely congressional purpose.295 A basic premise of the constitutional system has long been that appellate review of state court decisions is particularly important where treaty rights are asserted, both to assure a uniformity of interpretation and to minimize the possibilities of error in sensitive areas affecting foreign relations;296 appellate review of federal district court decisions may serve similar functions. Moreover, under the Charming Betsy canon, statutes are to be construed, when possible, as consistent with international law.297 Whether denial of appellate review of federal district court decisions on habeas corpus writs involving treaty violations could itself violate the treaty (in some circumstances) is a complex question; but if it were so regarded, the Charming Betsy canon would provide a further reason to avoid (if fairly possible) interpreting the statute to bar review of treaty claims in the absence of a very clear statement that this was Congress’s intent.298


295 In a different context involving an underlying constitutional claim, the Court rejected efforts narrowly to construe § 2253(c)(2). See Slack, 529 U.S. at 478 (rejecting the argument that when the district court denied habeas relief as to a constitutional claim on procedural grounds, without reaching the merits, no certificate of appealability could issue). The Court concluded that a certificate “should issue . . . if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . whether the district court was correct in its procedural ruling.” Id. Because Slack did raise a constitutional claim, the case is plainly not controlling on whether a treaty claim can be heard on a certificate of appealability, but the case suggests some willingness to avoid appeal-precluding constructions of the certificate-of-appealability requirement.

296 See Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 334–35, 347–48 (1816). While it is true that habeas corpus is not an appeal from a state court judgment, aspects of federal habeas do function to correct state court errors on important issues of federal law affecting liberty. The question raised here is whether Congress would have intended that district court decisions on treaty claims be final and ineligible for review by means of a certificate of appealability (with only the remote possibility of review by origional petition in the Supreme Court, see infra text at notes 323–24).

297 See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .”); see also F. Hoffmann-La Roche Ltd. v. Empagran S. A., 542 U.S. 155, 164 (2004) (referring to this language from Charming Betsy).

298 Under the domestic law of the United States, a later-enacted statute trumps a treaty. See Restatement (Third) of Foreign Relations Law § 115 (“An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.”). The Charming Betsy canon might, however, caution a court not to lightly assume Congress’s intent to override a treaty, especially if the statute does not refer to it. If the state courts were closed to hearing the treaty claims, a statute closing off federal review might well be deemed an interference with treaty rights, though whether barring appellate review (once
3. Habeas Corpus and Executive Lawmaking

Broader issues concerning executive lawmaking arise from the President’s Memorandum determination concerning how the United States would comply with the ICJ’s decision in *Avena*.

Although the *Medellín* Court did not reach the merits, the executive branch’s position in that case reveals a complex set of ambivalent possibilities about habeas corpus, law, and courts—possibilities that reveal the potential tensions between increasing claims by the executive branch of executive lawmaking powers and the function of the writ of habeas corpus.

The U.S. government argued in *Medellín* that the President’s position was not based on the Vienna Convention, nor was it based, as a legal matter, on the ICJ’s interpretation of that treaty in *Avena*. As the Solicitor General’s brief explained,

The President’s determination, which means that procedural default rules may not prevent review and reconsideration for the 51 individuals identified in *Avena*, is emphatically not premised on a different interpretation of the Vienna Convention. To the contrary . . . the Executive Branch regards the Court’s holding in *Breard* as controlling on that issue.

Nonetheless, the brief continued, the President had determined “pursuant to his authority under the U.N. Charter and Article II of the Constitution,” that “the foreign policy interests of the United States in meeting its international obligations and protecting Americans abroad require the ICJ’s decision to be enforced without regard to the merits of the ICJ’s interpretation of the Vienna Convention.”

