

December 2004

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Repository Citation

Linda A. Malone, *From Breard to Atkins to Malvo: Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty*, 13 Wm. & Mary Bill Rts. J. 363 (2004), <https://scholarship.law.wm.edu/wmborj/vol13/iss2/5>

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FROM *BREARD* TO *ATKINS* TO *MALVO*: LEGAL INCOMPETENCY AND HUMAN RIGHTS NORMS ON THE FRINGES OF THE DEATH PENALTY

Linda A. Malone*

In *Republic of Paraguay v. Allen*,¹ the *LaGrand Case*,² and *Avena and Other Mexican Nationals*,³ nations pressed their claims in U.S. courts and the World Court that the United States is violating its treaty obligations and human rights obligations under customary international law by failing to provide consular notice before imposing the death penalty on their nationals. These claims proceeded while three seemingly unrelated, but significant, developments occurred in United States Supreme Court jurisprudence with potential importance for future cases concerning the lack of consular notification. The first such development is the 2003 Supreme Court decision in *Atkins v. Virginia*, in which the Court concluded that the execution of mentally retarded individuals is cruel and unusual punishment prohibited by the Eighth Amendment.⁴ The second development was the growing receptiveness and acceptance by a majority of the Court of international law norms in interpretation of the Bill of Rights, most notably and recently in *Lawrence v. Texas*.⁵ Even more recently, a jury in Virginia refused to impose the death penalty on Lee Malvo, although Virginia is one of fifteen states which still allow the death penalty for juveniles between the ages of sixteen and eighteen.⁶ The United States is one of only two countries (the other being Somalia) which has not ratified the Convention on the Rights of the Child,⁷ which prohibits imposition of the death

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¹ 134 F.3d 622 (4th Cir. 1998).

² *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27), *available at* <http://www.icj-cij.org/iccjwww/idecisions.htm>.

³ *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), *available at* <http://www.icj-cij.org/iccjwww/idecisions.htm>.

⁴ 536 U.S. 304 (2002).

⁵ 539 U.S. 558 (2003).

⁶ *See* The International Justice Project, *Juveniles Statistics Table* (as of Mar. 2003), *at* <http://www.internationaljusticeproject.org/juvStatutes.cfm> (last visited Sept. 14, 2004).

⁷ *See* Office of the United Nations High Commissioner for Human Rights, *Status of*

penalty on anyone under the age of eighteen, and the constitutionality of the death penalty for juveniles is pending before the Court.⁸

Crucial to the Court's decision in *Atkins* was the Court's concern that mentally retarded defendants could not fully comprehend the process or the punishment in death penalty cases,⁹ and lacked the moral culpability of other perpetrators.¹⁰ Many of the same concerns are at the heart of the consular notice requirement. The jury verdict in the *Malvo* case suggests that growing public rejection of the death penalty for juveniles has outpaced the Court's decision-making, and that international norms prohibiting the death penalty for juveniles are more reflective of public opinion within the United States than either domestic legislation or the Court's decisions would suggest. *Atkins* and *Lawrence* provide an evident jurisprudential framework for abolition of the death penalty for juveniles, as well as renewed justification for Supreme Court consideration of the necessary remedy for the failure to provide consular notice. Finally, in light of international decisions binding on the United States indicating that the failure to provide consular notice violates fundamental notions of due process and necessitates judicial review, U.S. courts can no longer deny review and reconsideration of death penalty sentences obtained without the required consular notice.

I. BEGINNING WITH *BREARD*

The factual and procedural background of the *Breard* and *Paraguay* cases has never been fully delineated. This background continues to be important for several reasons, and merits a detailed examination. To date, these companion cases represent the fullest examination of the issue of consular notification in U.S. federal courts, including the Supreme Court. In addition, these early cases provide a comprehensive overview of every major legal issue related to providing or compelling consular notification.

Angel Francisco Breard was a Paraguayan and Argentinian dual-national who was convicted, sentenced to the death penalty, and executed by the state of Virginia for the crimes of rape and murder.¹¹ Although his conviction was obtained on

Ratifications of the Principal International Human Rights Treaties, at <http://www.unhchr.ch/pdf/report.pdf> (June 9, 2004).

⁸ *Convention on the Rights of the Child*, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49 at 166, UN Doc. A/44/49 (1989), revised by U.N. Doc. A/RES/44/25/Corr. 1 (1996), reprinted in 28 I.L.M. 1457 (1989).

⁹ 536 U.S. at 306.

¹⁰ *Id.* at 320–21.

¹¹ Breard was convicted of attempted rape and capital murder of Ruth Dickie, a single, thirty-nine-year-old woman who resided alone in Arlington County, Virginia. *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1271 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998). The jury imposed the death penalty based on findings of

sufficient evidence and he testified to committing the murder,¹² the trial procedure was flawed. Breard was not provided with the opportunity to obtain consular assistance as required by treaties between the United States and Paraguay.¹³ Such assistance would have provided him with fundamental protections essential to due process because foreign consular officials ensure that their nationals are provided a fair process and that their nationals understand the mechanisms of the judicial process that they face. Without these protections, the foreign nationals are unable to represent themselves or assist counsel adequately during their criminal proceedings. Even if a foreign national is ultimately found guilty of the accused crime, consular assistance is still necessary because an understanding of the criminal proceeding can drastically affect the sentence.

Correspondingly, in the *Breard* case, Paraguay was denied its right to assist its citizen while he was incarcerated in the United States. The claims of Breard and Paraguay to establish their rights under the international treaties were at the time relatively unique, but are now one of about a dozen instances in which states have sought to compel fulfillment of these international obligations entered into by the federal government of the United States.¹⁴

Currently, there is no accepted procedure by which a foreign country may seek redress in United States domestic courts for violations of the Vienna Convention. The tension between the individual states and federal government that occurs when determining how to ensure domestic compliance with international treaties highlights these problems within the federalist system. The United States' dual system of government is not recognized in international law as an excuse for noncompliance with international treaties, and the continued noncompliance of the individual states with the international obligations entered into by the federal government must be addressed. Without some change in domestic attitudes and policies, it is likely that noncompliance of the states with international treaties will

“vileness” and “future dangerousness” and on August 22, 1993 the trial court sentenced Breard in accordance with the jury’s verdicts. *Breard v. Commonwealth*, 445 S.E.2d 670, 673 (Va.), *cert. denied*, 513 U.S. 971 (1994).

¹² See *Breard*, 445 S.E.2d at 674. Conclusive evidence of Breard’s pubic hair and DNA from semen was found on Dickie’s body. Breard testified that he forced his way inside Dickie’s apartment, stabbed her several times, removed her pants, and then ran away through a kitchen window when a maintenance man, responding to the commotion, knocked on the door. Lastly, Breard stated that on the night of the crime, he felt he was under a curse placed on him by his ex-father-in-law.

¹³ See *Breard v. Pruett*, 134 F.3d 615 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998).

¹⁴ See, e.g., *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31), available at <http://www.icj-cij.org/icjwww/idecisions.htm>; *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27), available at <http://www.icj-cij.org/icjwww/idecisions.htm>.

be viewed as an excuse for other countries to abdicate their treaty responsibilities to the United States as well.

A. Vienna Convention Violations

The Vienna Convention¹⁵ is an agreement between the ratifying countries as to how certain consular relations among the nations shall be conducted. In particular, Article 36 sets out specifications for “Communication and Contact with Nationals of the Sending State.”¹⁶ The treaty provides procedural safeguards similar in effect and importance to *Miranda* rights. Article 36 provides:

With a view to facilitating the exercise of consular functions relating to nationals of the sending State: . . . (b) if [the national] 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 subparagraph.*¹⁷

The last sentence was the central basis for the claim that Virginia violated international law during Breard’s arrest, conviction, and sentencing. Breard should have been informed “without delay” upon detention of his right to contact and communicate with his consular post. Although foreign nationals are not

¹⁵ Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 262 [hereinafter Vienna Convention]. The treaty was ratified by the President of the United States on November 12, 1969, and entered into force with respect to the United States on December 24, 1969. Paraguay ratified the Vienna Convention on December 23, 1969. The treaty has been in force between the United States and Paraguay as of thirty days after ratification. *E.g.*, Petitioner’s Brief at 7, *Republic of Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996), *aff’d*, 134 F.3d 622 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998) (No. 3:96CV745).

