PRESCIENCE AND INSIGHT IN INTERNATIONAL LAW SCHOLARSHIP

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I. INTRODUCTION: A TRIBUTE TO HARRY RICHARDSON

Professor Henry J. Richardson III is one of the true giants of modern international law scholarship. The body of his scholarly work, in both depth and volume, is truly extraordinary. His monumental book, *The Origins of African-American Interests in International Law*,[1] is at the same time path-breaking and a definitive examination of its subject. His broader influence on the field—especially on the countless junior colleagues fortunate enough to claim him as a mentor—is immense. In short, he is amply worthy of a *festschrift* and symposium in his honor.

In this tribute, I examine two of the key signs of a great scholar that Professor Richardson has displayed throughout his long and distinguished career: prescience and insight. Deriving from different linguistic traditions (Latin and German), the two terms describe similar attributes, but the subtle difference is important. Prescience, in its purest etymological meaning, signifies the power "to know in advance."[2] This "fore-knowledge" does not come by chance. It results from a deep intellect as well as years of thoughtful scholarship in an intellectual field tilled with dedication and simple hard work. Like Thomas Edison's famous insight about genius, in other words, prescience results from "one percent inspiration, ninety-nine percent perspiration."[3]

Insight, on the other hand, involves the ability to see into the true nature of things. For a scholar, this describes a power of perception, a "penetrating understanding into character or hidden nature."[4] This, too, is not accidental, but rather is the result of years of deep, thoughtful examination in a chosen field of expertise.

These essential qualities are shown throughout Professor Richardson's ample body of scholarship. But I will examine them here through the lens of two of his

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1. *See generally* HENRY J. RICHARDSON, III, THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW (2008).

2. Prescience comes through Old French directly from the Late Latin word *praescientia*, meaning "fore-knowledge," and *praescientem*, the present participle of *praescire*, meaning "to know in advance." *Prescience*, ONLINE ETYMOLOGY DICTIONARY, http://etymonline.com/index.php?allowed_in_frame=0&search=prescience (last visited Apr. 3, 2017).

3. *The Meaning and Origin of the Expression: Genius Is One Percent Inspiration, Ninety-Nine Percent Perspiration*, PHRASE FINDER, http://www.phrases.org.uk/meanings/genius-is-one-percent-perspiration-ninety-nine-percent-perspiration.html (last visited Apr. 3, 2017).

4. Insight comes from the Old German word *innsihht*, meaning "sight with the 'eyes' of the mind, mental vision, understanding from within." *Insight*, ONLINE ETYMOLOGY DICTIONARY, http://www.etymonline.com/index.php?term=insight (last visited Feb. 25, 2017).

lesser-known works, and for a specific reason: Dedication to excellence is not an *a la carte* operation—excellent scholars are excellent in all of their scholarship. Thus, it is often in lesser-known works that we find the true measure of a dedicated scholar.

The first of these works, *The Execution of Angel Breard by the United States: Violating an Order of the International Court of Justice*,[5] is a shining example of Professor Richardson's power of prescience. This is one of his shorter scholarly articles, but in it we find a gem. In the second, *Excluding Race Strategies from International Legal History: The Self-Executing Treaty Doctrine and the Southern Africa Tripartite Agreement*,[6] Professor Richardson's scholarly insight comes to the fore. In it, we find a searing examination of the historical foundations for the notion of a "non-self-executing" treaty, a modern doctrine of substantial significance for the treaty law of the United States (U.S.).

II. THE POWER OF PRESCIENCE

On the surface, the subject of *Violating an Order of the ICJ* was prosaic: a brief *per curiam* opinion of the Supreme Court, *Breard v. Greene*.[7] But Professor Richardson quickly recognized that in this opinion lay the seeds of a constitutional controversy that would strike at the core of the relationship between domestic and international law, as well as at the fundamental relationship between our three branches of government. In fact, the Supreme Court's brief opinion in *Breard* would set off a tortuous series of legal proceedings before state, national, and even international courts.[8] Ultimately, it would produce a famous rebuke by the International Court of Justice (ICJ),[9] a surprise assertion of power by the President,[10] and—a decade later—perhaps the most significant opinion by the Supreme Court in a generation on the force of international law in our domestic legal system.[11]

A. The Case of Angel Breard

The subject of Professor Richardson's analysis in *Violating an Order of the ICJ* is the case of Angel Breard, a man convicted of murder and sentenced to death

5. Henry J. Richardson, III, *The Execution of Angel Breard by the United States: Violating an Order of the International Court of Justice*, 12 TEMP. INT'L & COMP. L.J. 121 (1998) [hereinafter Richardson, *Violating an Order of the ICJ*].

6. Henry J. Richardson, III, *Excluding Race Strategies from International Legal History: The Self-Executing Treaty Doctrine and the Southern Africa Tripartite Agreement*, 45 VILL. L. REV. 1091 (2000) [hereinafter Richardson, *Excluding Race Strategies*].

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

8. *See, e.g.*, Medellín v. Dretke, 544 U.S. 660 (2005) (per curiam); State v. Issa, 752 N.E.2d 904 (Ohio 2001); Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12 (Mar. 31).

