Breard v. Greene: International Human Rights and the Vienna Convention on Consular Relations

I. INTRODUCTION

In 1993 Angel Francisco Breard, a Paraguayan foreign national, was convicted of rape and capital murder in Virginia and sentenced to death.[1] During his trial, Breard stated that he killed the victim because he was under a curse placed upon him by his ex-wife's father.[2] On appeal, the Virginia Supreme Court affirmed the judgment and sentence of the trial court[3] and the United States Supreme Court denied certiorari.[4] In July 1996, after denial of state relief, Breard filed a motion for habeas corpus in federal district court pursuant to 28 U.S.C. § 2254.[5] In his federal habeas motion, Breard argued for the first time that his conviction and sentence should be overturned because at the time of his arrest, the state of Virginia violated his rights under Article 36 of the Vienna Convention on Consular Relations by not informing him that as a Paraguayan foreign national he had the right to contact the Paraguayan consulate.[6] The district court held that since the petitioner had not raised his Vienna Convention violation claim in state court, the claim was defaulted and not federally reviewable.[7] Further, the district court held that Breard had not shown just cause for the default.[8] After the Fourth Circuit

1. *See* Breard v. Commonwealth, 445 S.E. 2d 670, 673 (Va. 1994).
2. *See id.* at 674.
3. *See id.* at 682.
4. *See* Breard v. Virginia, 513 U.S. 971 (1994).
5. *See* Breard v. Netherland, 949 F. Supp. 1255, 1260 (E.D. Va. 1996). Section 2254(a), Title 28 United States Code reads, "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."
6. *See Netherland*, 949 F. Supp. at 1263.
7. *See id.*
8. *See id.*

affirmed the judgment of the trial court,[9] Breard petitioned the Supreme Court for certiorari.[10]

Separately, the Republic of Paraguay, the Ambassador of Paraguay to the United States and the Consul General of Paraguay to the United States filed suit in federal district court, arguing that their rights had also been violated under the Vienna Convention on Consular Relations by: (1) the state of Virginia's failure to notify Breard of his rights; and (2) failure of the state of Virginia to notify the plaintiffs of Breard's arrest, conviction and sentencing.[11] The Consul General also filed a separate suit alleging that Virginia's failure to notify him of Breard's detention gave rise to a cause of action under 42 U.S.C. § 1983.[12] The district court held that it lacked subject matter jurisdiction, because the Eleventh Amendment[13] typically barred "suits against state officials that are in fact suits against a state."[14] Additionally, because the court found no continuing violation of federal law, the case did not fall within that narrow exception.[15] The Fourth Circuit affirmed[16] and the plaintiffs petitioned the Supreme Court for certiorari.[17] The Supreme Court granted certiorari in *Breard v. Pruett* and *Republic of Paraguay v. Allen* and in the consolidated case, per curiam, *held*: (1) Breard procedurally defaulted on his Vienna Convention claim because he did not raise the issue in state court, (2) Virginia's failure to notify the

9. *See* Breard v. Pruett, 134 F.3d 615, 620 (4th Cir. 1998).

10. *See* Breard v. Greene, 118 S. Ct. 1352, 1354 (1998).

11. *See* Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1271 (E.D. Va. 1996).

12. Title 42 U.S.C. § 1983 (Supp. II 1997) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

13. The Eleventh Amendment provides, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of Another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

14. *Allen*, 949 F. Supp. at 1272.

15. *See id.* at 1272-73. The exception which the court refers to was established by the Supreme Court in Ex parte Young, 209 U.S. 123 (1908).

16. *See* Republic of Paraguay v. Allen, 134 F.3d 622, 629 (4th Cir. 1998).

17. *See Greene*, 118 S. Ct. at 1354.

Paraguayan consulate caused no continuing harm which would allow Paraguay's claim to fall within the exception to the Eleventh Amendment, and (3) the Paraguayan Consul General had no cause of action under 42 U.S.C. § 1983 because he brought the claim in his official capacity. *Breard v. Greene*, 118 S. Ct. 1352 (1998) (per curiam).

II. BACKGROUND

The Vienna Convention on Consular Relations (Vienna Convention or Convention) has been described as "the most important instrument on consular relations to date."[18] Its inception was spearheaded by the United Nations International Law Committee, and the treaty was unanimously adopted by participating states on April 4, 1963.[19] The treaty was primarily a codification of the international law on consular relations.[20] In addition to codifying consular law, the Convention also developed new rules of law from sources participating at the Convention.[21] As to its codification of customary consular law, all nations, even if they have not signed the treaty, are bound.[22] As to the conventional additions to the treaty, only the signatories are bound by its terms.[23]

Article 36 of the Vienna Convention describes the communication and contact that is permissible between a foreign national and his or her consulate under the Convention.[24] The right to

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18. Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 HOUS. J. INT'L L. 375, 384 (1997).

19. *See id.* Despite this unanimous adoption, the United States did not ratify the Vienna Convention until 1969. *See* Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 568 (1997).

20. *See* Uribe, *supra* note 18, at 384.

21. *See id.* at 385.

22. *See id.*

23. *Id.*

24. Article 36 provides:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
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> a) consular officers shall be free to communicate with nationals of the sending State and to have . . . the same freedom with respect to communication with and access to consular officers of the Sending State;
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> b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; consular officers

communicate with and have access to the foreign national as presented in Article 36(1)(a) is crucial because all other consular protective duties are built upon this communication and access.[25] The right to consul that is established for foreign nationals by Article 36 was first confronted in American courts in the context of reviews of deportation hearings by the United States Immigration and Naturalization Service (INS).[26] Most of these early immigration cases did not need to directly interpret or apply Article 36 in their opinions because the main issue arising in the cases was the implementation of INS regulation 8 C.F.R. § 242.2(e).[27] However, because this regulation was promulgated with compliance with Article 36 in mind, some courts briefly considered and discussed the article.[28]

> shall have the right to visit a national of the sending State who is in prison, custody, or detention to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
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> 2. The rights referred to in paragraph 1 of this Article 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.