¹⁶ Vienna Convention, *supra* note 15, at art. 36.

¹⁷ *Id.* at para. 1(b) (emphasis added).

required to use consular assistance under this provision,¹⁸ they are guaranteed the right to be informed of its availability. In Breard's case, he had no opportunity to decide if he would use consular help because he was not informed of his right to contact the consulate. Additionally, the consular officials, and thus the Republic of Paraguay, were denied their right guaranteed under the Vienna Convention 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."¹⁹ The authorities in Virginia violated Breard's rights under the Vienna Convention, and simultaneously violated Paraguay and Argentina's rights under the Vienna Convention, by not complying with the notice provision within the treaty.²⁰

Although Virginia has a right to enforce its state criminal laws, it operates within a constitutional system that mandates deference to laws and treaties of the federal government. In addition to its normal procedures, Virginia must, under the Supremacy clause, make an additional effort to follow the requirements of international agreements such as those found in the Vienna Convention. The treaty clearly expresses:

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.*²¹

Virginia was notified of this requirement through notices published and sent to the local and state governments by the U.S. Department of State.²² The message entitled "Notice: If You Have Detained a Foreign National, Read This Notice," dated September 1, 1991, was addressed to law enforcement personnel to inform them of the United States' obligation under international agreements to notify foreign authorities when foreign nationals are detained.²³ In particular, the notice

¹⁸ The United States does not have a specific bilateral agreement with Paraguay or Argentina requiring them under all circumstances to notify the national's country, rather the Vienna Convention is a multilateral agreement which gives the national the right to be notified so that he can contact his consular officials. *See id.*

¹⁹ *Id.* at para. 1(c).

²⁰ *See* Vienna Convention, *supra* note 15. Note that Argentina did not file suit against the United States with regard to the Vienna Convention violations.

²¹ *Id.* at para. 2 (emphasis added).

²² *See* Petition for a Writ of Habeas Corpus, Exhibit 7, Breard v. Netherland, 949 F. Supp. 1255 (E.D. Va. 1996), *aff'd sub nom.* Breard v. Pruett, 134 F.3d 615 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998) (No. 3:96CV366) (exhibit 7).

²³ *Id.* An additional notice entitled "Note For Law Enforcement Officials On Detention

states that “[t]he arresting official should in all cases immediately inform the foreign national of his right to have his government notified concerning the arrest/detention.”²⁴ If such a request is made, notification to the appropriate consulate must be made without delay.²⁵

The notices sent to local officials by the Department of State make it clear that state and local governments are legally bound by the requirements of this international agreement.²⁶ In fact, the obligations of such treaties could not be carried out without the cooperation of state and local governments.

Compliance with these agreements is of utmost importance to U.S. citizens, who must be able to depend upon reciprocal rights should they be subject to a judicial process in another country.²⁷ “The cooperation of state and local law enforcement authorities is essential if the United States is to carry out its notification obligations effectively, and to ensure that Americans arrested or detained abroad obtain the treatment to which they are entitled.”²⁸ The treaty safeguards protect foreign citizens from becoming targets of corrupt or poorly handled cases: “The Vienna Convention recognizes that sovereign states, such as the Republic of Paraguay, have an interest in protecting the life, liberty and property of their citizens abroad, and that interest can only be safeguarded by protecting the functions of consular officers.”²⁹

The United States has long acknowledged the importance of the rights afforded to detained persons, and provides safeguards in its domestic justice system through a system of guaranteed rights, such as *Miranda* rights.³⁰ The rights afforded by the Vienna Convention are similar in principle to those provided by *Miranda*. Consuls are available to help maintain the integrity of the criminal procedure employed. By informing foreign nationals of their rights under the Vienna Convention, as required by the treaty, consular officials place a defendant in a better position to look after

Of Foreign Nationals” reiterating the obligations of the local governments and giving a current list of phone numbers (including the countries formerly part of the USSR and Yugoslavia) dated October 1, 1992 was also sent to local law enforcement officials.

²⁴ *Id.*

²⁵ Vienna Convention, *supra* note 15, at art. 36, para. 1(b).

²⁶ The United States Senate ratified the Vienna Convention on December 24, 1969, and by doing so made it applicable to Virginia through the Supremacy Clause of the United States Constitution. U.S. CONST., art VI, cl. 2. *See also* Petition for a Writ of Habeas Corpus at 9, Exhibit 7A, *Breard* (No. 3:96CV366). For more in-depth analysis, see discussion *infra* Part II.E on Federalism and International Law.

²⁷ *See* Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELEY J. INT’L L. 147, 187–88 (1999).

²⁸ Petition for a Writ of Habeas Corpus, Exhibit 7A, *Breard* (No. 3:96CV366).

²⁹ Petitioner’s Brief at 8, *Republic of Paraguay v. Allen*, 949 F. Supp 1269 (E.D. Va. 1996), *aff’d*, 134 F.3d 622 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998) (No. 3:96CV745).

³⁰ *See generally* *Miranda v. Arizona*, 384 U.S. 436 (1966).

his or her own interests, to understand the legal system confronted, and to avail himself of protections that our justice system deems of fundamental importance.

Similar to the fears underlying the Fifth Amendment,³¹ a concern underlying the consular notice requirement is that detainees may act in a particular way or say something incriminating simply because of their cultural perceptions of the circumstances. “A foreigner may . . . be particularly vulnerable to deception used by police detectives as a standard interrogation technique. . . . [A]n accused from a country with an authoritarian government may anticipate torture or retaliation against family members; thus, even cajoling statements by police interrogators may evoke fear.”³² Such detainees are “unfamiliar with U.S. customs, police policies, and criminal proceedings.”³³ As is true with *Miranda* cases, a violation of the Vienna Convention resulting in “lack of consular access may lead to the conviction of a person who otherwise might be acquitted Apart from the question of guilt, a lack of consular access may result in a death sentence for a person who might otherwise be sentenced to life imprisonment.”³⁴

Overall, a violation of such fundamental procedural rights should result in an action being declared void without a requirement of prejudice or any additional showing.³⁵ This argument is based on the fact that both *Miranda* rights and the rights afforded by the Vienna Convention are absolute rights. The right of consular access under the Vienna Convention is an absolute right because “[n]othing in the text of Article 36 suggests that relief for a foreign detainee should depend on whether he can show prejudice. Moreover, requiring a showing of prejudice would often defeat the right.”³⁶ Because the right to consul is an absolute right embodied

³¹ The *Miranda* Court noted that police are instructed by police manuals to take the guilt of the subject as fact during an interrogation, causing the individual to be more forthcoming with actions or statements. *Id.* at 450. “Even without employing brutality, the ‘third degree’ or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.” *Id.* at 455. Such an atmosphere tends to make individuals succumb to the interrogator. *Id.* at 457.

³² 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, 720 (1995).

³³ *Id.*

³⁴ *Id.* at 727.

³⁵ See generally Valerie Epps, *Violations of the Vienna Convention on Consular Relations: Time for Remedies*, 11 WILLAMETTE J. INT’L L. & DISP. RESOL. 1 (2004); Howard S. Schiffman, *Breard and Beyond: The Status of Consular Notification and Access Under the Vienna Convention*, 8 CARDOZO J. INT’L & COMP. L. 27 (2000).

³⁶ Shank & Quigley, *supra* note 32, at 751. The only reported case to address Article 36 violations prior to the 1998 *Breard* decision by the Supreme Court was *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979). According to Shank and Quigley, “The Ninth Circuit’s decision to apply Article 36 was consistent with the Supremacy Clause of the United States Constitution, which requires that treaties be applied as law by federal and state court judges. Under the Supremacy Clause, treaties represent a part of ‘the Supreme Law of the Land’ and are on par with an act of Congress.” Shank & Quigley, *supra* note 32, at 731.

in the Vienna Convention, which aims to protect detainees from unfair procedures and trials, a violation of this right should confer the same authority on a court to reverse a decision as does a violation of *Miranda*.

B. Breard

As evidenced by the outcome of his case, the notification was not provided to Breard before or during his trial. In this instance, not only was Breard entitled to the integrity of a fair trial, he was also entitled to the rights guaranteed under the Vienna Convention. These violations had a fundamental impact on the outcome of the case because Breard was denied the safeguards the treaty would have normally placed on the process,³⁷ safeguards which in his case might have prevented him from taking the stand, admitting guilt on the stand, and allowed for evidence of a brain injury sustained and documented only in Paraguay.