9. *See generally* Mex. v. U.S., 2004 I.C.J.

10. *See Medellín*, 544 U.S. at 668 (discussing President Bush giving effect to the Avena decision).

11. *See generally id*.

by Virginia in 1993.[12] As Professor Richardson explains, this was no ordinary criminal case. Breard was a citizen of Paraguay and, as his lawyers later discovered, he was not afforded mandatory rights under an international treaty the U.S. had ratified decades earlier.[13] That treaty, the Vienna Convention on Consular Relations (Vienna Convention),[14] obliges member states—of which there are over 150 in total—to inform detained foreign nationals of their right to consult with a consular officer of their home state in order to organize adequate legal representation.[15] Neither the U.S. nor the Commonwealth of Virginia had afforded Breard that right prior to his conviction.[16]

As Professor Richardson explains in *Violating an Order of the ICJ*, Breard's lawyers raised this clear violation of international law in subsequent appeals and *habeas corpus* proceedings.[17] In addition, Paraguay and Germany separately initiated actions based on the treaty violations before the International Court of Justice (ICJ).[18] The interesting aspect of these latter actions was that the U.S. also had ratified an Optional Protocol that expressly grants the ICJ specific jurisdiction over disputes involving the Vienna Convention.[19] Thus, the ICJ had jurisdiction even though the U.S. had withdrawn from the Court's general compulsory jurisdiction in 1985.[20] The action by Paraguay was of particular urgency because lower state and federal courts in the U.S. had already uniformly rejected Breard's post-conviction attempts to resurrect his treaty-based claims.[21] Somewhat surprisingly, the ICJ acted promptly: It granted Paraguay's request for an immediate provisional measure and ordered the U.S. to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings."[22]

In the meantime, Breard's case also reached the U.S. Supreme Court. It too acted promptly, but as Professor Richardson recounts, the majority ultimately

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12. Richardson, *Violating an Order of the ICJ*, *supra* note 5, at 121–22.

13. Breard v. Greene, 523 U.S. 371, 372–75 (1998).

14. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77.

15. *Id*. art. 36 ¶ 1(a)–(c).

16. *Breard*, 523 U.S. at 374.

17. Richardson, *Violating an Order of the ICJ*, *supra* note 5, at 121–27.

18. LaGrand Case (Ger. vs. U.S.), Judgment, 2001 I.C.J. Rep. 466 (June 27); Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Order of Provisional Measures, 1998 I.C.J. Rep. 248, ¶ 41 (April 19) [hereinafter Order of Provisional Measures].

19. *See* Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, art. I, Apr. 24, 1963, 21 U.S.T. 325, 326 ("Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court . . . by any party to a dispute being a Party to the present Protocol.").

20. Letter and Statement From U.S. Dep't of State Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, Oct. 7, 1985, 24 I.L.M. 1742.

21. *See generally* Breard v. Virginia, 445 S.E.2d 670 (Va. 1994); Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998).

22. Order of Provisional Measures, *supra* note 18, ¶ 41.

chose to elevate domestic law over the clear obligations of the treaty.[23] Specifically, the majority found that Breard—through his court-appointed attorney—had waived his rights under the *international* treaty through applicable procedural rules of *national* law: "Absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."[24]

As Professor Richardson deftly explains in *Violating an Order of the ICJ*, this set up a significant conflict between the views of the Supreme Court and those of the ICJ.[25] But on this score the Supreme Court was almost dismissive of the ICJ's role as the ultimate arbiter of international law.[26] Although at bottom the dispute involved the interpretation of a treaty within the express jurisdictional authority of the ICJ, the Supreme Court found that the ICJ's views were merely entitled to "respectful consideration."[27] It then considered (although not especially respectfully) and rejected those views.[28] Thereafter, and in spite of the ICJ's express order, Virginia promptly executed Angel Breard.[29]

B. Prescience on a Monumental Conflict between International and Domestic Law

In *Violating an Order of the ICJ*, Professor Richardson was among the first scholars to examine the monumental portents of the Supreme Court's decision in *Breard*. Indeed, the article appeared in print only months later. Although he saw that the case was only the first skirmish in a much bigger battle to come, he already saw much to criticize. First, he recognized that the opinion, and the actions of the Executive Branch,[30] violated a fundamental tenet of international law—that a state is not permitted to "plead the authority of its internal law to mitigate its international legal obligations."[31]

Second, he explained that the Supreme Court's dismissive attitude toward the views of the ICJ—even though they were only provisional—conformed fully to the

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

24. *Id*.

25. Richardson, *Violating an Order of the ICJ*, *supra* note 5, at 129.

26. *Id*.

27. *Breard*, 523 U.S. at 375.

28. *Id*.

29. Richardson, *Violating an Order of the ICJ*, *supra* note 5, at 127.

30. The Clinton administration contended at the time that it did not have the authority to compel Virginia to comply with an international treaty ratified by the U.S. *See* Brief for the United States as Amicus Curiae at 51, Breard v. Greene, 523 U.S. 371 (1998) (Nos. 97-1390, 97-8214) ("[o]ur federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The 'measures at [the United States'] disposal' under our Constitution may in some cases include only persuasion. . . . That is the situation here.") (alteration in original).