On the one hand, the President’s position could be seen as a vindication of the importance of habeas corpus, or of postconviction relief more generally. The presumptive availability of postconviction relief in the state courts gave the President a forum to which to direct adjudication. The tradition of postconviction review of detention—that there should be a remedy available to test the legality of restraints on liberty—is reflected in the availability of some form of postconvic-

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299 See supra note 287.
300 Brief for the United States in *Medellín*, supra note 287, at 48.
301 *Id.*
tion relief in all of the states, as well as in the federal habeas corpus writ. The President’s invocation of the legal process of the state courts could be understood as affirming the importance of this remedy. On the other hand, the President’s determination, with its designation of state fora for the habeas claims, could also be seen as undermining the significance of federal habeas corpus as a remedy for aliens held in violation of international legal requirements and, given the differences between state court judges (often elected) and tenure-protected federal judges, as undermining the likely efficacy of the judicial forum being provided.

More generally with respect to the rule of law, the President’s determination has conflicting valences. Submission of the executive to judicial authority is a hallmark of the rule of law; there is perhaps no greater demonstration of fealty to the rule of law than for an executive to require compliance with a decision with which it vehemently disagrees. The President’s Memorandum, in some contrast to the


304 On the other hand, it is possible that the state courts were chosen because they might be more efficacious: The AEDPA controls the jurisdiction of the lower federal courts in habeas, but not of the state courts. If Congress were understood by a later enacted law to have limited federal habeas jurisdiction with respect to a prior treaty, see Breard v. Green, 523 U.S. 371, 376-77 (1998), then state courts have a further possible advantage: State law—unlike a federal statute—cannot trump a federal treaty, and accordingly, state courts could more readily exercise jurisdiction (an argument in some tension with the government position that it is the President’s determination, rather than the Treaty, which provides the controlling law). The government’s reliance in Medellin on 28 U.S.C. § 2254(d), see supra note 288, lends force to the possibility that, in some respects, state courts would face fewer jurisdictional barriers to considering the petition. See Respondent’s Brief, supra note 292, at 11; Brief for the United States in Medellin, supra note 287, at 15-17. The briefs argued that the controlling Supreme Court precedent was Breard v. Greene, 523 U.S. 371 (1998), which held that ordinary state procedural default rules could apply to violations of the Vienna Convention; the state court’s decision was thus consistent with, not contrary to, Breard and, the argument goes, 28 U.S.C. § 2254(d) forbids federal habeas relief. See Respondent’s Brief, supra note 292, at 5, 11; Brief for the United States in Medellin, supra note 287, at 15-17. This “habeas corpus with blinders” approach, which requires federal habeas courts to ignore what the law currently is, derives from the Court’s decision in Teague v. Lane, 489 U.S. 288 (1989), as well as from 28 U.S.C. § 2254(d). For questions about the constitutionality of § 2254(d), see, e.g., Vicki C. Jackson, Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy, 86 Geo. L.J. 2445, 2467-70 (1998).

305 Cf. Klarmann, supra note 183, at 324 (noting that “President Eisenhower repeatedly refused to say whether he endorsed” Brown v. Board of Education, arguing that it was his duty
position of the federal government in *Breard*, could be seen as an advance toward the rule of law, to the extent that the rule of law requires judicial judgments to be respected and enforced. On the other hand, it might be argued that the President’s Memorandum is inconsistent with the rule of law in several respects, the most important one being that the Memorandum does not say that the Vienna Convention or the *Avena* judgment have legally binding domestic effect in U.S. courts. To the contrary, the tenor of its language as amplified in the U.S. government’s brief, implies that the President’s decision is not based on what the law—indeed, independent of the office of the President—requires, but on what he as President believes to be in the “foreign policy interests” of the country. The language of the declaration, in other words, suggests that it is for the President, not the courts, to decide whether to give effect to the *Avena* decision—and executive discretion about whether to comply with a judgment to “enforce Court decisions, not to approve or disapprove them,” even though Eisenhower did call out federal troops to enforce desegregation orders in Little Rock.