Vienna Convention on Consular Relations, April 24, 1963, art. 36, 21 U.S.T. 77, 100-01, [hereinafter Vienna Convention or Convention].

25. *See* Uribe, *supra* note 18, at 387. Article 5 of the Convention indicates that consular functions consist of protecting the interests of the home state in the foreign nation; preserving and promoting commercial, economic, cultural and scientific development and "friendly relations" between the home state and the foreign nation; observing and reporting on commercial, economic, cultural, and scientific development in the foreign nation; issuing passports and other travel documents; generally helping and assisting nationals of the home state; acting as "notary and civil registrar;" protecting the interests of all nationals in the foreign state "in cases of succession *mortis causa* in the territory of the [foreign nation]"; protecting the interests of those nationals of the home state who are children or otherwise lack full capacity; "representing or arranging for appropriate representation" for nationals of the home state in the foreign state; transmittal of international agreements and other documents or other evidence to the courts of the foreign nation; supervising, inspecting and assisting vessels of the home state in the foreign nation; and performing other nonobjectionable functions. *See* Vienna Convention, 21 U.S.T. at 82-85.

26. *See* Kadish, *supra* note 19, at 571-72.

27. Section 8 C.F.R. 242.2(e) states in part, "Every detained alien shall be notified that he may communicate with the consular or diplomatic officers of the country of his nationality." *See* United States v. Calderon-Medina, 591 F.2d 529, 530 (9th Cir. 1979); Kadish, *supra* note 19, at 572 n.30.

28. *See Calderon-Medina*, 591 F.2d at 531-32 n.6 (establishing that the right conferred to aliens by Article 36 of the Vienna Convention is a personal "benefit"); United States v. Vega-Mejia, 611 F.2d 751, 752 (9th Cir. 1979) (holding that a violation of 8 C.F.R. § 242.2, which was established to ensure compliance with the Vienna Convention, does not invalidate a defendant's deportation unless he can show he was prejudiced by the violation); Tejeda-Mata v. INS, 626 F.2d 721, 726 (9th Cir. 1980) (finding that the allegation of the defendant's rights under the Vienna

In *United States v. Calderon-Medina*, the Ninth Circuit implicitly stated that Article 36 of the Vienna Convention grants an individual "benefit" to foreign nationals.[29] In this consolidated case, the United States appealed the district court's dismissal of indictments against Calderon-Medina and Rangel-Gonzales for illegal re-entry into the United States following deportation.[30] The district court found that the INS had violated "at least one" of its own regulations at the defendants' deportation hearings making the original deportations unlawful.[31] On appeal, the Ninth Circuit held that a deportation is unlawful if: (1) the violated regulation serves the purpose of benefiting the foreign national absent the violation; and (2) the defendant can show evidence of prejudice resulting from the violation.[32] In a footnote, the court stated that "[t]he regulation admittedly violated here was evidently intended to ensure compliance with the Vienna Convention on Consular Relations."[33] The court continued by acknowledging the government's argument that the Vienna Convention states in its preamble that its purpose is not to benefit individual foreign nationals, but to provide a mechanism for consular efficiency.[34] However, the court found this argument unpersuasive and stated that "[n]evertheless, protection of some interests of aliens as a class is a corollary to consular efficiency."[35] This was evident to the court from noted consular functions in Article 5 of the Convention, such as helping and assisting nationals by arranging proper representation where the national himself is unable

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Convention being violated was not raised below; therefore, the court of appeals cannot review the claim); United States v. Rangel-Gonzales, 617 F.2d 529, 532 (9th Cir. 1980) (developing fully the *Calderon-Medina* court's assertion that the right to consul established by the Vienna Convention "is a personal one"); United States v. Bejar-Matrecious, 618 F.2d 81, 83 (9th Cir. 1980) (holding that testimony regarding whether the INS had violated a regulation based on compliance with the Vienna Convention was relevant to the legality of deportation).

29. *Calderon-Medina*, 591 F.2d at 531 n.6. *But see* Vienna Convention, 21 U.S.T. at 79 ("*Realizing* that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective states"); Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir. 1997) (stating that the Vienna Convention does not grant rights to individuals, but to signatory nations).

30. *See Calderon-Medina*, 591 F.2d at 530.

31. *Id.* The INS regulation at issue was again 8 C.F.R. § 242.2(e). Curiously, "[t]he only official [governmental] document concerning consular access is [8 C.F.R. § 242.2(e)]. Apart from [t]hese immigration instructions, no other federal administrative directive pertaining to consular access for foreigners in the United States exists." S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719, 738 (1995).

32. *See Calderon-Medina*, 591 F.2d at 530-31.

33. *Id.* at 531 n.6.

34. *See id.* at 532 n.6.

35. *Id.* at 532 n.6.

to do so.[36] The Ninth Circuit concluded that the district courts in the consolidated case made no findings of harm and remanded the cases to allow the defendants an opportunity to show prejudice.[37]

More recently in the immigration context, the Second Circuit has held that the right to consul under the Vienna Convention cannot be equated with a fundamental right granted by the Constitution, but is most similar to a provision of an administrative statute.[38] In *Waldron v. Immigration and Naturalization Service*, the court stated that "[a]lthough compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights, such as the right to counsel, which traces its origins to concepts of due process."[39] As cases have begun to evolve where courts must directly interpret and apply the Vienna Convention, the edict of the *Waldron* court has been carried over into a criminal justice context.[40]