31. Richardson, *Violating an Order of the ICJ*, *supra* note 5, at 127; *see also* Vienna Convention on the Law of Treaties art. 27, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

dominant approach of "American Exceptionalism" for such issues.[32] The underlying ethos here—certainly of the Executive Branch and increasingly of the Judicial Branch—is that the U.S. somehow is uniquely justified in defying international law and norms to advance domestic political interests. This fundamentally undermines the rule of law, as Professor Richardson made clear, "in the vital expanding area where international law intersects with U.S. law."[33] Moreover, he convincingly explained that *Breard*'s implicit support for American Exceptionalism in elevating domestic over international law "is not protecting any doctrine that is better or morally preferable than its analog under the international law of human rights".[34]

Third, he decried the Supreme Court's refusal in *Breard* "to ascribe any special importance to the international nature of th[e] case."[35] Indeed, he lamented that the Court failed to take ample "opportunities of interpretation to ameliorate any conflicts with [the ICJ's] Order."[36] This has special significance for international human rights law, a subject on which Professor Richardson is an expert with few peers. I will have more to say about this below.[37] The point for now is that he immediately recognized that *Breard*, though only a short, *per curiam* opinion, carried fundamental significance for judicial enforcement of treaties that protect individual rights.[38] The Supreme Court's opinion there, he explained, promoted the view that "generally internal U.S. law should be held harmless against conflicting international human rights law, and that the meeting by U.S. law of international rights standards should not be tested in the courts."[39]

In all of this, Professor Richardson displayed the prescience of a savant on the future path of U.S. jurisprudence and policy. Indeed, as Part IV will examine, the Supreme Court's opinion in *Breard* teed up a multiparty and multifaceted dispute that ultimately would involve a formal, final decision of the ICJ, a power grab by President Bush, and two further, major decisions by the Supreme Court.[40] But three of Professor Richardson's more specific feats of prescience in *Violating an Order of the ICJ* are worthy of special emphasis upfront. First, he immediately recognized that the execution of Angel Breard violated the obligation of the U.S. under Article 94(1) of the United Nations (U.N.) Charter "to comply with the decision of the ICJ in any case to which it is a party".[41] This very issue would be at the foundation of the Supreme Court's definitive opinion in the dispute a decade

32. Richardson, *Violating an Order of the ICJ*, *supra* note 5, at 127–28.
33. *Id*. at 128.
34. *Id*.
35. *Id*. at 130.
36. *Id*. at 128.
37. *See infra* Part III.
38. Richardson, *Violating an Order of the ICJ*, supra note 5, at 130.
39. *Id*. at 129.
40. *See infra* Part IV.
41. Richardson, *Violating an Order of the ICJ*, supra note 5, at 127.

later.[42]

Second, he recognized that the *Breard* opinion had even deeper potential implications for separation of powers. Specifically, he observed that an authorization to elevate U.S. foreign policy interests over international law—the notion at the foundation of American Exceptionalism—would mean that "the Executive . . . has a free, discretionary, and largely unreviewable hand in deciding whether or how to carry out [the U.S.'s] obligations" under international law.[43] Almost eerily, the Bush Administration would claim only seven years later that this in fact was a formal rule of constitutional law.[44]

Finally, Professor Richardson discerned that *Breard* planted the seeds of an even more fundamental, indeed constitutional, controversy over the force of treaties in our domestic legal system.[45] In ultimate effect, the Supreme Court permitted the U.S. to violate with impunity individual rights expressly secured in a binding treaty. This is a quite profound conclusion, and indeed the Supreme Court would need to revisit the effect of the very treaty at issue in *Breard* three times in the next two decades.[46] But Professor Richardson also recognized that the claim that the U.S. is not bound by treaty obligations carries even more significant implications for international human rights law.[47] He would examine those implications in depth in *Excluding Race Strategies* two years later.[48] That work, as the next section explains, contains profound insights into the historical connection between the doctrine of "non-self-executing" treaties and the rights of racial and other minorities in the U.S.

III. THE POWER OF SCHOLARLY INSIGHT

As Professor Richardson highlighted in *Violating an Order of the ICJ*, the most troubling aspect of the *Breard* opinion was the notion that at least some treaties have no effect in domestic law.[49] The Supremacy Clause, after all, expressly states that it extends to "all Treaties."[50] He explored this anomalous constitutional circumstance in another important work, *Excluding Race*

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42. *See infra* notes 91–95 and accompanying text.

43. Richardson, *Violating an Order of the ICJ*, supra note 5, at 131.

44. *See infra* Part IV.B.

45. Richardson, *Violating an Order of the ICJ*, supra note 5, at 131.

46. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 337 (2006) (discussing an alleged violation of the Vienna Convention by the U.S. concerning an individual Mexican national); Medellín v. Texas (Medellín II) 552 U.S. 491, 497–98 (2008) (discussing an alleged Vienna Convention violation by the U.S. concerning Mexican nationals); Garcia v. Texas, 564 U.S. 940 (2011) (discussing an alleged violation of the Vienna Convention by the U.S. concerning an individual Mexican national).