After exhausting his avenues for appeal at the state level, Breard filed for habeas corpus relief in federal district court, with one claim for relief based on the Vienna Convention violations.³⁸ Breard pointed to a series of procedural flaws that demonstrated his need for consular assistance.³⁹ Despite the strong evidence against him, and contrary to the advice of his attorney, Breard refused to accept a plea arrangement offered by the Commonwealth.⁴⁰ Breard also admitted to the murder and attempted rape of Dickie, again against the advice of his attorney at trial.⁴¹ He believed that by confessing that he had performed these acts under a satanic curse and explaining that he had since been freed from this curse by a rebirth in Jesus Christ, he would be found not guilty.⁴² He was under a mistaken belief from his own culture that this confession was how he could best obtain a lenient sentence in the American judicial system. The district court, however, dismissed Breard's

Because the treaty creates an individual right and does not require congressional action to be implemented, Article 36 is self-executing. *Id.* at 730–32. For discussions of how federal and state courts have treated challenges based on Article 36 violations since the 1998 Breard decision by the Supreme Court, see generally Anthony N. Bishop, *The Unenforceable Rights to Consular Notification and Access in the United States: What's Changed Since the LaGrand Case?*, 25 HOUS. J. INT'L L. 1 (2002); Robert Iraola, *Federal Criminal Prosecutions and the Right to Consular Notification Under Article 36 of the Vienna Convention*, 105 W. VA. L. REV. 179 (2002).

³⁷ See *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1273 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998).

³⁸ See *Breard v. Netherland*, 949 F. Supp. 1255, 1260 (E.D. Va. 1996), *aff'd sub nom.*, *Breard v. Pruett*, 134 F.3d 615 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998).

³⁹ *Id.* at 1260 (listing claims presented in the petition).

⁴⁰ Petition for a Writ of Habeas Corpus at 6, *Breard* (No. 3:96CV366).

⁴¹ *Id.*

⁴² *Id.* at 6–7.

claims and held that the claim was procedurally defaulted because Breard had never raised the issue in state court.⁴³

After Breard's habeas corpus petition was dismissed by the district court, Breard filed an appeal in the United States Court of Appeals for the Fourth Circuit in which he raised the following issues: the Vienna Convention violation and whether it was procedurally defaulted; whether he made a sufficient showing of "cause" and "prejudice" or "a fundamental miscarriage of justice" so that his claim should not be procedurally defaulted; and whether the death penalty was arbitrarily sought.⁴⁴

The Fourth Circuit affirmed the district court's denial of Breard's habeas corpus petition, holding that the claims under the Vienna Convention were precluded under the principles of exhaustion and procedural default.⁴⁵ In Virginia, a claim is procedurally barred if the petitioner could have raised a claim in the initial petition and the facts were either "known or available" to the petitioner at the time.⁴⁶ Since Breard did not raise the issues involving the Vienna Convention in the state proceedings, it followed that he would be barred from raising them at the federal level.

Breard responded by arguing that he had "no reasonable basis" for asserting the Vienna Convention until after April 1996, when the Fifth Circuit held in *Faulder v. Johnson*⁴⁷ that an "arrestee's rights under the Vienna Convention were violated when Texas officials failed to inform the arrestee of his right to contact the Canadian Consulate."⁴⁸ Furthermore, precisely because Virginia failed to advise Breard of his rights under the Vienna Convention, he was unaware he had such rights.⁴⁹ The Court rejected this argument, concluding that because the Vienna Convention had

⁴³ *Breard*, 949 F. Supp. at 1263.

⁴⁴ Petition for a Writ of Habeas Corpus, *Breard* (No. 3:96CV366). See *Breard*, 949 F. Supp. 1255; Appellant's Opening Brief, *Breard v. Pruett*, 134 F.3d 615 (4th Cir.), cert. denied, 523 U.S. 371 (1998) (No. 96-25).

⁴⁵ *Breard*, 134 F.3d at 618-19. The court cited the principle that a state prisoner must exhaust all available state remedies before applying for federal habeas relief. *Id.* at 619. This exhaustion requirement is related to the procedural default rule because a procedural default can occur "when a habeas petitioner fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.'" *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991)). The Fourth Circuit also held that the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), applied in this case because Breard filed his federal habeas petition after the AEDPA went into effect. The specific provisions of AEDPA, however, did not affect the final judgment. *Breard*, 134 F.3d at 618.

⁴⁶ *Breard*, 134 F.3d at 619 (quoting *Hoke v. Netherland*, 92 F.3d 1350, 1354 n.1 (4th Cir. 1996)).

⁴⁷ 81 F.3d 515 (5th Cir. 1996).

⁴⁸ *Breard*, 134 F.3d at 619.

⁴⁹ *Id.*

been in effect since 1969, a “reasonably diligent” search by Breard’s counsel should have discovered the treaty.⁵⁰ Therefore, Breard was foreclosed from presenting any claim that he did not raise in the state proceedings. The court found no justification for the procedural default, ruled that Breard was not entitled to relief under the Vienna Convention, and ultimately affirmed the district court’s judgment.⁵¹

Judge Butzner wrote a particularly insightful concurring opinion.⁵² He first noted the importance of the Vienna Convention and emphasized the “mandatory and unequivocal” nature of its language.⁵³ The judge then stated that the relevant provisions of the Vienna Convention should be implemented *before* the trial when possible.⁵⁴ Judge Butzner then stated:

The protections afforded by the Vienna Convention go far beyond Breard’s case. United States citizens are scattered about the world Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that “international law is founded upon mutuality and reciprocity”

. . . The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty *and all states of this nation*.⁵⁵

Although he concurred with the procedural default theory, Judge Butzner emphasized the importance of the Vienna Convention and mutual respect for its implementation.

Breard submitted a petition for a writ of certiorari to the United States Supreme Court; the petition was subsequently combined with Paraguay’s case.⁵⁶ On the day of Breard’s scheduled execution, five Justices, and Justice Souter in a concurring opinion, ruled against both Breard and Paraguay and declined to grant certiorari.⁵⁷ The Court began by stating that it was clear that Breard had procedurally defaulted

⁵⁰ *Id.* at 620 (citing *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997)). No attorney with expertise in international law was involved in Breard’s case until the habeas stage.

⁵¹ *Id.* The court also ruled against Breard’s various other claims.

⁵² *Id.* at 621–22 (Butzner, J., concurring).

⁵³ *Id.* at 622.

⁵⁴ *Id.*

⁵⁵ *Id.* (quoting *Hilton v. Guyot*, 159 U.S. 113, 228 (1895) (emphasis added)).

⁵⁶ Paraguay had filed suit in federal district court claiming its rights were violated under the Vienna Convention. See *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1271–72 (E.D. Va. 1996), *aff’d*, 134 F.3d 622 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998).

⁵⁷ *Breard v. Greene*, 523 U.S. 371, 378–79 (1998). The Supreme Court’s holding regarding Paraguay’s claims is discussed in text accompanying notes 67–125.

his claim by not raising the claim in the state courts.⁵⁸ The Court held that the argument put forth by Breard and Paraguay that the Vienna Convention trumps the procedural default doctrine was “plainly incorrect for two reasons.”⁵⁹ First, the Court held that it has been recognized in international law that the implementation of a treaty is bound by the procedural rules of the forum state.⁶⁰ The Court then held that under *Wainwright v. Sykes*,⁶¹ the rule in the United States is “that assertions of error in criminal proceedings must first be raised in state court.”⁶² Since this procedure was not followed in Breard’s case, Breard could not raise a claim of a treaty violation before the Supreme Court.⁶³ Second, the Court asserted that the relevant portions of the Vienna Convention had effectively been superseded under the doctrinal “last in time” rule.⁶⁴ In other words, if a treaty and a congressional statute conflict, the most recent will trump the other. Since the Vienna Convention has been in effect since 1969, it was superceded, according to the Court, in part by the Antiterrorism and Effective Death Penalty Act⁶⁵ (AEDPA), which was passed in 1996. The AEDPA states that a habeas petitioner “alleging that he is held in violation of ‘treaties of the United States’ will, as a general rule, not be afforded an evidentiary hearing if he ‘has failed to develop the factual basis of [the] claim in State court proceedings.’”⁶⁶ Thus, Breard’s ability to obtain relief under the Vienna Convention was limited by the subsequently enacted statute. In doing so, the Court ignored the longstanding rule of judicial decision that a federal statute must first be construed to avoid any conflict with a treaty obligation under the *Charming Betsy* case.⁶⁷ This could easily have been done under the rather vague, generally relevant language of the AEDPA.