In *Faulder v. Johnson*, the Fifth Circuit articulated a reason why a violation of the Vienna Convention does not automatically call for a reversal of a defendant's conviction.[41] Joseph Stanley Faulder was a Canadian citizen who was twice convicted[42] and sentenced to death in the murder of an elderly woman during the armed robbery of her home in Texas.[43] On appeal from denial of his motion for federal habeas corpus, Faulder argued that his rights to compulsory and due process were violated when Texas officials failed to notify him of his right under the Vienna Convention to contact the Canadian consulate for assistance.[44] In its discussion of the Vienna Convention claim and its application to *Faulder*, the Fifth Circuit stated that if a foreign national requests assistance, the Canadian consulate is required to gather information relevant to the case that could not otherwise be obtained by the defendant.[45] The court continued by holding that even though "Texas admits that the Vienna Convention was

36. *See id.*
37. *See id.* at 532.
38. *See* Waldron v. INS, 17 F.3d 511, 518 (2d Cir. 1994); *see also* Kadish, *supra* note 19, at 575 (explaining the relevance of *Waldron* to previous immigration case law and more current criminal law).
39. *Waldron*, 17 F.3d at 518.
40. *See* Kadish, *supra* note 19, at 575-76 n.57.
41. *See* Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996).
42. Faulder's first conviction was reversed on appeal because his confession, which had been admitted into evidence, was found to have been procured in violation of Faulder's Fifth Amendment rights. *See* Faulder v. State, 611 S.W.2d 630 (Tex. Crim. App. 1979), *cert. denied*, 449 U.S. 874 (1980).
43. *See Faulder*, 81 F.3d at 517.
44. *See id.*
45. *See id.* at 520 (citing *Manual of Consular Instructions of the Department of Foreign Affairs and International Trade of Canada*, vol. 11, ch. 2, annex D).

violated[,]"[46] the district court correctly concluded that Faulder already had access to all of the pertinent information that could have been obtained by the Canadian consulate.[47] "While we in no way approve of Texas' failure to advise Faulder, the evidence that would have been obtained by the Canadian authorities is merely the same as or cumulative of evidence defense counsel had or could have obtained. The violation, therefore, does not merit reversal."[48]

A similar decision results from a recent Vienna Convention claim in the Fourth Circuit.[49] Mario Benjamin Murphy, a Mexican national, was hired by his victim's wife and her lover to kill the woman's husband for $5,000.[50] At trial, Murphy was convicted of murder-for-hire and conspiracy to commit capital murder and sentenced to death.[51] In argument for his certificate of appealability,[52] Murphy asserted that his rights under the Vienna Convention had been violated by the arresting officers' failure to notify him of his right to contact the Mexican consulate and that this violation rendered his guilty plea involuntary.[53] The Fourth Circuit began by stating that under 28 U.S.C. § 2253(c)(2), a petitioner must present "a substantial showing of the denial of a constitutional right."[54] The court held that Murphy had not made this showing.[55] It then stated that:

> even if the Vienna Convention on Consular Relations could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly does not create constitutional rights. Although states may have an obligation under the Supremacy Clause to

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46. *Id.*
47. *See id.*
48. *Id.*
49. *See Murphy*, 116 F.3d 97.
50. *See id.* at 98.
51. *See id.*
52. In this proceeding, Murphy is simply arguing for a certificate of appealability. *See id.* Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), it is necessary to first argue for a certificate of appealability to become eligible to appeal a district court's denial of a habeas petition. *See* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2253 (Supp. II 1997), which reads in pertinent part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, or; the final order in a proceeding under section 2255.
> (c)(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
> (c)(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

53. *See Murphy*, 116 F.3d at 99.
54. *Id.*
55. *See id.* at 99-100.

> comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions (regardless whether those provisions can be said to create individual rights) into violations of constitutional rights. Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty.[56]

The Fourth Circuit continued by stating that even if Murphy had made a substantial showing of the denial of a constitutional right, his Vienna Convention claim would be procedurally barred because it was not raised at the state level and the petitioner could not show cause and prejudice from his default.[57] The court next cited *Faulder v. Johnson* and *Waldron v. Immigration and Naturalization Service*, emphasizing that the Vienna Convention had been in effect since 1969 and that a reasonably diligent search by Murphy's counsel should have disclosed the claim because treaties would be one of the first sources consulted by the reasonably diligent counsel of a foreign national.[58] Therefore, the court rejected Murphy's "novelty" claim as cause for default.[59] Next, the Fourth Circuit held that Murphy also failed to show prejudice from the alleged Vienna Convention violation because: he presented no evidence that the Mexican consulate would have offered any assistance in obtaining a plea bargain that his attorney could not or did not offer; he presented no evidence that the Mexican consul would have assisted with obtaining mitigating evidence from Mexico; and he failed to show how help from the Mexican consulate would be necessary in acquiring character evidence from his family as this evidence would be "largely duplicative of the character testimony that was actually presented at the sentencing hearing."[60] Finally, the court dismissed the petitioner's claim that his plea was involuntary by stating that similar to the original Vienna Convention claim, this extension claim was also procedurally barred, as it was not even raised in the federal habeas petition, much less on the state level.[61]

In addition to the substantive cases regarding the Vienna Convention mentioned above, the Supreme Court has addressed cases that highlight the procedural aspects of bringing a Vienna Convention claim. Several Supreme Court cases have discussed the implementa-

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56. *Id.* at 100. *But see Calderon-Medina*, 591 F.2d at 531 n.6 (holding that the Vienna Convention confers a personal benefit on an alien).

57. *See Murphy*, 116 F.3d at 100.

58. *See id.*

59. *See id.*

60. *Id.* at 101.