*See* Brief for the United States as Amicus Curiae, *supra* note 275, at 46–47 (indicating that the United States could only request, not require, state compliance with the ICJ’s order indicating provisional measures). Because the United States viewed the provisional orders in *Breard* as nonbinding requests (a view later rejected by the ICJ), rather than an obligatory judgment, the government’s position in the two cases may be reconcilable. But cf. Carlos Manuel Vázquez, *Breard* and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures, 92 Am. J. Int’l L. 683 (1998) (arguing that even if the provisional measures, issued by the ICJ in Paraguay’s case concerning *Breard*, were not binding, the President had authority to issue an executive order requiring compliance with those provisional measures by delaying execution of the death sentence). While acknowledging that the *Avena* judgment creates an international obligation for the United States, the government’s position appears to be that the Optional Protocol to the Vienna Convention does not impose an obligation to comply with the ICJ judgment, and, to the extent that Article 94 of the U.N. Charter contemplates such an obligation, the only remedy it provides for noncompliance is through a vote in the Security Council. *See* Brief for the United States in *Medellin*, *supra* note 287, at 33–37; id. at 35 (asserting that “Article 94(2) envisions that the political branches of a Nation may choose not to comply with an ICJ decision, and provides that, in that event, recourse to the Security Council is the sole remedy” and that “[p]rivate judicial enforcement” of ICJ decisions in domestic courts “is incompatible with that enforcement structure”). The government’s position further seems to be that the President not only has the power to decide how the United States will comply with an ICJ judgment under a treaty to which the United States is signatory, but also, at least in some circumstances, whether the United States will comply, see *id.* at 40–42—a position in tension with the Supremacy Clause. If the President’s claim were that the U.N. Charter, as a matter of treaty law, contemplates that it is exclusively for the President to decide, see *id.* at 42 (referring to Article 94), then there are at least two further questions: whether this is a correct understanding of the treaty and, if so, whether treaty law can constitutionally allocate decision-making power over such issues to the President acting alone. If, on the other hand, the President’s claim is that it is for the President to decide under the Constitution whether to give effect to treaties and international judgments resulting from and contemplated by treaties, then that too raises a domestic constitutional question, whether this presidential power is in some way a gloss on the implication of the Supremacy Clause that treaties are law for the courts to apply. *See also infra* note 309.

*See supra* text at notes 300–01. For the text of the President’s Memorandum, see *supra* note 287.
seems at odds with prevailing concepts of what the rule of law means.\footnote{For a helpful discussion of the rule of law, see Richard H. Fallon, Jr., \textit{"The Rule of Law" as a Concept in Constitutional Discourse}, 97 \textit{COLUM. L. REV.} 1 (1997). A highly formalist definition, i.e., that \textit{the law} places compliance with legal judgments in the President's discretion, would rob the concept of the rule of law of much (if any) independent, constraining force. A distinct issue is whether Congress should have decided how the United States should comply with the \textit{Asena} judgment—must some forms of lawmaking occur in the legislative process? The Solicitor General's Brief in \textit{Medellin} asserts that federal statutes implicitly recognize the President's "lead role" in determining how to respond to an ICJ decision. Brief for the United States in \textit{Medellin}, supra note 287, at 40. It is unclear whether this "lead role" is based directly in the Constitution or derives from delegations of authority embodied in federal statutes (or the U.N. Charter; see supra note 307). In either case, the basis for the claim is subject to serious debate. The United States agreed to the Charter, see 91 \textit{CONG. REC.} 8189–90 (1945), and the Charter states that signatories "undertak[e] to comply with" decisions of the ICJ, U.N. Charter art. 94. While Congress did enact statutes authorizing the President to appoint persons to represent the United States in the United Nations and specifying that such representatives shall "at all times, act in accordance with the instructions of the President," see 22 U.S.C. §§ 287, 287a (2000), do these statutes, or the Constitution, authorize the President to decide how binding an ICJ judgment is? How to enforce it? To override state procedural rules to give effect to an ICJ judgment that (as the President sees is) does not, of its own force, have such a requirement?}