The Court then asserted that it would be impossible for Breard to prove his claim since he could not establish how the advice he would have received from consul and the advice he received from appointed counsel would have differed. The Court declared that such a novel claim would be barred on habeas review under

⁵⁸ *Id.* at 375.

⁵⁹ *Id.*

⁶⁰ *Id.* (The court cited three of its own cases for this proposition and no international law sources). The Court failed to recognize that the rule is in fact that *how* the treaty is implemented is left to the forum state, not *whether or not* it is implemented. It also failed to acknowledge the *separate* and additional obligation of the United States under Article 36(2): to give full effect to the purposes of consular notification. *See supra* text accompanying note 21.

⁶¹ 433 U.S. 72 (1977).

⁶² *Breard*, 523 U.S. at 375.

⁶³ *Id.* at 375–76.

⁶⁴ *Id.* at 376 (citing *Reid v. Covert*, 354 U.S. 1, 18 (1957)).

⁶⁵ Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–132, 110 Stat. 1214 (1996).

⁶⁶ *Breard*, 523 U.S. at 376 (quoting 28 U.S.C. § 2254(a), (c)(2) (1994 ed., Supp.IV)).

⁶⁷ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

Teague v. Lane,⁶⁸ thus negating Breard's claim that such a fact should be disregarded due to the nature of the claim.⁶⁹ The Court stated that Breard could not establish that advice and assistance from the consul would have had any impact on his conviction and sentence,⁷⁰ and that the hypothetical acceptance of a plea bargain in return for a life sentence was too speculative to meet the necessary standard of prejudice.⁷¹

C. *Paraguay's Case*

1. *Republic of Paraguay v. Allen*⁷²

The Republic of Paraguay, Jorge J. Prieto, Ambassador from Paraguay, and Jose Dos Santos, Consul General of Paraguay, filed an action in federal district court for declaratory and injunctive relief⁷³ claiming that the violations committed "caused injury both to the Republic of Paraguay's sovereign interest in protecting the life and liberty of its citizens abroad through its consular officers and to the interests of plaintiffs . . . in effectively performing their consular functions."⁷⁴ Paraguay sought the right to exercise effectively its consular function of protecting and assisting Breard during his criminal proceeding in a meaningful manner,⁷⁵ and argued that vacating "Breard's conviction and sentence is . . . the only way Paraguay [could] vindicate *its own rights* under the Treaties, and it is the real party in interest."⁷⁶ This case was novel in that it was the first attempt by a nation to vindicate treaty procedural rights through an action in U.S. federal court. Thus Paraguay sought to vacate the state criminal conviction of its national who was convicted without having been afforded the required treaty protection.⁷⁷

The district court dismissed the suit based on a finding that it lacked subject matter jurisdiction⁷⁸ due to the constitutional limits placed on federal courts by the Eleventh Amendment.⁷⁹ Specifically, the opinion points out that "the Eleventh

⁶⁸ 489 U.S. 288 (1989).

⁶⁹ *Breard*, 523 U.S. at 377.

⁷⁰ *Id.*

⁷¹ *Id.* (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

⁷² *Republic of Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998).

⁷³ *Id.* at 1271-72 (claiming violations of the Vienna Convention, the Treaty of Friendship, Commerce, and Navigation, and of 42 U.S.C. § 1983).

⁷⁴ Opposition to Defendant's Motion to Dismiss at 5, *Paraguay* (No. 3:96CV745).

⁷⁵ *Id.*

⁷⁶ *Id.* at 27.

⁷⁷ See Brief of Amicus Curiae Union Internationale Des Avocats at 8, *Paraguay* (No. 96-2770).

⁷⁸ *Paraguay*, 949 F. Supp. at 1272.

⁷⁹ *Id.* (quoting U.S. CONST. amend. XI, and observing that it prevents the court from

Amendment bars suits by a foreign government against a state government in federal court,⁸⁰ including a suit against a state official which in reality is a suit against a state.⁸¹ An exception to the Eleventh Amendment, established in *Ex Parte Young*, allows parties “at risk of or suffering from a violation of federally protected rights . . . to enjoin the offending state officers”⁸² if they can show both that (1) “they seek a remedy for a continuing violation of federal law and (2) . . . the relief is prospective.”⁸³ The district court, however, determined that the plaintiffs had not established an ongoing violation because the complaint did not show that the defendants continued to deny plaintiffs access to Breard or presently hindered their ability to give him legal assistance. The district court noted that the Paraguayan officials currently had access to Breard and assisted in his habeas corpus petition; thus, the state was not currently in violation of the Vienna Convention.⁸⁴

The district court additionally declared that it was unable to disturb the state court’s decision because the federal claim was “inextricably intertwined with the merits of a state court judgment,” which would, in effect, require the district court to review the state court’s decision.⁸⁵ Even though this was the first forum in which Paraguay sought to vindicate its rights, the court believed that such action would be contrary to legal principles set by the Supreme Court and the Fourth Circuit, which state that a district court “has no authority to disturb a state court ruling regardless of the procedural posture of the litigants.”⁸⁶

Despite the fact the district court decided that it lacked subject matter jurisdiction, it did make several findings in Paraguay’s favor. The court determined that treaties “have the same force as federal law,”⁸⁷ a district court has equitable

having “jurisdiction over actions against a state by ‘Citizens of another State or by Citizens or Subjects of any Foreign State.’”

⁸⁰ *Id.* (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Monaco v. Mississippi*, 292 U.S. 313 (1934)).

⁸¹ *Id.*

⁸² *Id.* (citing *Ex parte Young*, 209 U.S. 123 (1908)).

⁸³ *Id.* (citing *Green v. Mansour*, 474 U.S. 64, 68 (1986)).

⁸⁴ *Id.* at 1273.

⁸⁵ *Id.* (implicating the *Rooker/Feldman* doctrine). The *Rooker/Feldman* doctrine states that a party who has lost in state court cannot turn to federal court to seek review of the state court’s decision because the Supreme Court has exclusive appellate jurisdiction over state court decisions which involve federal law. Claims are not barred, however, when a plaintiff has not been involved in the state action, but is seeking redress for the claim for the first time. See *Plaintiffs-Appellant’s Brief at 23, Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998) (No. 96–2770) (citing 28 U.S.C. § 1257; *Johnson v. De Grandy*, 512 U.S. 997, 1005–06 (1994); D.C. Court of Appeals v. *Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 416 (1923)).

⁸⁶ *Paraguay*, 949 F. Supp. at 1273. The principle behind this rule is that the Supreme Court is to have appellate authority over such actions.

⁸⁷ *Id.* at 1274 (citing *United States v. Alvarez-Machain*, 504 U.S. 655, 668 (1992)).

authority to remedy treaty violations,⁸⁸ and Paraguay, as a party to the treaty, had standing to sue for the violations.⁸⁹ Furthermore, Paraguay was not a third-party seeking to assert the rights of Breard;⁹⁰ the Consul General was a "person" within the meaning of 42 U.S.C. § 1983, and was therefore a proper plaintiff;⁹¹ and finally, the issues were determined not to be moot, but suitable for declaratory relief.⁹²

The plaintiffs appealed the district court's decision, claiming that they sought only prospective injunctive relief to stop any further action based on Breard's unlawful conviction.⁹³ The plaintiffs-appellants asserted that access after Breard had already been arrested, arraigned, tried, and sentenced was ineffective and did not give effect to Paraguay's ongoing, violated treaty rights.⁹⁴ The appellants further argued that consular assistance is to be given at a time when it will be effective,⁹⁵ but that they did not have access when assistance could have meaningfully affected the outcome because the trial and conviction had already occurred.⁹⁶ "In the most fundamental sense, so long as defendants continue to detain Breard and to take steps to carry out a death sentence rendered without permitting the notification and access to which Paraguay is entitled, defendants continue to violate Paraguay's [treaty] rights."⁹⁷

The appellants also stated that the district court had original jurisdiction over their suit because Paraguay had no habeas remedy, was not a party to the state action, and therefore did not seek review of any ruling by the state court.⁹⁸ Additionally, the appellants argued that federal district courts have original jurisdiction over cases involving treaties,⁹⁹ and have the authority to grant an injunction against further action which enforces a state court's ruling, if that ruling was issued in violation of federal law.¹⁰⁰ Lastly, the appellants argued that

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* The district court held the Vienna Convention was not self-executing in the sense of conferring private rights of action for individuals; therefore, according to the district court, Breard could not sue for violations of the Vienna Convention, but Paraguay could because Paraguay is a party to the treaty. *Id.*

⁹¹ *Id.* at 1275.