61. *See id.*

tion of international treaty provisions on the state level. In *Sun Oil Co. v. Wortman*, the defendant corporation appealed to the Court seeking reversal of a decision by the Supreme Court of Kansas finding the defendant liable for unpaid interest on "previously suspended gas royalties"[62] to the plaintiffs, some of whom resided in states other than Texas, which was the defendant's principle place of business.[63] The Kansas court had rejected the defendant's argument that the Full Faith and Credit Clause[64] and the Due Process Clause of the Fourteenth Amendment prohibited application of Kansas' statute of limitations and allowed a suit to go forward in Kansas courts that had been barred by the statute of limitations of the state whose substantive law governed the claim.[65] The Supreme Court began by reiterating that the Constitution does not bar application of the forum state's statute of limitations to substantive claims governed by law of another state.[66] In addition, the Court stated that the Full Faith and Credit Clause does not require a state to substitute another state's laws for its own in matters the state is "competent to legislate."[67] The Court held that procedural matters of its own courts are definitely matters which a state is "competent to legislate" and it may, therefore, apply its own procedural rules.[68] The Court then turned to whether a statute of limitations fell into the category of a procedural rule for the purposes of the Full Faith and Credit Clause.[69] It conducted this inquiry by examining the holding of *McElmoyle v. Cohen*,[70] which stated that a statute of limitations can be considered procedural with the forum law governing that portion of the claim.[71] In the Court's

62. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 719 (1988). The defendant extracted gas from property it leased from the plaintiffs. The leases allowed the property owner to receive a royalty from the sale of the gas. The defendant sold the gas at prices that required approval by the Federal Power Commission (FPC). The FPC allowed the defendant to collect proposed increased prices from its customers pending FPC approval, but any amount that was ultimately not approved had to be refunded with interest. *See id.* The defendant did not pay royalties on the proposed increased amounts to the plaintiffs until it received FPC approval. *See id.* at 720. This unpaid amount was what the Court termed "previously suspended gas royalties." *Id.*

63. *See id.*

64. The Full Faith and Credit Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

65. *See Sun Oil Co.*, 486 U.S. at 719.

66. *See id.* at 722.

67. *Id.*

68. *Id.*

69. *See id.* at 722-23.

70. 13 Pet. 312, 327-28 (1839).

71. *See Sun Oil Co.*, 486 U.S. at 723.

view, this holding "reflected the rule in international law at the time the Constitution was adopted."[72]

The Court extended its discussion of the underlying rule in international law concerning which law applies to a procedural claim in *Volkswagenwerk Aktiengesellschaft v. Schlunk*.[73] In that case, the Court was confronted with the issue of whether "an attempt to serve process on a foreign corporation by serving its domestic subsidiary which, under state law, is the foreign corporation's involuntary agent for service of process . . . is compatible with the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Service Convention)." The Court stated that the central purpose of the Hague Service Convention was to require each state to establish an agent to receive requests for service of process from foreign countries.[74] Article 1 of the Hague Service Convention states that "[t]he present convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."[75] The Court found that the Hague Service Convention did not create a standard defining when an "occasion to transmit a . . . document for service abroad might occur."[76] Therefore, it held that the proper reference point must be "the internal law of the forum state."[77]

In *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, the Court again addressed the necessity of examining the law of the forum state for guidance in implementing the provisions of a treaty.[78] Here the Court examined to what extent a federal district court must abide by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[79] (Hague Evidence Convention) when parties demand discovery from a citizen of a signatory nation over whom the

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72. *Id.* The Court also stated that the *McElmoyle* holding rested on an implicit premise that a rule derived from international law could properly be applied "in the interstate context consistently with the Full Faith and Credit Clause." *Id.*

73. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988). This case was decided on the same day as *Sun Oil Co.*

74. *See Volkswagenwerk Aktiengesellschaft*, 486 U.S. at 698.

75. *Id.* at 699 (quoting Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters [hereinafter Hague Service Convention], 20 U.S.T. at 362).

76. *Id.* at 700.

77. *Id.*

78. *See* Société Nationale Industrielle Aérospatiale v. United States Dist. Ct. for the S. Dist. of Ia., 482 U.S. 522 (1987).

79. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555 [hereinafter Hague Evidence Convention].

court can assert personal jurisdiction.[80] The Court asserted that under an interpretation of the Hague Evidence Convention which considers its procedures for obtaining international discovery exclusive, the treaty would subject all American courts hearing cases involving a national of a signatory state to the internal laws of that state.[81] However, since the Hague Evidence Convention contained no clear preemptive intent, the Court held "that the Hague [Evidence] Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation."[82]

Another procedural aspect of bringing the Vienna claim in a criminal proceeding involves the timing of the assertion of the claim so that the allegation of error is properly raised.[83] In *Wainwright v. Sykes*, the Court considered whether a defendant's claim that his testimony was admitted at trial in violation of his *Miranda* rights[84] could properly be considered on federal habeas corpus review when it was not properly raised in the state proceeding below.[85] The Court held that the state's requirement that the confession be challenged at trial or be procedurally barred was constitutional and that the defendant's noncompliance with this requirement prevented direct review of his *Miranda* claim on habeas corpus motion.[86] The Court added, "we deal only with contentions of federal law which were not resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure."[87]

Procedurally, the Court has also addressed the interplay between a federal statute and a treaty.[88] In the consolidated case of *Reid v. Covert*, the defendants, both wives of military officers living with their husbands overseas, were convicted of killing their husbands in separate incidents.[89] In each situation the country where the defendant's husband was stationed was a party to an executive agreement with the United States.[90] These agreements gave the

80. *See Société Nationale Industrielle Aérospatiale*, 482 U.S. at 524.
81. *See id.* at 539.
82. *Id.* at 539-40.
83. *See* Wainwright v. Sykes, 433 U.S. 72 (1977).
84. *See* Miranda v. Arizona, 384 U.S. 436 (1966).
85. *See Wainwright*, 433 U.S. at 74.
86. *See id.* at 86-87.
87. *Id.* at 87.
88. *See* Reid v. Covert, 354 U.S. 1 (1957); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that a statute and a treaty are both the supreme law of the land, but if the two conflict, "the one last in date will control the other").
89. *See Reid*, 354 U.S. at 3-4.
90. *See id.* at 15-16.