The President's Memorandum also assumes that the President has power to set aside otherwise lawful state court procedural rules.\footnote{See Memorandum from President George W. Bush to the Attorney General, supra note 287. The President's memorandum might be viewed as consonant with the fact that federal habeas law—both statutory and judicially developed—has long insisted that prisoners challenging their state court convictions exhaust state remedies on each federal claim before petitioning a federal court. See supra note 42; see also supra note 288. But there is a difference between requiring petitioners to exhaust available state court remedies and requiring state courts to ignore their own procedural rules. Moreover, the case had been pending in the federal court of appeals, to which four justices would have remanded the case for reconsideration. See supra note 289 (describing Justice O'Connor's dissent). The President's determination to have the state courts resolve the issue, even though arguably significant legal reasons may exist for the choice, see supra this note and note 304, thus raises at least a possibility of executive branch forum shopping. See supra notes 199, 303.} As the federal government's brief in \textit{Medellin} makes clear, the President was "emphatically not" taking action in the belief that the Vienna Convention legally required him to do so, but rather based on his determination of "the foreign policy interests of the United States in meeting its international obligations and protecting Americans abroad. . . ."\footnote{The legislative authority of Congress to overcome state procedural rules is itself contested, though the case law establishes a fairly wide swathe in which federal procedural rules will trump state procedural rules with respect to federal claims. See, e.g., Felder v. Casey, 487 U.S. 131 (1988); Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359 (1952). When federal legislation is enacted, at least in theory states have opportunities in the national legislative process to seek protection of state interests, e.g., in their own procedural systems. Here, however, Congress has made no decision. Cf. Curtis A. Bradley &
courts, federalism (although American Insurance Ass'n v. Garamendi\(^{313}\) may have gone some of the way toward this conclusion).\(^{314}\) And if the President has authority to insist that state courts hear habeas claims barred by their ordinary rules, would this imply presidential authority to bar courts from hearing habeas claims otherwise within their jurisdiction?\(^{315}\)


Prior cases, involving presidential power to engage in claims settlement or respond to emergencies, are inapposite, see, e.g., Dames & Moore v. Regan, 453 U.S. 654 (1981), and Garamendi itself may be distinguishable. Although space does not allow full treatment, I note that in contrast to the possible preemption of state court procedural law effected by the President's Memorandum, the California law at issue in Garamendi targeted activities that occurred in foreign nations. See 539 U.S. at 408–10. In issuing the Memorandum during the Medellín litigation, moreover, the President was not acting in an area of traditional executive branch authority (as in monetary claims settlements), nor pursuant to an executive agreement with Mexico (however much a formality such an agreement, as to state court proceedings, may have been). Finally, in Garamendi, the Court implied that the state's interest was undifferentiated from the larger national interest in vindicating the rights of U.S. citizens with respect to the Holocaust-era insurance. See id. at 426–27. Given the longstanding doctrines, such as the "independent and adequate" state ground rule, see, e.g., Dretke v. Haley, 541 U.S. 386, 392–93 (2004), that are designed to recognize the role of the state courts in the federal system, the Court might treat the interests of the states in the procedural integrity of their own criminal justice systems differently than the state's interest at issue in Garamendi.