47. Richardson, *Violating an Order of the ICJ*, supra note 5, at 128.

48. *See generally* Richardson, *Excluding Race Strategies*, *supra* note 6.

49. Richardson, *Violating an Order of the ICJ*, supra note 5, at 130–31.

50. U.S. CONST., art. VI ("This Constitution, and the laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").

Strategies.[51] There, Professor Richardson examines the origins of the "non-self-execution" doctrine in two decisive Supreme Court opinions, *Foster v. Neilson*[52] and *United States v. Percheman*,[53] in the early 1800s.[54] In *Foster*, Chief Justice Marshall recognized—in perhaps the most famous statement in all of U.S. treaty law—the import of the Supremacy Clause for treaties: "Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."[55] But the last prepositional phrase carried significance. For in the same opinion Justice Marshall also proclaimed that when the terms of a treaty "import a contract . . . the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."[56] Four years later, the Court in *Percheman* overruled the formal holding in *Foster* upon a closer examination of the Spanish language text of the treaty at issue.[57] But as Professor Richardson explained, the possibility that the Constitution contemplates "self-executing" and "non-self-executing" treaties (terms attached decades later) thereafter became a firm fixture in the treaty law of the U.S.[58]

After this brief review of the legal background, Professor Richardson applies decades of scholarly expertise on the treatment of racial minorities in international law to expose the shadowy underpinnings of non-self-execution doctrine. Indeed, *Excluding Race Strategies* puts on display his scholarly insight in two significant respects. First, he unearths the historical foundations of the non-self-execution doctrine in the treatment of racial minorities. He explains that the doctrine "was forged in the crucible of American racial military conquest and systemic domination of African Americans and Native Americans in the first half of the nineteenth century."[59] That is, by permitting the political branches and (through interpretation) the courts to pick and choose which treaty obligations in fact were enforceable as law, the non-self-execution doctrine in its practical effect permitted the U.S. to both drive out Native Americans from their ancestral homes and administer conquered territories to facilitate the extension of slavery to the west.[60]

The second profound insight in *Excluding Race Strategies* concerns the modern consequences of the non-self-execution doctrine for the rights of racial minorities in the U.S. Professor Richardson begins a valuable "Evaluation" section with the key observations that the doctrine is both contrary to the presumption in

51. Richardson, *Excluding Race Strategies*, *supra* note 6, at 1099–117.
52. 27 U.S. 253, 314 (1829).
53. 32 U.S. 51 (1833).
54. Richardson, *Excluding Race Strategies*, *supra* note 6, at 1100–110.
55. *Foster*, 27 U.S. at 299.
56. *Id*.
57. *Percheman*, 32 U.S. at 89.
58. Richardson, *Excluding Race Strategies*, *supra* note 6, at 1002–110.
59. *Id*. at 1102.
60. *Id*. at 1102–109.

the Supremacy Clause and, sadly, not surprising: "It seems neither new nor historically surprising that 150 years later the Doctrine should bar the access to claims of right to peoples of color by reversing the presumption of any rights pursuant to a treaty's authority under the Supremacy Clause[.]"[61]

The article's following paragraphs then tease out the modern implications of this insight. Professor Richardson first explains that blind adherence to *stare decisis* permits a "scrubbing of racial history out of the Doctrine," and significantly that "[t]his 'scrubbing' has continued by federal courts down to the present."[62] The essential point is that, bolstered by layers of *stare decisis*, the non-self-execution doctrine permits the political branches and the courts to recast "all Treaties" in the Supremacy Clause as, in effect, "those treaties that advance our interests."[63] The ultimate result is to "prevent[] African Americans from claiming directly to treaty provisions as a known source of wider human rights than those currently available under the United States Constitution."[64] At the same time, one might add, it permits the U.S. to present the sheen of abiding by international law through the ratification of important human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR),[65] but then to prevent them from having any practical effect for the intended beneficiaries, and in particular racial and other disadvantaged minorities.[66]

Professor Richardson concludes this valuable analysis with a section entitled, "Policy Recommendation." Not surprisingly, he argues that "[s]erious thought should be given to overruling" the non-self-execution doctrine.[67] Other scholars of international law share this view.[68] But Professor Richardson is at his most convincing when he ties together his analysis of the historical background of the doctrine with its modern effect. Because one can scarcely improve on the prose, his words are worthy of full quotation:

> The historical symmetry between the Doctrine having been born to uphold a government policy of racial conquest, and the Doctrine's present status of being consistently used by the judiciary and political branches to bar people of color, in a context of continuing American racism, from invoking the full width of human rights to which they are entitled for protection, confirms the correctness of giving great weight and authority to the facts and decisions about the birth of the Doctrine in assessing its present constitutionality.[69]

Excluding Race Strategies is a powerful indictment of the non-self-execution

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61. *Id*. at 1110–113.

62. *Id*., at 1111, 1113.

63. Michael P. Van Alstine, *Stare Decisis and Foreign Affairs*, 61 DUKE L.J. 941, 967 (2012).

64. Richardson, *Excluding Race Strategies*, *supra* note 6, at 1113.

65. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (ratified by the U.S. Apr. 2, 1992) [hereinafter ICCPR].