United States military courts exclusive jurisdiction over offenses committed in the foreign nation by a serviceman or any of his dependents.[91] The Court held that Article 2(11) of the Uniform Code of Military Justice[92] is not legislation essential to carrying out international agreements made with foreign nations.[93] The Court based its holding on the lack of language in the Supremacy Clause,[94] which would indicate that treaties[95] and laws pursuant to treaties do not have to comply with the Constitution.[96] Additionally, the Court held that a statute, which must comply with the Constitution, renders a treaty void to the extent it conflicts with that statute.[97]

Novelty also implicates procedural issues in Vienna Convention claims.[98] In *Teague v. Lane*, a black man was convicted by an all white jury of three counts of attempted murder, two counts of armed robbery, and one count of aggravated battery.[99] During jury selection, the prosecutor used all ten of his peremptory challenges to strike potential jurors who were black.[100] The defendant's counsel moved for a mistrial, but the trial court denied the motion.[101] On appeal, the defendant argued that he had been denied "the right to be tried by a jury that was representative of the community."[102] The Illinois Appellate Court rejected the defendant's appeal and the Illinois

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91. *See id.*

92. Jurisdiction over the two defendants was based on Article 2(11) of the Uniform Code of Military Justice (UCMJ). *See id.* at 3. The Article provides:

> The following persons are subject to this code:
> 1) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States . . . .

Id. at 3-4 (quoting 50 U.S.C.A. § 712).

93. *See Reid*, 354 U.S. at 16.

94. The Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2.

95. The Court states "[w]e recognize that executive agreements are involved here but it cannot be contended that such an agreement rises to greater stature than a treaty." *Reid*, 354 U.S. at 17 n.33.

96. *See id.* at 16.

97. *See id.* at 18.

98. *See* Teague v. Lane, 489 U.S. 288 (1989).

99. *See id.* at 292-93.

100. *See id.* at 293.

101. *See id.*

102. *Id.*

Supreme Court denied leave to appeal.[103] The defendant then filed a petition for writ of habeas corpus where he reargued his fair cross section claim but added for the first time his assertion that under *Swain v. Alabama*[104] once a prosecutor offered an explanation regarding his peremptory choices, he could be questioned regarding the individual challenges.[105] The district court denied the appeal, but the Sixth Circuit reversed.[106] After en banc rehearing, the Sixth Circuit held the defendant's *Swain* claim procedurally barred.[107] The Supreme Court stated that "[i]t is well established that 'where an appeal was taken from a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised, and those that could have been presented but were not are deemed waived.'"[108] Since the defendant did not raise his novel *Swain* claim until federal habeas corpus review, the Court held it was procedurally barred.[109]

The Vienna Convention violation asserted by a defendant must be shown to have had an effect on his or her trial.[110] In *Arizona v. Fulmante*, the defendant claimed that his jailhouse confession was coerced in violation of his constitutional rights.[111] The Supreme Court held that a harmless error standard applied to the admission of evidence in violation of the defendant's constitutional rights.[112] Therefore, only if the admission did not affect the defendant's trial can the conviction be sustained.[113]

The Supreme Court addressed the right of a foreign nation to sue a state in *Principality of Monaco v. Mississippi*.[114] In that case, Monaco sued the state of Mississippi regarding bonds issued by Mississippi that were claimed to be the property of Monaco.[115] The Court addressed whether under the Constitution a state can be sued

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103. *See id.*
104. *See* Swain v. Alabama, 380 U.S. 202 (1965).
105. *Teague*, 489 U.S. at 293.
106. *See id.* at 293-94.
107. *See id.* at 294.
108. *Id.* at 297 (quoting People v. Gaines, 473 N.E.2d 868, 873 (1984), *cert. denied*, 471 U.S. 1131 (1985)).
109. *See id.* at 297-98.
110. *See* Arizona v. Fulminante, 499 U.S. 279 (1991); *see also, e.g.*, Hill v. Lockhart, 474 U.S. 52, 59 (1985) (holding that in order to satisfy the prejudice standard needed to prove ineffective assistance of counsel, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.").
111. *See Fulminante*, 499 U.S. at 284.
112. *See id.* at 295.
113. *See id.*
114. *See* Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).
115. *See id.* at 317.

without its consent by a foreign nation.[116] The Court held that the Eleventh Amendment was an absolute bar to a nonconsensual suit by a foreign nation against a state.[117] It based its decision regarding sovereign immunity in part on the legislative history of the Constitution and its view of what is properly adjudicated in the forum of international law.[118]

> It cannot be supposed that it was the intention that a controversy growing out of the action of a State, which involves a matter of national concern and which is said to affect injuriously the interests of a foreign State, or a dispute arising from conflicting claims of a State of the Union and a foreign State as to territorial boundaries, should be taken out of the sphere of international negotiations and adjustment through a resort by the foreign State to a suit under the provisions of Section 2 of Article 3 [of the United States Constitution]. In such a case, the State has immunity from suit without her consent and the National Government is protected by the provision prohibiting agreements between States and foreign powers in the absence of the consent of the Congress.[119]

A discussion of the exception to the absolute bar established by the Eleventh Amendment was undertaken by the Court in *Milliken v. Bradley*.[120] In this northern school desegregation case, the Court reviewed the questions of the extent of district court power in fashioning remedies for de jure segregation and whether it was constitutional under the Eleventh Amendment for a federal court to order those state officials responsible for constitutional violations to bear the costs of remedial programs put in place to correct past de jure segregation.[121] The Court discussed *Edelman v. Jordan*,[122] which held that a prospective injunction against a state was permissible where it ensures future compliance with a federal court order.[123] The Court reaffirmed this exception to the general rule that was established in *Ex parte Young*[124] and held that the Eleventh Amendment is not a bar to prospective relief.[125]

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116. *See id.* at 323.
117. *See id.* at 329.
118. *See id.* at 331.
119. *Id.* at 331-32.
120. *See* Milliken v. Bradley, 433 U.S. 267 (1977).
121. *See id.* at 269.
122. 415 U.S. 651 (1974).
123. *See Milliken*, 433 U.S. at 289.
124. 209 U.S. 123 (1908) (establishing that a continuing violation of federal rights is an exception to the Eleventh Amendment bar of suit against a state).
125. *See Milliken*, 433 U.S. at 290.