⁹² *Id.*

⁹³ See Plaintiffs-Appellant's Brief at 12, *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998) (No. 96-2770).

⁹⁴ *Id.* at 16-17.

⁹⁵ *Id.* at 20.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 21.

⁹⁹ *Id.* (citing 28 U.S.C. § 1331, which vests original jurisdiction in the district courts of cases involving treaties).

¹⁰⁰ *Id.* at 22.

because their action was the first attempt to remedy the violations Paraguay suffered, the *Rooker/Feldman* doctrine should not act as a bar to their claims.¹⁰¹

Amicus briefs were filed in support of both sides. The Union Internationale des Avocats amicus brief expressed its view that the only remedy for the violations would be to declare Breard's conviction void.¹⁰² The Union Internationale des Avocats argued that the jurisdictional question should not have been used to analyze the available remedy before the district court had determined whether the case should succeed on the merits.¹⁰³ If Paraguay succeeded on the merits, then the court could at that time structure a proper equitable remedy.¹⁰⁴

The United States filed an amicus brief supporting dismissal of the action asserting that the claims were nonjusticiable under the "political question" doctrine or, in the alternative, that Paraguay did not have a cause of action.¹⁰⁵ The United States argued that the treaty violations "are issues of a diplomatic and political nature regardless of which kind of official has committed the violation."¹⁰⁶ The United States agreed that the primary issue at stake was how to remedy effectively the violations which Paraguay suffered; however, it believed that this determination is to be made by the executive branch when the dispute is not personal in nature.¹⁰⁷ The United States also argued that the political branches of the federal government, not the individual states, deal with foreign nations.¹⁰⁸

The United States claimed that Paraguay had no cause of action under federal law because "neither an Act of Congress nor the Vienna Convention provides for

¹⁰¹ *Id.* at 25. See note 85 *supra* for an explanation of the *Rooker/Feldman* doctrine.

¹⁰² See Brief for Amicus Curiae Union Internationale Des Avocats at 8, *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998) (No. 96-2770).

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.* The Eleventh Amendment bar posed no threat to such a remedy since Paraguay did not seek money damages, and the Eleventh Amendment was not a barrier to equitable relief sought to bring state authorities into compliance with the law. See generally *id.* (citing *Ex parte Young*, 209 U.S. 123 (1908); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)). Note that the Eleventh Amendment bar is intended to prevent depletion of treasury funds from monetary remedies based on past federal violations. Paraguay's case is not barred since it is squarely within the longstanding tradition, supported by innumerable holdings, of recognizing that the Eleventh Amendment interposes no barrier to a federal court's use of injunctions and other remedies to bring state authorities into compliance with the law." *Id.* at 9-10. (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

¹⁰⁵ Brief for Amicus Curiae United States at 2, *Paraguay* (No. 96-2770).

¹⁰⁶ *Id.* at 15.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* The United States' brief suggested diplomatic alternatives for Paraguay: (1) to make a formal diplomatic request to the State Department to take measures to remedy the violation, or (2) to declare the United States to be in breach of a treaty and then take action to suspend all or part of the treaty or to repudiate it. Simply stated, the United States took the position that the correct avenue for redress was not through the judiciary. *Id.* at 22-23.

the treaty's enforcement in domestic courts."¹⁰⁹ Additionally, the brief argued that the § 1983 claim was also properly dismissed because its definition of persons has not been extended to nations,¹¹⁰ and the action is based upon Paraguay's rights, not any individual's rights.¹¹¹

In response, the appellants stated that the judiciary has the responsibility for ensuring that states respect and comply with treaty obligations, and the United States' brief failed to demonstrate that Article III courts lack authority to hear such issues.¹¹² The Supremacy Clause and Article III give the judiciary the power to hear cases arising under treaties, and the judiciary is not only competent, but is required to address these issues. The appellants also argued that Paraguay had stated a valid cause of action¹¹³ because "the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal constitution or laws."¹¹⁴ Paraguay had stated a federal cause of action under the Supremacy Clause based on a treaty violation and therefore was entitled to sue for injunctive relief.¹¹⁵

The Fourth Circuit Court of Appeals ruled against Paraguay. Addressing only the Eleventh Amendment ground for dismissal,¹¹⁶ the court held that the treaty violation was not an "ongoing" violation of federal treaty law, and that the "relief sought was not prospective."¹¹⁷ The court found that the violation was not ongoing because Virginia was allowing Paraguay access to Breard at the time of the filing

¹⁰⁹ *Id.* at 25. The United States argued that Congress needs to create an express statutory measure to provide for the Vienna rights Convention before such causes of action under federal law can arise. *Id.*

¹¹⁰ *Id.* at 27–28.

¹¹¹ *Id.* at 28–30. The United States' brief argued that the court did not need to consider Eleventh Amendment immunity or the application of the *Ex Parte Young* doctrine because the case already required dismissal; the issue was nonjusticiable, and a cause of action could not be stated under 28 U.S.C. § 1983. *Id.* at 30–32.

¹¹² Plaintiffs-Appellants' Reply Brief at 9–13, *Paraguay* (No. 96–2770).

¹¹³ *Id.* at 22–25.

¹¹⁴ *Id.* at 23 (quoting *Burgio & Compofelice, Inc. v. N.Y.S. Dep't of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997)).

¹¹⁵ *Id.* at 22–23. The appellants' brief also quoted the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 4 (1987), which states that when it is necessary "foreign governments and officials . . . may sue to enjoin or to undo violations" of rights granted them under international law. *Id.* at 13. Thus, when foreign nations raise treaty violations in United States domestic courts no "political question" is at issue. The brief also lists and gives factual scenarios for several cases which state this principle. *See id.* at 13–15. The appellants additionally distinguished the five categories of "political question" cases established in *Baker v. Carr*, 369 U.S. 186, 211–13, 217 (1962), from this case. *See id.* at 21–22.

¹¹⁶ *Republic of Paraguay v. Allen*, 134 F.3d 622, 626 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998).

¹¹⁷ *Id.* at 627.

of the suit, and the state was not presently violating Paraguay's rights.¹¹⁸ The court also denied that the treaty violations were prospective, stating that even though the requested action "could be effectuated in an injunctive or declaratory decree directed at state officials [this did] not alter the inescapable fact that its effect would be to undo accomplished state action and not to provide prospective relief against the continuation of the past violation."¹¹⁹ The appellate court emphasized its "disenchantment" with Virginia's "past" violations of the treaty rights of Paraguay¹²⁰ and noted the potentially serious implications for U.S. interests.¹²¹ The court, however, held that these concerns could not overrule the Eleventh Amendment's protections of states against federal court actions for past violations.¹²²

With respect to Paraguay's suit, the Supreme Court held 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."¹²³ In addition, the Court held that the Eleventh Amendment also prevented Paraguay's suit against Virginia, as Virginia is immune from suits brought against it by a foreign state absent its consent.¹²⁴ The Court then held that the "failure to notify the Paraguayan Consul occurred long ago and has no continuing effect."¹²⁵

The Court also rejected the § 1983 claim raised by Paraguay's Consul General, finding that because he was acting in his official capacity, there was no difference between him as an individual and the Republic of Paraguay.¹²⁶ A nation is not a "person" within the standing requirements of § 1983 and is, according to the Court, precluded from bringing such an action.¹²⁷

¹¹⁸ *Id.* at 628. The Court distinguished the case from *Papasan v. Allain*, 478 U.S. 265 (1986), and *Milliken v. Bradley*, 433 U.S. 267 (1977), noting that these two cases involved examples of officials who were in violation of federal law when the suit was filed, whereas, in this case Paraguay officials had access to Breard at the time the suit under consideration was filed.