66. For more on this point see *infra* notes 118–21 and accompanying text.

67. Richardson, *Excluding Race Strategies*, *supra* note 6, at 1117.

68. *See infra* notes 116–17 and accompanying text.

69. Richardson, *Excluding Race Strategies*, *supra* note 6, at 1117.

doctrine in historical foundation, constitutional doctrine, and moral integrity. Nonetheless, in *Violating an Order of the ICJ*, Professor Richardson perceived the potential for righting the historical wrong in the unusual circumstance of a direct conflict between the ICJ and the U.S. Supreme Court. Indeed, he even ended the earlier work on a note of hope. "Some U.S. judges," he observed, "may now be signaling their understanding of the essential indivisibility of U.S. and international law under any notion or obligation to uphold the rule of law" and thus "[w]e can only hope for their success."[70]

The signs, as Part IV will explore, initially were encouraging: when the controversy returned for a final decision, the ICJ vindicated Professor Richardson's analysis of international law.[71] Unfortunately, his hopes were to be dashed as a matter of domestic law. First, in realization of Professor Richardson's concerns on this score,[72] President Bush claimed unilateral authority to determine which international law obligations had domestic law effect.[73] Then, unfortunately, the Supreme Court took the occasion of the underlying dispute to further undermine the force of treaties in domestic law.[74]

IV. PRESCIENCE AND INSIGHT REVEALED

A. Professor Richardson's Views Vindicated: The ICJ's Judgment in Avena

In *Violating an Order of the ICJ*, Professor Richardson declared without equivocation that the Vienna Convention on Consular Relations "provides individual rights" and indeed rights that the U.S. is obligated to protect as a matter of international law.[75] And the entire thrust of that scholarly work was that, on the foundation of the unusual circumstance of ICJ jurisdiction,[76] this significant issue certainly would return to prominence before that highest international court. This was all the more certain because, even at the time, literally tens of thousands of foreign nationals were held in state prisons, and it was quite likely that very few had been afforded the rights secured by the Vienna Convention.[77]

In fact, in 2004, the ICJ vindicated Professor Richardson's views in nearly all particulars. In a case brought by Mexico on behalf of fifty-one of its nationals then on death row, *Avena and Other Mexican Nationals*,[78] the ICJ held that the Vienna

70. Richardson, *Violating an Order of the ICJ*, *supra* note 5, at 131.

71. *See infra* Part IV.A. and accompanying text.

72. *See supra* note 43 and accompanying text.

73. *See infra* Part IV.B and accompanying text.

74. *See infra* Part IV.C and accompanying text.

75. Richardson, *Violating an Order of the ICJ*, *supra* note 5, at 122.

76. *See supra* notes 18–20 and accompanying text.

77. *See* Paige M. Harrison & Allen J. Beck, U.S. DEPT. OF JUST., OFF. OF JUST. PROGRAMS, *Bureau of Justice Statistics Bulletin* (2005), www.bjs.gov/content/pub/pdf/pjim04.pdf (noting that as of 2004, over 90,000 non-citizens were held in federal and state prisons).

78. Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12 (Mar. 31).

Convention indeed creates individual rights.[79] The Court also held that the U.S. violated its treaty obligations by failing to give individual notices to the Mexican detainees of their rights under the Convention.[80] Then came the most important point: the ICJ directly rejected the U.S. claim that the "procedural default rule" of domestic law prevails over the obligations of international law as reflected in the Convention.[81] This rejection, of course, was precisely what Professor Richardson had argued in *Violating an Order of the ICJ* a decade earlier.[82] As the required remedy, the ICJ ordered the U.S. to provide "by means of its own choosing" some form of judicial "review and reconsideration" to assess whether the treaty violations had prejudiced the criminal proceedings against the covered Mexican nationals.[83] None of this would have been a surprise to anyone who had read Professor Richardson's prescient words in *Violating an Order of the ICJ* a decade earlier.

B. Professor Richardson's Concerns Realized: President Bush's Surprise Determination

The reader will recall that one of the acts of Professor Richardson's powerful prescience about the significance of *Breard vs*. *Greene* came in the form of an apprehension about executive power: if international treaties were not formally law, he worried in *Violating an Order of the ICJ*, then the question of compliance with this fundamental form of international law would become almost entirely a matter of presidential discretion.[84] One may wonder whether seven years of executive branch officials read these words, for in 2005 President Bush made precisely that argument as a matter of constitutional law.

As a bit of backdrop, the clash between domestic and international law reflected in ICJ's decision in *Avena* of course promptly reappeared on the docket of the Supreme Court.[85] But before the Court even could hold oral arguments, President Bush issued a "Determination," in the form of a simple memorandum to the Attorney General, stating that he had a unilateral power to determine which international obligations are enforceable in domestic courts:

> [P]ursuant to the authority vested in me as President by the Constitution and the laws of the United States of America . . . the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[86]

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79. *Id*. at 35–36, ¶ 40.

80. *Id*. at 50, ¶ 90.