Finally, the Supreme Court has addressed the procedural issue of who is considered a statutory person under 42 U.S.C. § 1983.[126] In *Will v. Michigan Department of State Police*, the plaintiff initiated suit in state court under § 1983 alleging that the defendant had improperly denied his promotion.[127] The Supreme Court reviewed the issue of whether a state or state official when acting in his or her official capacity is a "person" under § 1983.[128] The Court began by stating that a common rule of statutory construction holds that statutes are normally construed to exclude the sovereign in the definition of "person."[129] The Court also observed that the language of § 1983 doesn't meet the additional rule of construction stating that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"[130] Additionally, the Court buttressed its argument with legislative history and congressional purpose in enacting the statute.[131] "Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties."[132]

III. NOTED DECISION

In the noted case, the Supreme Court began by discussing the weight of an interpretation of an international treaty by a court of proper jurisdiction.[133] The Court stated that while that interpretation should be respectfully considered, the implementation of the treaty in an individual's state is governed by the law of the forum state, absent an unambiguous statement to the contrary contained in the treaty.[134] The Court pointed out that this proposition was contained in Article 36 of the Vienna Convention itself by the proviso that the treaty should be enacted in compliance with laws and regulations of the forum state providing that such laws give full force to the purposes of

126. *See* Moor v. Alameda County, 411 U.S. 693 (1973) (holding that a municipality is not a person for the purposes of § 1983); South Carolina v. Katzenbach, 383 U.S. 301 (holding "[t]he word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union.").

127. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989).

128. *See id.* at 60.

129. *See id.* at 64.

130. *Id.* at 65 (quoting Altascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

131. *See id.* at 65-66, 68.

132. *Id.* at 66.

133. *See Greene*, 118 S. Ct. at 1354.

134. *See id.*

the article.[135] The majority also stated the basic rule of law that in criminal proceedings allegations of error must first be raised at the state level to be reviewable in federal habeas proceedings.[136] Failure to raise a claim of error results in default.[137] The Court applied these rules to Breard by holding that because he did not raise his Vienna Convention claim in state court, he "failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia."[138] Therefore, Breard's Vienna Convention claim was held procedurally barred on federal habeas review.[139]

Second, the Court emphasized that a statute and a treaty, both being the supreme law of the land, are equal in weight.[140] However, when "'a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'"[141] The Court indicated that since the Antiterrorism and Effective Death Penalty Act (AEDPA)[142] had been enacted in 1996 before Breard filed his federal habeas petition asserting error under the Vienna Convention, the "subsequent in time" rule rendered Breard's rights under the Vienna Convention void.[143] Since the statute denied an

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135. *See id.* at 1355.

136. *See id.*

137. *See id.* The petitioner argued that his Vienna claim could be heard in federal court because the Convention is the "supreme law of the land" and supercedes the procedural default doctrine. *See id.* at 1354.

138. *Id.* at 1355.

139. *See id.*

140. *See id.*

141. *Id.* (citing *Reid*, 354 U.S. at 18).

142. AEDPA reads in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on 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 . . . .
>
> (e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made
>
> retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C.A. § 2254(a), (e)(2) (West Supp. 1998).

143. *See Greene*, 118 S. Ct. at 1355.

evidentiary hearing in Breard's case, he could not establish how a violation of his rights under the Vienna Convention prejudiced him.[144] Third, the Court indicated that even if the Vienna claim was properly raised and proven, it would be unlikely Breard's conviction would be overturned without some showing of an effect on the trial.[145]

The majority then moved to address the case brought by Paraguay. The Court began by asserting that "neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States courts to set aside a criminal conviction and sentence for violation of consular notification provisions."[146] In addition, the Court rejected Paraguay's argument that its claim fit into the "continuing violation" exception to the immunity from suit provided to states by the Eleventh Amendment.[147] The Court held that the violation of Breard's rights was a singular occurrence that happened in the past with no continuing effect.[148]

Furthermore, the Court rejected the contention that the Consul General of Paraguay could bring a parallel suit under § 1983.[149] The Court felt it was "clear" that Paraguay was not a "person" within the meaning of § 1983 and the country was not "within the jurisdiction" of the United States, as required by the statute.[150] The majority concluded by holding that "since the Consul General is acting only in his official capacity, he has no greater ability to proceed under § 1983 than does the country he represents."[151]

At the end of its opinion, the Court indicated that it was "unfortunate" that this case arose while Paraguay had a suit pending against the United States in the International Court of Justice (ICJ).[152]

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144. *See id.* Breard attempted to argue that his claim was so novel that it could not have been discovered any earlier. The Court assumed that was true, but stated such a novel claim would then be barred on habeas review. *See id.*; *see also Teague*, 489 U.S. at 288.

145. *Greene*, 118 S. Ct. at 1355. The Court noted that Breard's assertion of prejudice could be considered even more speculative "than the claims of prejudice courts routinely reject in those cases were [sic] an inmate alleges that his plea of guilty was infected by attorney error." *Id.* at 1355-56.

146. *Id.* at 1356.