This question may be particularly pressing with respect to executive detentions. Note that the U.S. government in lower court litigation took strong positions against judicial review of military detentions. See, e.g., Hamdi v. Rumsfeld, 296 F.3d 278, 285 (4th Cir. 2002) (describing, but not accepting, the government's argument that a court may not review the military's decision to designate a citizen as an enemy combatant). In Dames & Moore v. Regan, the Court upheld an executive agreement that suspended (in effect terminating) litigation of private claims in U.S. courts. 453 U.S. at 675–88. Dames & Moore involved civil, commercial claims; by analogy could the President suspend the hearing of habeas corpus claims? The Suspension Clause (by itself or with other parts of the Constitution, including the Due Process Clause) might be read to impose limits on presidential power to foreclose habeas relief otherwise available under state or federal law (except pursuant to a constitutional suspension) and thus might provide a basis for developing doctrine that would permit executive branch lawmaking to open, but not close, access to adjudication of habeas corpus claims. On the original meaning of the Suspension Clause, authorities are divided. See generally Trevor Morrison, Hamdi's Habeas Puzzle: Suspension as Authorization?, 91 Cornell L. Rev. 411, 428 n.99 (2005) (collecting authorities). There is, however, substantial support for the proposition that "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." INS v. St. Cyr, 533 U.S. 289, 301 (2001); see also Rasul v. Bush, 542 U.S. 466, 474 (2004) (quoting this language from St.
Finally, the President’s Memorandum was written so as to avoid any implication that the Vienna Convention or the *Avena* judgment would apply directly to require judicial consideration of the claims of persons not named in the *Avena* proceedings. In trying to so limit the effect of the *Avena* judgment, the U.S. government was seeking to assure the judgment would not be extended to other prisoners, similarly situated except that their claims were not raised by Mexico in *Avena*. The subsequent withdrawal of the United States from the Optional Protocol confirms the effort to cabin the effect of the ICJ judgment. But this situation also raises a rule-of-law question: If the essence of the rule of law is treating like cases alike, then the limitation of full review to the fifty-one individuals named in *Avena* raises concerns of equality for other foreign nationals similarly deprived of the opportunity to communicate with their consul and seek consular assistance.

The President’s Memorandum, then, has dual and conflicting valences for the rule of law and the role of courts. The Memorandum can be seen as at once an acknowledgment of and a resistance to law, an acknowledgment of and a resistance to a distinctively judicial power to apply treaty law in habeas corpus proceedings. It is the distinctively adjudicatory nature of the writ of habeas corpus on which Kutner—and many others—have relied in defending habeas corpus as a bulwark of liberty, for the distinctly adjudicatory character implies the independence of the courts in decision making. To the extent that habeas operates within “law,” and that “law” is made and changed by a single head of state, the more difficult it is to carry out this historic task. And to the extent that the executive branch can choose the judges to decide particular cases—for example, by declaring that

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316 It might be argued that since the statute of the ICJ provides that judgments are binding only as to the parties and with respect to the particular case, see Statute of the International Court of Justice, art. 59, June 26, 1945, 59 Stat. 1031, 1055, 1062, T.S. 993, there is no violation of “equal treatment” norms in not extending the reasoning of the *Avena* judgment to others—but this is a thin and formalist conception of equality and the rule of law. The ICJ, by contrast, sought to promote the even-handed application of the legal rule it articulated. See *Avena*, 43 I.L.M. 581, *supra* note 18, at 622, para. 151 (“[W]hile . . . the Court has stated concerns [of] the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an a contrario argument in respect of any of the Court’s findings in the present Judgment. In other words, the fact that in this case the Court’s ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.”).

317 See *supra* note 19.
state, not federal, courts will decide—the greater the risk of executive manipulation of the writ.

**Conclusion:**

Habeas corpus cases have played an important role in rebuffing presidential claims of unlimited presidential power, or of what some call “lawless enclaves,” in dealing with alleged enemy combatants. *Rasul* and *Hamdi* were in important measures a vindication of Kutner’s vision of habeas corpus: Suspected terrorists and aliens, held by a powerful nation, received access to a court through invocation of the ancient writ. Pride in the availability of corrective process and in the independence of the courts from executive power was vividly present in these opinions.

But the occasional use of habeas corpus to actually hear the claim of one held at the behest of the executive branch should not be allowed to obscure the substantial power of the executive branch to constrain the range of reasoned and reasonable decisions for a court to make. The President’s determination in *Medellín* has arguably presented the courts with a conundrum, in which either compliance...
or resistance poses a threat to the rule of law and the position of the courts. Perhaps the President’s assertion of his own prerogative to decide, based on the foreign policy interests of the United States, how to comply with the ICJ judgment by remitting the challengers to state courts will be met by an equivalent move by the judiciary: to assert a power to review the legality of the President’s determination, but ultimately to acquiesce in it. Such an approach, if the courts adopt it, could provide opportunities for a hearing on the merits of their claims for Medellín and the other persons named in the *Avena* judgment. But whether it advances the rule of law, the role of habeas, or the independence of the courts remains to be seen.