81. *Id*. at 56–57, ¶ 112.

82. Richardson, *Violating an Order of the ICJ*, *supra* note 5, at 127–29.

83. *See* Avena and Other Mexican Nationals (Mex. v. U.S.), ¶ 153 (finding that the appropriate reparation is for the U.S. to review and reconsider convictions of Mexican nationals).

84. *See supra* note 43 and accompanying text.

85. *See* Medellín v. Dretke, 543 U.S. 1032 (2004) (addressing the impact international tribunals have on U.S. law).

86. Medellín v. Texas, 552 U.S. 492, 503 (2008). A full text of the President's

However, as I have explained elsewhere, subsequent arguments by the President made clear that "[a] core feature—and presumably a core purpose—of this assertion of executive power [was] that it removes from the judicial branch any responsibility for interpreting and applying the domestic law incidents of the international law in the United States."[87]

Almost eerily, President Bush's assertion of authority was exactly what Professor Richardson warned would happen on the basis of *Breard* and its progeny. Indeed, it amounted almost exactly to a claim that "the Executive . . . has a free, discretionary, and largely unreviewable hand in deciding whether or how to carry out" our nation's treaty obligations.[88] The President's surprise Determination "produced substantial disarray in the Supreme Court."[89] In a *per curiam* opinion muddled by various individual opinions, the Court then simply decided to dismiss the grant of certiorari "as improvidently granted."[90] This of course only delayed the inevitable, for affected Mexican nationals promptly refiled for *habeas corpus* relief in state court, this time on the basis of both the ICJ's decision in *Avena* and the President's "Determination."[91]

Now, the multi-party, multi-faceted, multi-layered controversy Professor Richardson had examined a decade earlier was well and truly joined. In the light of *Violating an Order of the ICJ*, it all had an air of inevitability. But that simply proves the point with which we began: prescience—the power of "knowing in advance"—is among the clearest signs of a knowledgeable, thoughtful, and sophisticated scholar. In this and numerous other instances, Professor Richardson's power of prescience was on full display.

C. Professor Richardson's Hope Dashed: The Supreme Court's Opinions in Sanchez-Llamas and Medellín

In *Violating an Order of the ICJ*, Professor Richardson criticized the Supreme Court for failing to recognize the significance of the conflict between international law (as reflected in the ICJ's Preliminary Determination at the time) and domestic law (as reflected in Virginia's impending execution of an individual protected by the Vienna Convention).[92] He nonetheless saw a grain of hope that the important

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Determination is available at *President's determination (Feb. 28, 2005) regarding U.S. response to Avena decision in the ICJ*, U.S. DEPT. OF STATE (Feb. 28, 2005), https://www.state.gov/s/l/2005/87181.htm.

87. Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 53 UCLA L. REV. 309, 314 (2006) [hereinafter Van Alstine, *Executive Aggrandizement*].

88. Richardson, *Violating an Order of the ICJ*, *supra* note 5, at 131.

89. Van Alstine, *Executive Aggrandizement*, *supra* note 87, at 327.

90. Medellín v. Dretke, 544 U.S. 660, 661 (2005) (per curiam).

91. Ex parte Medellín, 223 S.W.3d 315 (Tex. Crim. App. 2006). The Texas Court of Criminal Appeals dismissed Medellín's habeas application, reasoning that neither the ICJ's decision in *Avena* decision nor President Bush's Determination reflected "binding federal law." *Id*. at 352.

92. *See* Richardson, *Violating an Order of the ICJ*, *supra* note 5, at 126, 130 ("[T]he U.S. Supreme Court majority[] refus[ed] to ascribe any special importance to the international nature

issues at the core of that conflict would provide a vehicle for enlightenment. Unfortunately, in two opinions issued nearly a decade later, the Supreme Court would dash that hope.

i. Sanchez-Llamas

The first blow had come in the interim in a 2006 opinion that, because it was not brought by one of the 51 covered individuals, did not involve a formal conflict with the ICJ's *Avena* opinion. In *Sanchez-Llamas v. Oregon*, the Supreme Court nonetheless broadly sided with domestic law over claims founded in international law.[93] Relying on *stare decisis*—the force, as Professor Richardson observed in *Excluding Race Strategies* that permits a "scrubbing of racial history" out of the non-self-execution doctrine[94]—the Court simply reaffirmed its holding in *Breard* that the Vienna Convention did not supersede domestic procedural default rules.[95] Doing so also permitted the Court to avoid the fundamental question of whether the Convention creates directly enforceable individual rights. But the Court also had to confront the fact that in *Avena*, the ICJ had expressly found that the Convention did just that.[96] In spite of this, the Court returned to the theme Professor Richardson recognized a decade earlier[97] that the ICJ's decision was only deserving of "respectful consideration."[98] As one might expect from these words, the Court then held that this "consideration" did not mean that *Avena* was binding on domestic courts.[99]

ii. Medellín

The real damage to the hope that Professor Richardson had expressed in 1998 came in the 2008 opinion of *Medellín vs. Texas*.[100] That case involved a direct conflict with the ICJ's opinion in *Avena* because Medellín was one of individuals named in that opinion.[101] The Court began with an express acknowledgement that *Avena* "constitutes an *international* law obligation on the part of the United States."[102] But, ominously, it emphasized in the very next sentence that "not all international law obligations automatically constitute binding federal law

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of [Breard]… [and] [t]he Court was therefore disinclined to take opportunities of interpretation to ameliorate any conflicts with [the ICJ's] Order.").