147. *See id.*

148. *See id.*

149. *See id.*

150. *Id.*

151. *Id.*

152. *See id.* In early April 1998, Paraguay brought suit against the United States asserting its Vienna Convention claim in the International Court of Justice. *See id.* at 1354. The ICJ asserted jurisdiction over the issue. *See id.* On April 9, 1998 the ICJ issued a "Request for the Indication of Provisional Measures Order" demanding that the United States not execute Breard before the conclusion of the ICJ proceedings. *See* Paraguay v. United States of America (visited Oct. 10, 1998) <http://www.icj-cij.org/idocket/ipaus/ipausframe.htm>. The Court and the Governor of Virginia ignored the order and Breard was executed on April 14, 1998, the same day

However, unlike the executive branch that may engage in "diplomatic discussion," the Court stated it was bound to resolve the matter before it under the law.[153] Therefore, it could not and would not prevent the Governor of Virginia from carrying out Breard's scheduled execution.[154] "If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him."[155] The writ of habeas corpus, the motion to leave to file a bill of complaint, the petitions for certiorari, and the application for a stay of execution were all denied.[156]

Following the majority opinion, Justice Souter added a statement concurring with the majority decision.[157] He agreed that the lack of a "causal connection" between alleged violations of the Vienna Convention by the state of Virginia and Breard's eventual conviction and sentence barred the petitioner relief on the theory presented.[158] In addition, Souter concurred in the Court's reasoning denying that the country of Paraguay or any Paraguayan representative acting in his official capacity was a statutory "person" under 42 U.S.C. § 1983.[159] For these reasons, Justice Souter stated that he "voted to deny Paraguay and Breard's individual petitions for certiorari, Paraguay's motion for leave to file a bill of complaint, Breard's application for an original writ of habeas corpus and the associated requests for a stay of execution."[160]

Justice Stevens filed a dissenting opinion.[161] He disagreed with the fact that the writ of habeas corpus was reviewed on an expedited timetable.[162] Stevens cited Supreme Court Rule 13.1 which would normally give the petitioner ninety days to file a writ of certiorari to review the entry of judgment by the Court of Appeals on a petition for a federal writ of habeas corpus.[163] He went on to state that the Court had been "deprived of the normal time for considered deliberation by

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Breard v. Greene was decided. *See* William J. Aceves, *Application of the Vienna Convention on Consular Relations*, 92 A.J.I.L. 517, 518 (1998) (discussing the ICJ case as connected to Breard v. Greene).

153. *Greene*, 118 S. Ct. at 1356.
154. *See id.*
155. *Id.*
156. *See id.*
157. *See Breard*, 118 S. Ct. at 1356.
158. *Id.*
159 *Id.*
160. *Id.*
161. *See id.* at 1356-57.
162. *See id.* at 1357.
163. *Id.*

the Commonwealth's decision to set the date of petitioner's execution for today."[164] Justice Stevens asserted that there was "no compelling reason" for not adhering to procedures established for the disposal of noncapital cases.[165] He felt that "the international aspects of this case provide an additional reason for adhering to our established rules and procedures."[166] Because of Justice Stevens' stated reasons, he dissented on what he termed the Court's "decision to act hastily rather than with the deliberation that is appropriate in a case of this character."[167]

Justice Breyer also filed a dissenting opinion.[168] He agreed with Justice Stevens' observation that inadequate time had been given to appropriately consider the issues in the case.[169] In particular, Justice Breyer believed that the petitioner's argument that the novelty of his Vienna Convention claim demonstrated "cause" for his failure to raise the claim at the state level needed more time for consideration.[170] He indicated that he believed the petitioner could also argue that the nature of his claim was of sufficient importance "as to 'create a watershed rule of criminal procedure,' which might overcome the bar to consideration otherwise posed by *Teague v. Lane*.'"[171] In addition, petitioner's argument that the violation of his rights under the Vienna Convention "prejudiced" him by separating him from Paraguayan consular officials at a crucial phase of his case may have been determined to have merit if the Court had the advantage of a fuller briefing.[172] Justice Breyer also emphasized that additional briefing would give the Court appropriate time to consider the "relevance of proceedings in an international forum."[173] In agreement with Justice Stevens, Justice Breyer stated that he could find no special reason to stray from the rules of the Court in this case and stated he would grant the stay of execution and consider the petitions for certiorari in the normal timeframe.[174]

Justice Ginsberg was the final Justice to dissent.[175] In one brief sentence, she summarily stated that she would also grant the stay of

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164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *See id.*
169. *See id.*
170. *See id.*
171. *Id.* (citing *Teague v. Lane*, 489 U.S. 288, 311 (1989)).
172. *See id.*
173. *Id.*
174. *Id.*
175. *See id.*

execution so the petition for certiorari to review the Court of Appeal's judgment on the writ of habeas corpus could be considered in the normal timely manner.[176]

IV. ANALYSIS AND CRITICISM

The decision in the noted case is an issue of first impression for the Supreme Court but is consistent with the way various courts of appeal have resolved the Vienna Convention claim issue.[177] The *Breard*, *Murphy*, and *Faulder* courts all agree that a Vienna Convention claim not raised in state court is procedurally barred from review on petition for federal habeas corpus.[178] In addition, the noted case cites the same procedural reasons for denying the petition for federal habeas corpus as the lower courts.[179] The uniqueness of the case is in Paraguay's lawsuit in federal court. This suit is one of the first where a foreign nation has gone beyond filing an amicus brief and actually instituted proceedings in federal court praying for relief from the violation of its rights under the Vienna Convention.[180] However, the Supreme Court's refusal to stay Breard's execution and its insistence on reviewing the writ on an expedited timetable does not fairly address Paraguay's, or Breard's, claims. This leaves the Court with a decision that while correct procedurally, is harmful to the United States in terms of the policy implications in the international arena.

The principle of *pacta sunt servanda*[181] has been called the "fundamental principle of the law of treaties."[182] The Vienna Convention on the Law of Treaties states that "[e]very treaty in force is binding upon the parties to it and must be performed in good faith."[183] The United States Constitution also acknowledges that a treaty is the "supreme law of the land."[184] However, in cases where

176. *Id.*

177. *See Pruett*, 134 F.3d at 615; *Murphy*, 116 F.3d at 97; *Faulder*, 81 F.3d at 515; *Calderon-Medina*, 591 F.2d at 529.