Independent judgment on the legality of detention is an essential component to any rule-of-law system. Independent judgment may be obtained in many ways. Kutner’s idea, impracticable as it may have been, was to find independence from the judgments of national governments through an international tribunal. In the United States, our tradition identifies independence with the courts, and particularly with the federal courts protected by Article III tenure and salary provisions. While there is considerable disagreement over the role of courts (for example, in resolving redistributive questions of economic and social welfare), there is little question that an individualized hearing before an impartial adjudicator is essential to the protection of liberty.\(^{321}\) Independence of judgment may be particularly important when those detained are regarded as enemies, in order to resist the natural prejudices and passions of the moment. Whether through international adjudication or domestic courts, a key point is that review by an independent decision-maker be available. Kutner saw this in the case of William Oatis; the U.S. Supreme Court saw it in *Hamdi*; and we in the legal community need to continue to insist upon it.

But the most independent judge will find it difficult, if not impossible, to serve the functions of the Great Writ if the positive law of her jurisdiction plainly forbids it: Judges are supposed to be independent, *not from law*, but from political pressures, in order to serve the law. Within the United States, the constitutional status of the writ of habeas corpus affords an interpretive space for U.S. judges to take a critical posture, even on positive statutes—or claims of executive

\(^{321}\) See, e.g., *Hamdi*, 542 U.S. at 537–38 (plurality opinion) (holding that military interrogators did not meet the requirement for a “neutral” adjudicator of enemy combatant status, and stating, “‘[O]ne is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true,’” quoting *Concrete Pipe Prods. of Cal. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617-18 (1993) (internal quotation marks omitted)); *Tumey v. Ohio*, 273 U.S. 510 (1927) (holding that due process requires an impartial judge, not one with a financial stake in the defendant’s conviction).
power—that seek to cabin its use. This constitutional space has been preserved, though not used, in recent years in *Felker v. Turpin*, in which the Court interpreted the AEDPA to preserve the Supreme Court's own jurisdiction to hear and grant relief on original writs of habeas corpus. Without disagreeing with the highly restrictive new positive law limiting habeas relief to challenge state court convictions, the Court maintained the possibility of judicial review.

International law, or even the nonbinding judgments of an international court, can provide other sources of critical distance. If the very purpose of habeas corpus relief is to ensure that a judge can say no to the most powerful body in society on behalf of law and liberty, the judge's own "community of judgment" plays an important sustaining role. Awareness of the views of a different or broader community of judges concerned with similar questions of liberty and fair treatment may provide helpful perspective, and "critical distance," on the interpretation of our own domestic law when domestic judges are asked to exercise their judgment against the will of a powerful executive.

Today the United States sits in judgment on the lives of many foreign nationals, some convicted of heinous crimes in this country,