¹¹⁹ *Paraguay*, 134 F.3d at 628. As its only support, the court cited *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). *Coeur d'Alene Tribe* held that a claim to enjoin state officials from continuing to exercise jurisdiction over lands claimed by the tribe was barred by the Eleventh Amendment. The court did not go into the rationale of its statements and merely rendered its decision in short, conclusory terms. *Paraguay*, 134 F.3d at 628–29.

¹²⁰ *Paraguay*, 134 F.3d at 629.

¹²¹ *Id.* at 629 n.7. These same concerns were enumerated by Judge Butzner in his concurrence in *Breard v. Pruett*, 134 F.3d at 621–22.

¹²² *Breard*, 134 F.3d at 629.

¹²³ *Breard v. Greene*, 523 U.S. 371, 377 (1998).

¹²⁴ *Id.* (citing *Monaco v. Mississippi*, 292 U.S. 313, 329–30 (1934)).

¹²⁵ *Id.* at 378.

¹²⁶ *Id.*

¹²⁷ *Id.*

The Court concluded by chastising the applicants for not bringing the action before the International Court of Justice (ICJ) earlier.¹²⁸ The Court noted that the U.S. Secretary of State had sent a letter to the Governor of Virginia requesting that he stay the execution while the diplomatic discussion with Paraguay continued.¹²⁹ The Court, however, stated that while this was a legitimate alternative avenue to pursue, it did not have the authority to make the decision for the governor.¹³⁰

Justices Stevens, Breyer and Ginsburg dissented, stating that the Court at the least should have taken more time to consider the arguments.¹³¹ Specifically, Stevens noted that Virginia's decision to set a relatively early date for execution deprived the Court of "the normal time for considered deliberation."¹³² Breyer thought more consideration should have been given to Breard's arguments that the novelty of the Vienna Convention constituted "cause," and his isolation from consular officials "prejudiced" him by not allowing the officials to advise him to accept a plea bargain.¹³³ Both Stevens and Breyer also contended that the "international aspects" of the case provided additional reasons for a stay of execution.¹³⁴

2. *Paraguay v. United States*

On April 3, 1998, the Republic of Paraguay also instituted proceedings in the ICJ against the United States for the violations of the Vienna Convention occurring in Breard's criminal case.¹³⁵ In its application, Paraguay requested "*restitutio in integrum*: the re-establishment of the situation that existed before the United States failed to provide the notifications and permit the consular assistance required by the Convention."¹³⁶ The remedy requested that any criminal liability imposed on Breard in violation of international law be voided and that the United States guarantee the non-repetition of the illegal acts.¹³⁷ In the interim, Paraguay requested provisional

¹²⁸ *Id.*

¹²⁹ *Id.* (Stevens, J., Breyer, J., & Ginsburg, J., dissenting).

¹³⁰ *Id.*

¹³¹ *Id.* at 379–81 (Stevens, J., dissenting).

¹³² *Id.* at 379.

¹³³ *Id.* at 380 (Breyer, J., dissenting).

¹³⁴ *Id.* at 380–81 (Stevens, J., & Breyer, J., dissenting).

¹³⁵ Application of the Republic of Paraguay (Para. v. U.S.), I.C.J. (Apr. 3, 1998), at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm>. Paraguay established jurisdiction pursuant to Article I of the Vienna Convention's Optional Protocol. *Id.* at para. 22. It asserted that the United States violated a number of its international legal obligations under the Vienna Convention, including the requirement to notify arrested nationals of the right to consular assistance and to ensure that municipal law enables the United States to give full effect to the rights under the Convention. *Id.* at para. 24.

¹³⁶ *Id.* at para. 4.

¹³⁷ *Id.* at para. 25.

measures of protection to ensure that Breard would not be executed before the ICJ had the opportunity to resolve the dispute.¹³⁸

In oral arguments on whether the interim measure should be granted, the United States argued that even if the ICJ had jurisdiction, a violation of Article 36 of the Vienna Convention did not require a reversal of conviction. The United States maintained that no dispute existed over the interpretation or application of the Convention,¹³⁹ characterizing Paraguay's claim as whether the Vienna Convention required a new trial when a violation of Article 36 occurred, which would be separate from the "interpretation or application" of Article 36.¹⁴⁰ In response, Paraguay cited an argument made previously by the United States in a case it brought before the ICJ, "that an allegation of a failure to comply with Article 36, and a resulting dispute over what remedies should follow, was within the [ICJ]'s jurisdiction."¹⁴¹

Although the United States acknowledged that it had violated Article 36 in Breard's case, it contended that the violation did not require a reversal of his conviction. Indeed, the United States disputed Paraguay's assertion that international law requires a state, which violates an obligation to restore the situation as it previously existed, which, in this case, would entail reversal of the conviction.¹⁴² The United States maintained that consular assistance is not "an essential element of the host country's criminal justice system," since consuls have no obligation to assist their own nationals and may provide little assistance in a given case.¹⁴³ Additionally, the United States argued that a judicial remedy was not appropriate because a court could not determine whether consular assistance would have prevented Breard's conviction,¹⁴⁴ and that Breard had not been prejudiced by the violation because he had been represented by competent counsel, was assisted by his relatives in Paraguay, had lived in the United States for six years, and spoke English well.¹⁴⁵

¹³⁸ *Id.* at para. 28.

¹³⁹ S. Adele Shank & John Quigley, *Obligations to Foreign Nationals Accused of Crime in the United States: A Failure of Enforcement*, 9 CRIM. L.F. 99, 104 (1998).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 106 (citing Memorial of the United States (U.S. v. Iran), 1980 I.C.J. Pleadings (United States Diplomatic and Consular Staff in Tehran) 143 (Jan. 15, 1980)). While Paraguay made the same jurisdictional argument that the United States had made in the Tehran hostages case, the United States reversed its previously held position and argued that Paraguay did not have standing before the ICJ.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 109–10 (citing International Court of Justice Verbatim Record, Vienna Convention on Consular Relations (Para. V. U.S.), 1998 Hearing on Requests for Provisional Measures, I.C.J. Doc. Cr. 9817, at para. 2.24 (Apr. 7, 1998), at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm>). The United States actually contradicted its position in U.S. courts by suggesting that a requirement of demonstrating prejudice would be inappropriate.

Moreover, the United States pointed to the text of the Vienna Convention and its drafting process to suggest that imposing notification requirements in all cases was understood as overly burdensome to the states,¹⁴⁶ and the treaty drafters did not intend for Article 36 to infringe on domestic criminal processes by requiring a reversal of conviction to remedy its violation.¹⁴⁷ The United States indicated that state practice suggests that reversal of a conviction is not required, based on an informal survey by the State Department which failed to identify any case in which any state's court reversed a conviction because of an Article 36 violation. Instead, the informal survey indicated that an apology and a promise to improve future compliance would be the usual consequences of an Article 36 violation.¹⁴⁸

Paraguay responded to these arguments by emphasizing the "background norm in . . . state responsibility that requires restoration of [a] previously existing situation" when a nation violates its international legal obligations.¹⁴⁹ Pointing again to the Tehran hostages decision of the ICJ, in which the ICJ fashioned a remedy to address a breach of the Vienna Convention even though the Convention itself did not specify the remedies sought by the United States, Paraguay argued that it is irrelevant that the Convention does not specify a judicial remedy.¹⁵⁰ Paraguay then argued that statements made in the drafting process, as objections to the text of Article 36, calling the proposed text "an inappropriate override of domestic criminal procedural norms" are not interpretations of the Article's meaning.¹⁵¹ In rejecting those objections and adopting the text, Paraguay argued that the drafters "manifested an intent that domestic criminal procedural norms be overridden to ensure consular access."¹⁵²

The ICJ agreed with Paraguay's assessment of the drafting history, finding that the drafters intended Article 36 to require domestic procedures to give full effect to the right of consular access.¹⁵³ The ICJ also found the drafting history consistent with the expectation that a violation would require the typical treaty law remedy, i.e., the restoration of the *status quo ante*.¹⁵⁴ As Paraguay had argued, the ICJ found that treaties operate against the background norms of state responsibility. Thus, a violation of Article 36 would require the United States to restore the prior existing situation and set aside Breard's conviction.¹⁵⁵

¹⁴⁶ *Id.* at 110.