93. *See generally* 548 U.S. 331 (2006).

94. *See supra* notes 62–66 and accompanying text.

95. Sanchez-Llamas, 548 U.S. at 351–52.

96. *See* Avena and other Mexican Nationals (Mex. v. U.S.), Judgement, 2004 I.C.J. Rep. ¶¶ 61, 63, 121–123 (Mar. 31) (holding that the Vienna Convention creates individual rights).

97. *See* Richardson, *Violating an Order of the ICJ*, *supra* note 5, at 126, 130 (noting the respectful consideration formulation in *Breard v. Greene* and then criticizing the Court failing to use available tools of interpretation to ameliorate any conflicts with the ICJ's Preliminary Order at the time).

98. Sanchez-Llamas, 548 U.S. at 353 (quoting Breard v. Greene, 523 U.S. 371, 375 (1998)).

99. *Id*., at 353–54 ("Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts").

100. *See generally* 552 U.S. 491 (2008).

101. *Id*. at 498.

102. *Id*. at 504.

enforceable in United States courts."[103]

The core issue in *Medellín* was the very one Professor Richardson had highlighted a decade earlier: whether the obligation in Article 94(1) of the U.N. Charter "*to comply* with the decision of the [ICJ] in any case to which it is a party"[104] meant that the ICJ's decision in *Avena* was binding in U.S. law.[105] Almost as Professor Richardson would have predicted,[106] the Court founded its analysis in this regard on the progenitors of the non-self-execution line of authority, *Foster v. Neilson* and *United States v. Percheman*.[107] And indeed it directly relied on the holding in *Foster* that the treaty there was non-self-executing because it merely "pledge[d] the faith of the United States to pass acts which shall ratify and confirm them."[108]

Parroting this language, the Court in *Medellín* held that Article 94(1) was not self-executing because "[i]t does not provide that the United States 'shall' or 'must' comply with an ICJ decision, nor indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts."[109] Worse, the Court took the occasion to issue the broader declaration that a treaty "of course" is "primarily a compact between independent nations."[110] Taken alone, there may be some truth in this. But the following analysis very much leaves the flavor that treaties generally have little to do with individual rights.[111] As I have explained elsewhere in detail, this is both historically inaccurate[112] and contrary to venerable principles of treaty interpretation that have existed from the very adoption of the Constitution.[113]

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103. *Id*.

104. *Id*. at 508 (quoting U.N. Charter art. 94, para. 1) (emphasis original).

105. *Id*. at 504–11.

106. *See* Richardson, *Excluding Race Strategies*, *supra* note 6, at 1102–1110 (comprehensively analyzing the historical background of *Foster* and *Percheman*).

107. *Medellín*, 552 U.S. at 504–05.

108. *Id*. at 508 (quoting Foster v. Neilson, 27 U.S. 253, 314 (1829)).

109. *Id*. Along the way the Court held that the Optional Protocol to the Vienna Convention also is not self-executing. *Id*. at 507–08 ("The Protocol says nothing about the effect of an ICJ decision and does not itself commit signatories to comply with an ICJ judgment.").

110. *Id*. at 505 (quoting Head Money Cases, 112 U.S. 580, 598 (1884)).

111. Worse still, in a footnote, the Court seemed to embrace a "background presumption"—taken out of context from a Comment in the Restatement (Third) of Foreign Relations—"that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" *Id*. at 506 n.3 (quoting 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907, cmt. A, p. 395 (AM. LAW INST. 1986)).

112. Michael P. Van Alstine, *Treaties in the Supreme Court (1901–1945)*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY OR CHANGE 191, 223–24 (D. Sloss, M. Ramsey & W. Dodge, eds., 2011) (noting that in the 45 years at the turn of the 20th century alone the Supreme Court had enforced individual treaty rights in over 300 cases).

113. *See* Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1945 (2005) (examining the liberal interpretation canon).

The one positive aspect of *Medellín* is that the Court rebuffed the power grab of the Executive Branch that had occasioned a concern by Professor Richardson in *Violating an Order of the ICJ*. The Court held that neither the general powers in Article II of the Constitution,[114] nor any historical "gloss" on those powers,[115] nor the Take Care Clause[116] confer on the President a unilateral power to transform non-self-executing treaties into binding domestic law.[117] To be sure, this does not formally resolve the question of whether the President may block the enforcement of otherwise-binding international law. But the Court's broad rebuke of the Bush Administration's assertion of executive power at a minimum undermined any claim that the President has unilateral lawmaking powers.[118]

IV. CONCLUDING THOUGHTS: THE CONTINUING FORCE OF PROFESSOR RICHARDSON'S INSIGHTS

Thus, the Supreme Court's resolution of the momentous controversy Professor Richardson addressed in *Violating an Order of the ICJ* failed in substantial measure to fulfill his "hope."[119] It likewise amounted to a rejection of his Policy Recommendation in *Excluding Race Strategies* that the Court formally reject the entire self-execution doctrine.[120]