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322 On the importance of interpretive space to judicial independence, see Kim Lane Scheppel, *Declarations of Independence: Judicial Reactions to Political Pressure, in Judicial Independence at the Crossroads* 227 (Stephen B. Burbank & Barry Friedman eds., 2002).
324 See id. at 654, 658–63 (construing AEDPA not to preclude the Supreme Court’s entertaining an original petition for habeas corpus and concluding “that the availability of such relief in this Court obviates any claim by petitioner under the Exceptions Clause of Article III, § 2, of the Constitution, and that the operative provisions of the Act do not violate the Suspension Clause of the Constitution, Art. I, § 9”). The Court in *Felker* had “ordered briefing on . . . whether application of the [AEDPA] suspended the writ of habeas corpus in this case,” thereby suggesting that the Suspension Clause might provide some basis for invalidating federal legislation restricting habeas corpus. See id. at 658; cf. *Ex parte Yerger*, 75 U.S. (8 Wall.) 88 (1868) (affirming the Supreme Court’s jurisdiction to review the denial of habeas corpus in the lower courts despite Congress’s repeal of one avenue of appellate review). The Felker Court also concluded, however, that the restrictions on the lower courts’ habeas corpus jurisdiction would “inform our authority to grant such relief as well . . . [w]hether or not we are bound by these restrictions.” *Felker*, 518 U.S. at 662–63. And the Court upheld new limitations on successive petitions, concluding they did not amount to a suspension of the writ. See id. at 664.
325 Whether this is a good or bad thing for liberty and the rule of law is debatable. If the interpretive space is only an illusion, the Court’s action may be seen merely as a device to strengthen the political legitimacy of the restrictive statute by holding out the false hope that it will be ameliorated (through interpretation in light of the Constitution, for example) in extreme cases. On the other hand, uncertainty may play some role in restraining public officials, who cannot be sure that relief will be unavailable, and the interpretive space might be understood as dormant, rather than illusory.
327 Cf. id. at 273–75, 277 (exploring how some are able to judge against their communities); Scheppel, *supra* note 322, at 245 (discussing “critical distance”).
some held for trial, some held for deportation, and some held as enemy combatants. But the world grows smaller, and the pace of U.S. citizens traveling abroad increases; it is predictable that U.S. citizens will be held in foreign countries, which will sit in judgment on them. All countries have an interest in the procedures used by others to determine cause for detention, and the procedures of the most powerful are more likely to influence procedures of the less powerful. For reasons of self-interest, then, the United States should not be eager to shut out or ignore the multiple sources of law that seek to protect against unjust or wrongful detentions. We have in the past benefited from the spur to end racial segregation provided by international developments, even if some of our actions were driven by interests rather than by principle. And we have in the past taken national pride in leading the world in procedural respect for liberty. Whatever the formal legal doctrine that emerges at the end of the day in Medellín, we should acknowledge the possibility that critical evaluations in multiple fora—whether binding or not—may offer added protection for the independence of judging, of law, and of liberty.

What those who emerged from the end of World War II saw was the capacity of even the most apparently “civilized” of nations to engage in barbarous, inhumane, degrading, and evil conduct—on a massive scale—if unchecked by the possibilities for external intervention, independent judging under law, or aroused public opinion. And recent experience suggests that communities beyond our own borders will be concerned with and capable of responding to how the United States treats those over whom it exercises physical coercive power, and that our own behavior will contribute to the standards that may be applied by other nations to their own and to our citizens. Adherence to the rule of law and fair process for the protection of liberty may not be the luxuries so many, in this country and abroad, now seem to think they are, but instead essential requisites to the possibilities for a more peaceful and orderly world—as Luis Kutner, in his optimistic

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328 See Neuman, supra note 240, at 87 (“In a world of massive international trade, travel, communication, and cooperative law enforcement, the effective enjoyment of liberties often depends on the overlapping laws of several countries.”).
329 See Dudziak, supra note 162, at 79–114.
330 See Miranda v. Arizona, 384 U.S. 436, 489–90 (1966) (arguing that the United States should provide at least as much protection against abusive interrogation as countries like England, India, or Ceylon provided, in light of our constitutional commitment to Fifth Amendment rights).
331 Cf. Sarah K. Harding, Comparative Reasoning and Judicial Review, 28 Yale J. Int’l L. 409 (2003) (discussing different styles of judicial reasoning, one based on dialogue, the other on enforcement); Cover & Aleinikoff, supra note 249, at 1046–52 (noting the benefits of dialogue between more “utopian” federal courts and more “pragmatic” state courts over constitutional criminal procedure rights).
advocacy of the mid-twentieth century, believed. If all the world is not yet ready for habeas corpus review, let us hope that those countries in which it has been established do not retreat from their commitments to fair process, judicial independence and the rule of law.