¹⁴⁷ *Id.* at 107.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 108.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 109.

¹⁵⁵ *Id.* (citing *Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May–26 July 1996*, U.N. GAOR, 51st Sess., Supp. No. 10 at 142, U.N. Doc.

The ICJ also suggested that a requirement of a showing of prejudice would not be feasible or consistent with the concept of consular protection. According to the ICJ, the Vienna Convention presumes the need for consular assistance, and a domestic court may not require a showing of prejudice or substitute its internal procedures, such as the provision of a court-appointed attorney, for Article 36 protections.¹⁵⁶

The ICJ granted Paraguay's request for interim measures by indicating that "[t]he United States should take all measures at its disposal to ensure that . . . Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order."¹⁵⁷ Virginia, however, proceeded with Breard's execution five days later on April 14, 1998. Although both the Legal Adviser to the State Department and the Secretary of State asked the Governor of Virginia to give consideration to the ICJ's order in his clemency decision, neither suggested that he had a legal obligation to postpone the execution pursuant to the ICJ's order.¹⁵⁸ In a Supreme Court brief filed on April 13, 1998, however, the Solicitor General, the Legal Adviser, and attorneys in the Justice Department took the position that the interim order of the ICJ was not binding on the United States and that the Vienna Convention imposed no obligation to reverse Breard's conviction.¹⁵⁹ First, they argued that Article 94 of the United Nations Charter and Article 41 of the Statute of the International Court of Justice, which established the powers of the ICJ, make interim orders non-binding. Moreover, the Solicitor General maintained that the ICJ did not consider interim orders to be binding,¹⁶⁰ but even if the ICJ generally deems interim orders to be binding, the court did not deem this order to be binding.¹⁶¹

Paraguay eventually withdrew its case on the merits from the ICJ, but only after the United States issued a public apology for the Vienna Convention violations.¹⁶² In a letter to the Court, Paraguay informed the ICJ that it wished to discontinue the proceedings with prejudice and requested that the case be removed from the

A/51/10 (1996)).

¹⁵⁶ *Id.* at 110–11.

¹⁵⁷ *Id.* at 111 (quoting Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, para. 41 (Apr. 9) (order granting Paraguay's request for indication of provisional measures). To issue interim measures, the Court must satisfy itself that it may have jurisdiction and that Paraguay may have a meritorious case.

¹⁵⁸ *Id.* at 112 (citing Brooke A. Masters, *Albright Urges Virginia to Delay Execution*, WASH. POST, Apr. 14, 1998, at B1).

¹⁵⁹ *Id.* at 112–13.

¹⁶⁰ *Id.* at 115–16.

¹⁶¹ *Id.* at 116.

¹⁶² See Mark Warren, *Death, Dissent and Diplomacy: The U.S. Death Penalty as an Obstacle to Foreign Relations*, 13 WM. & MARY BILL OF RTS. J. 309 (2004).

docket.¹⁶³ Upon the United States' concurrence, the ICJ removed the case from the list.¹⁶⁴

D. LaGrand and the Inter-American Court of Human Rights: The Treaty Non-compliance Continues

The *LaGrand Case*, filed by Germany with respect to two German nationals on death row, presented the ICJ with similar ongoing Vienna Convention violations by the United States three years after *Breard*.¹⁶⁵ In its application, Germany argued that the United States violated its obligations under the Vienna Convention when the state of Arizona failed to notify two arrested German nationals, Karl and Walter LaGrand, of their right to consular assistance.¹⁶⁶ Germany contended that "the failure to provide the required notification precluded it from protecting its nationals' interest in the United States at both the trial and the appeal level in State courts."¹⁶⁷ It maintained that the United States violated its obligation under Article 36, paragraph 2, of the Convention "to ensure that its national law[s] and regulations enable full effect to be given to the purposes of the rights accorded under Article 36 of the Vienna Convention."¹⁶⁸ Moreover, pursuant to Article 27 of the Vienna Convention and customary international law, Germany claimed that the United States "[could] not derogate from its international legal obligation to uphold the Vienna Convention based upon its municipal law doctrines and rules."¹⁶⁹

¹⁶³ Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 426 (Nov. 10) (order on request for discontinuance), available at http://www.icj-cij.org/icjwww/idocket/ipaus/ipausorder/ipaus_iorder_981110.htm.

¹⁶⁴ *Id.*

¹⁶⁵ *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27), available at <http://www.icj-cij.org/icjwww/decisions.htm>. The ICJ had jurisdiction under Article I of the Vienna Convention's Optional Protocol, in which both Germany and the United States agreed "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." *Id.* at para. 36 (quoting Article I of the Optional Protocol).

¹⁶⁶ *Id.* at para. 10. The LaGrand brothers were convicted of the murder of a bank manager during a robbery attempt in 1982. *Id.* at para. 14.

¹⁶⁷ Press Release, International Court of Justice, Germany Brings a Case Against the United States of America and Requests the Indication of Provisional Measures (Mar. 2, 1999), at http://www.icj-cij.org/icjwww/ipresscom/iPress1999/ipresscom9907_19990302.htm.

¹⁶⁸ Application Instituting Proceedings (F.R.G. v. U.S.), *LaGrand Case* (Mar. 2, 1999), para. 14, at http://www.icj-cij.org/icjwww/idocket/igus/igusapplication/igus_iapplication_19990302.htm.

¹⁶⁹ *Id.*

As for remedies, Germany asked that the criminal liability imposed on the LaGrands be voided, that the United States provide reparation for the execution of Karl LaGrand, and that the United States restore the *status quo ante* in Walter LaGrand's case.¹⁷⁰ Furthermore, Germany wanted the court to adjudge and declare "that the United States is under an international legal obligation not to apply the doctrine of 'procedural default' or any other doctrine of national law, so as to preclude the exercise of the rights accorded under Article 36."¹⁷¹ In addition, Germany argued that "the United States should provide Germany with a guarantee of the non-repetition of the illegal acts."¹⁷²

Germany also requested interim measures of protection (provisional measures) because of the extreme urgency of the situation and to ensure that Walter LaGrand would not be executed pending the final decision in the international proceedings.¹⁷³ Responding to the urgency of the matter, the ICJ indicated provisional measures without other proceedings for the first time in its history.¹⁷⁴ It indicated that the United States "should take all measures at its disposal to ensure that Walter LaGrand [was] not executed pending the final decision in these proceedings, and should inform the [ICJ] of all the measures which it [had] taken in implementation of this

¹⁷⁰ *Id.* at para. 15.

¹⁷¹ *Id.*

¹⁷² *Id.* The LaGrands claimed that there were Vienna Convention violations in the federal habeas corpus proceedings after German consular officers became aware of their case in 1992. *Id.* at para. 4. However, the federal courts rejected their claims based on the doctrine of procedural default, i.e., that the LaGrands were precluded from asserting Vienna Convention claims because they had failed to raise them in the initial state proceedings. *Id.* at para. 7. Likewise, Breard was barred from raising Vienna Convention violations in the federal appeals process because of the procedural default rule. *See supra* note 79.

¹⁷³ LaGrand Case (F.R.G. v. U.S.), 1999 I.C.J. 9 (Mar. 3) (order on the request for the indication of provisional measures), available at http://www.icj-cij.org/icjwww/idocket/igus/igusorder/igus_iorder_19990303.htm. Walter LaGrand was scheduled to be executed on March 3, 1999. *Id.* at para. 8. Germany filed its application with the ICJ on March 2, 1999. *Id.* at para. 6. Walter's brother Karl LaGrand was executed on February 24th, 1999, despite his appeals for clemency and diplomatic intervention by the German government. *Id.* at para. 8. In its request for provisional measures, Germany argued such measures were necessary to protect the life of Germany's national. *Id.* Without indication of provisional measures, Germany would be "forever deprived of the opportunity to have [the] status quo ante restored" if the ICJ decided in favor of Germany on the merits. *Id.* The representative of the United States objected to the procedure, requested at such a late date, because it would result in the ICJ issuing an order without having first heard the two parties. *Id.* at para. 12.

¹⁷⁴ *Id.* at para. 29. The ICJ observed that Germany did not become fully aware of the facts of the case until February 24, 1999, and that Germany had immediately pursued its action at a diplomatic level. *Id.* at para. 20. Furthermore, the ICJ noted that provisional measures were justified to preserve the rights of the parties from irreparable harm pending resolution of the dispute. *Id.* at para. 22.