Nonetheless, Professor Richardson's insights about the true force and meaning of the modern non-self-execution doctrine remain as an admonition for future generations. Other scholars have challenged the constitutionality of the doctrine (save for certain express constitutional limitations on the treaty power);[121] and some even have questioned whether express declarations on the subject by the Senate are constitutional.[122] But no scholar has explored the darker side of the doctrine's history with anywhere near the depth or aplomb as did Professor Richardson in *Excluding Race Strategies*. There, he convincingly explained that, in historical foundation and modern application, the doctrine of "non-self-executing" treaties has the purpose and effect of denying individuals, and especially racial minorities, rights expressly secured in international law.

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114. *Medellín*, 552 U.S. at 525–30.

115. *Id*. at 530–31.

116. *Id*. at 532 (citing U.S. CONST., art. II, § 3).

117. *Id*.

118. *See id*. (declaring that the Take Care Clause permits the President to execute the laws, not to make laws).

119. *See* Richardson, *Violating an Order of the ICJ*, *supra* note 5, at 131 (hoping that U.S. judges would begin to understand the unity of domestic U.S. law and international law).

120. Richardson, *Excluding Race Strategies*, *supra* note 6, at 1117.

121. *See*, *e.g.*, Jordan J. Paust, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 67 (2003); David L. Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 35–36 (2002).

122. *See*, *e.g.*, Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law in the United States*, 20 MICH. J. INT'L L. 301, 324–35 (1999); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999); Thomas Burgenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 222, n. 36 (1997).

The result of the non-self-executing doctrine is a legal status quo for human rights in domestic law—a status quo that cannot gain from judicial insights through the interpretation of modern norms anchored in international human rights law. Indeed, it should be of little surprise to those who have had the pleasure of reading *Excluding Race Strategies* that it is now a common practice for the U.S. (acting through the combined efforts of the President and the Senate) to declare that human rights treaties in particular are not self-executing.[123] It also should not surprise that, on the foundation of avoidance techniques like the non-self-execution doctrine, the U.S. government wins over 90% of the disputes with individuals over claimed treaty rights.[124]

In *Excluding Race Strategies*, Professor Richardson exposed the effect of non-self-execution on the racial minorities and other disadvantaged groups in the U.S. At its core is a disconnect between the aspirations of human rights law and the realities for such groups in the U.S. Nowhere is this disconnect clearer than in the ICCPR.[125] The U.S. ratified the treaty in 1992, precisely because "the absence of U.S. ratification of the Covenant [was] conspicuous and, in the view of many, hypocritical."[126] But, of course, the U.S. ratified the treaty subject to an express declaration that the treaty would not be self-executing.[127]

Although the ICCPR thus did not become enforceable federal law, the U.N. Human Rights Committee (HRC) in its first report on U.S. compliance declared that "despite the existence of laws outlawing discrimination, there persist within society discriminatory attitudes and prejudices based on race or gender . . . [and that] the effects of past discriminations in society have not yet been fully eradicated."[128] As a result, the Committee concluded that these continuing effects of discrimination "make[] it difficult to ensure the full enjoyment of the rights provided for under the Covenant to everyone."[129] The most recent report of the

123. *See* Carlos Manuel Vazquez, *Treaties As Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 667–694 (2008) (broadly examining the issue); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 446–49 (2000) (broadly describing, but ultimately supporting, the practice); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346–348 (1995) (criticizing the practice).

124. *See* David Sloss, *United States*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT 540, 546 (D. Sloss, ed., 2009) (assessing the percentage of cases in which a party invoked a treaty and won).

125. *See* ICCPR, *supra* note 65.

126. *See* S. COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 23, 1, 3 (102d Sess. 1992), *reprinted in* 31 I.L.M . 645 (1992) (outlining the Committee's comments).

127. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (citing 138 Cong. Rec. 8071(1992)) (noting that when the Senate ratified the ICCPR it stated that the substantive provisions of the agreement were not self-executing).

128. Comments by the U.N. Human Rights Committee, ¶ B.5., CCPR/C/79/Add.50 (7 Apr. 1995), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f79%2fAdd.50&Lang=en.

129. *Id*.

Committee echoed many of the same concerns in 2014.[130]

The ultimate message of Professor Richardson's analysis in both *Violating an Order of the ICJ* and *Excluding Race Strategies* is that the disconnect between international human rights law and the actual, enforceable law of the U.S. is not accidental. Better than any other scholar of our age, he convincingly has explained that, in purpose and effect, some significant blame for this falls to the doctrine of non-self-executing treaties. In a time (still) marked by substantial social unrest as well as racial tension—and even conflict—the practical significance of that insight plays out in an unfortunately large segment of our society today.

130. U.N. Human Rights Committee, Concluding observations on the Fourth Periodic Report of the United States of America, ¶ C., CCPR/C/USA/CO/4 (23 Apr. 2014), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fCO%2f4&Lang=en.