178. *See Pruett*, 134 F.3d at 620; *Murphy*, 116 F.3d at 100; *Faulder*, 81 F.3d at 517. *Calderon-Medina* does not address this issue as it concerns an unlawful deportation proceeding. *See Calderon-Medina*, 591 F.2d at 530.

179. *See Pruett*, 134 F.3d at 620; *Murphy*, 116 F.3d at 100; *Faulder*, 81 F.3d at 515.

180. *See* Aceves, *supra* note 152, at 517-18; Kadish, *supra* note 19, at 565.

181. "Agreements must be obeyed." *See* Kadish, *supra* note 19, at 566 n.2 (discussing the principle of *pacta sunt servanda*).

182. *Id.* (citing Reports to the International Law Commission to the General Assembly, 2 Y.B. Int'l L. Comm'n 211, U.N. Doc. A/6309/Rev.1).

183. *Id.* (citing the Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339).

184. U.S. CONST. art. VI.

the Vienna Convention claim is raised, the United States is permitting noncompliance with the "supreme law of the land" to go unpunished.[185] In *Faulder v. Johnson*, the state of Texas admitted that it violated Faulder's rights under the Vienna Convention.[186] Yet, in making its decision, the Fifth Circuit, while registering its disapproval of Texas' violation, ignored this flagrant violation of a treaty by basically stating that even if Faulder had known of his right to contact the Canadian consulate, it would not have helped him in his court proceedings.[187] The court in essence declared that the exercise of the rights embodied in Article 36, at least in Faulder's case, was unimportant.[188]

The Supreme Court continues this duality regarding America's commitment to uphold the Convention in *Breard*. In one of the closing paragraphs of the Court's opinion, the justices make reference to the Secretary of State sending a letter to the Governor of Virginia.[189] In the letter, Secretary Madeline Albright urged the governor to stay Breard's execution because she felt the execution could lead foreign nations to believe the United States does not take its obligations under the Convention seriously.[190] Secretary Albright also felt it might negatively affect the ability of Americans to be protected when living or traveling abroad.[191] However, at the same time Albright was making her plea, the Supreme Court held, in effect, that the violation of rights under the Vienna Convention was inconsequential if the issue was not raised properly on a procedural level.[192] This duality created by the executive and judicial branches of government directly contradicts the Constitutional proposition that a treaty is the "supreme law of the land."

V. CONCLUSION

When the Vienna Convention applies to American nationals in foreign countries the United States demands strict compliance with

185. The United States made no reservations to the Vienna Convention when it signed the treaty, so theoretically there is no excuse for noncompliance. *See* Gregory Dean Gisvold, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771, 782 n.46 (1994).

186. The Assistant Attorney General of Texas investigated the allegation of a violation and could not find evidence of Faulder being advised he could contact the Canadian consulate. *See Faulder*, 81 F.3d at 520.

187. *See id.*

188. *See id.*

189. *See Greene*, 118 S. Ct. at 1356.

190. *See* Aceves, *supra* note 152, at 520.

191. *See id.*

192. *See Greene*, 118 S. Ct. at 1355.

Article 36.[193] However, American authorities regularly violate the notification portion of the same article.[194] If the United States wishes foreign countries to honor the rights of its citizens under the Vienna Convention, it must do the same.[195] As Secretary Albright indicated, a lower level of safety for Americans abroad may be an unintended consequence of the United States ignoring its treaty obligations.[196] The *Breard* decision should put attorneys representing foreign nationals on notice as far as the procedural aspects of raising the Vienna Convention claim. Once a properly raised claim is presented, American courts will be required to squarely face the United States its international treaty obligations and judge their ultimate importance. Until this happens, the violation of rights of foreign nationals can be convincingly disguised behind procedure.

When the Vienna Convention claim was just beginning to be addressed in United States courts, Judge Taksugi of the Ninth Circuit summed up what should be the duty of the United States under not just the Vienna Convention but any treaty it is a party to:

> This nation must manifest integrity in our treaties with foreign countries. To honor the provisions of Article 36 of the Vienna Convention on Consular Relations . . . mandates a sense of justice and decency. To do anything less is a severe erosive compromise of our very essence equal if not greater than a constitutional violation.[197]

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193. When two Americans were detained in Syria and not informed of their right to contact the American consulate in Damascus, the State Department stated in conferring with Syria that the Vienna Convention is "widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention." Uribe, *supra* note 18, at 385. The United States also relied on Article 36 in 1977 when two American missionaries were detained in El Salvador after photographing a security-related installation and were not informed of their Article 36 rights. *See* Shank, *supra* note 31, at 729. The government demanded to know why the pair was not informed of their Article 36 rights and why the United States was not informed of their detention until 28 hours later. *See id.* The United States took the same strong arm stance eight years later in Nicaragua when two Americans were detained. *See id.* at 729 n.52.

194. In the case of Angel Breard, the Paraguayan consulate did not learn of his arrest and conviction until "some point after" January 1996 when the Virginia Supreme Court refused his petition for appeal almost three years after his conviction. *See Allen*, 134 F.3d at 625. In the case of Joseph Faulder, the Canadian consulate was not notified until the post-conviction phase which was several years after Faulder's second trial. *See* Uribe, *supra* note 18, at 411. Mario Murphy indicated in an amendment to the petition for writ of habeas corpus that he had never been informed of his rights under the Convention before or during the four years since his sentencing. *See id.* at 416.

195. *See* Gisvold, *supra* note 185, at 793.

196. *See* Aceves, *supra* note 152, at 520.

197. *Calderon-Medina*, 591 F.2d at 531 (Takasugi, D.J., dissenting).