Order.”¹⁷⁵ Despite the order, Arizona authorities executed Walter LaGrand on March 3, 1999.

On June 27, 2001, the ICJ held on the merits that the United States breached its obligation to the LaGrand brothers and to Germany under Article 36, paragraph 1, of the Vienna Convention by not informing either of the commencement of criminal proceedings and the right to contact diplomatic personnel.¹⁷⁶ The ICJ further held that the refusal to review the convictions was a separate violation.¹⁷⁷ The ICJ held that a third violation occurred when the United States did not act forcefully enough to prevent the execution of Walter LaGrand in accordance with the provisional order.¹⁷⁸ This decision was the first time the ICJ ruled that a provisional order issued under its authority was binding on participating nations.

As analyzed elsewhere in this issue, the Inter-American Court of Human Rights has also addressed the lack of consular access in death penalty cases. As discussed by John Quigley, the Inter-American Court has found the imposition of the death penalty to be an arbitrary deprivation of life when the right to consular notification and access has been denied.¹⁷⁹ The Inter-American Court has also suggested that the appropriate remedy for consular access and notification violations is a new trial.¹⁸⁰

E. Federalism and International Law

The notion of *pacta sunt servanda* — treaties are binding and must be observed — prevails over conflicting domestic law as a form of customary international law known as *jus cogens*.¹⁸¹ Once treaties are signed and ratified, they impart an international obligation on the parties regardless of domestic law provisions.¹⁸² A self-executing treaty is one that does not require any additional legislation in order for it to enter into effect, such as the Vienna Convention on Treaties.¹⁸³ A non-self-executing treaty is one that requires domestic legislation to be passed in order for the obligations under the treaty to be enforceable in domestic courts.¹⁸⁴ The recent trend in the Senate is to interpret human rights treaties as non-self-executing, therefore necessitating implementation by Congress before the treaty rights and responsi-

¹⁷⁵ *Id.* at para. 29.

¹⁷⁶ LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment-20010625.htm.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ John Quigley, *Suppressing the Incriminating Statements of Foreigners*, 13 WM. & MARY BILL OF RTS. J. 339 (2004).

¹⁸⁰ *Id.*

¹⁸¹ Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT’L L. 406, 424 (1989).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

bilities are enforceable in the United States.¹⁸⁵ The guaranteed rights of the Vienna Convention establish a requirement of immediate protection of the individual. Because the treaty creates an immediate, concrete, individual right, Article 36 is self-executing and does not require congressional action to be implemented.¹⁸⁶ Self-executing treaties are more problematic in a federalist system because international obligations are imposed although Congress, the Judiciary, and/or the Executive Branch may fail to take the necessary steps to ensure compliance or to ensure compliance by the states. This obligation/compliance dichotomy is most complicated when state cooperation is necessary for compliance.

International treaties are held on par with federal legislation under U.S. domestic law, and can therefore trump conflicting state law under the Supremacy Clause.¹⁸⁷ Although the Supremacy Clause gives great leeway to Congress as to how it can legislate state conduct, including allowing for the preemption of state laws, the federal government cannot compel or require states to bear the burden of implementing federal legislation.¹⁸⁸ In order for the federal government to implement treaty obligations, the federal government can impose considerable pressure on states to comply.

Recent decisions of the Court restricting the federal power over states suggest that the Court will be inclined to continue its unreceptive approach to more extensive remedies for non-compliance with these international obligations. The discrepancy which occurs when the United States ratifies an international treaty, but does not implement it domestically, is analogous to the situation which arises when the federal government has legislated in an area, but cannot force states to use their own resources to enact or uphold that law. Both of these situations create obligations on the part of the federal government that it cannot always sustain as a practical matter within the federalist framework.¹⁸⁹

¹⁸⁵ *Id.* at 425. This bifurcation stems from *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

¹⁸⁶ See Shank & Quigley, *supra* note 32, at 730–32 (supporting the Ninth Circuit’s opinion in *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979)). See also John Quigley, *The Law of State Responsibility and the Right to Consular Access*, 11 WILLAMETTE J. INT’L L. & DISP. RESOL. 39 (2004); Luna & Sylvester, *supra* note 27. For a discussion of arguments for and against the finding that Article 36 is self-executing, see Schiffman, *supra* note 35.

¹⁸⁷ U.S. CONST., art. VI, cl. 2.

¹⁸⁸ *New York v. United States*, 971 F. Supp 789, 795 (S.D.N.Y. 1997), *aff’d*, 179 F.3d 29 (2d Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000). The Supreme Court has asserted this dividing line in federalism in other cases, including *Printz v. United States*, 521 U.S. 898, 925 (1997), and *United States v. Lopez*, 514 U.S. 549, 557 (1995). See also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (an example of federal preemption of conflicting state law).

¹⁸⁹ For additional discussion of Article 36 and the tension that the federalist system creates in assuring compliance by the states, see generally Quigley, *supra* note 179.

F. Repercussions and Future Trends

Notwithstanding a federalist system in which the states and the federal government may in some instances differ in their compliance with treaty obligations, under international law the United States federal government "ultimately bears the responsibility to the foreign power aggrieved by the state's actions [or lack thereof]." ¹⁹⁰ The United States will, among other repercussions, be in violation of Article 94(1) of the UN Charter, which requires that all members give full effect to any rulings of the ICJ to which they are a party. ¹⁹¹ It is no longer sufficient (if it ever was) for the United States to apologize for the lack of Vienna Convention adherence. ¹⁹² There is no value left in the United States' acknowledgment alone of its obligations in the face of ongoing violations at the federal or state level. Other nations have acknowledged that either the United States is not doing all it can to ensure compliance, or there is insufficient control of the federal government over the states to assure compliance with the Convention. If the United States wants to preserve the Vienna Convention rights for its own citizens, it must do so for foreign nationals under its own jurisdiction. Mark Warren points out in his article that the "ambivalent response of the State Department to the case of Paraguayan national Ángel Francisco Breard had lasting foreign relations consequences." ¹⁹³ Warren also notes that the U.S. Secretary of State was aware of these lasting consequences as early as *Breard*, and told the governor of Virginia that the United States would appear to be denying the significance of international law if Breard was executed, which in turn may "limit [the United States'] ability to ensure that Americans are protected . . . abroad." ¹⁹⁴ The United States is creating an unnecessary international problem for itself and its citizens by being a proponent of Vienna Convention rights when its citizens are necessitous of their protections (such as during the detention of American citizens in Syria and Iran), yet doing little to protect the citizens of other nations within its own borders. ¹⁹⁵

¹⁹⁰ Gregory Dean Givold, *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, 796 (1994).

¹⁹¹ 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, 127 (1998).

¹⁹² *Id.* at 124.

¹⁹³ Warren, *supra* note 162, at 328. See generally Schiffman, *supra* note 35; Luna & Sylvester, *supra* note 27.

¹⁹⁴ Warren, *supra* note 162, at 328 (quoting Letter from Madeline Albright, Secretary of State, to James Gilmore, Governor of Virginia (Apr. 13, 1998)).

¹⁹⁵ William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 270-71 (1998).

First, the domestic courts of the United States should interpret their own procedural rules in order to assure full consideration of international procedural protections, and interpret domestic procedural requirements to avoid a conflict with international obligations if at all possible. At a minimum in *Breard*, the Supreme Court could have issued a stay of execution, binding on the courts of Virginia, so that it could have examined more fully the petitions before it. In his dissent, Justice Stevens noted that the Court did not even use the nine days it is allowed to deliberate because the date of execution was set too close to when the Supreme Court heard the case.¹⁹⁶

Second, the United States can take more active steps to ensure that all federal and state officials understand what is necessary to implement Article 36 rights. The United States has already provided State Department notices to local officials and given them wallet cards detailing the relevant provisions of the Vienna Convention.¹⁹⁷ While providing information to enforcement authorities alone does not remedy current Vienna Convention violations, it may decrease the number of future violations. Additionally, states could be asked to participate in a voluntary program to report the number of foreign nationals imprisoned each year. Alternatively, federal employees could be delegated this task, thus removing any imposition of the federal government upon the states.

Third, federal funding could be withheld from those states that do not adhere to these international obligations of the United States. This technique is used commonly by Congress in domestic matters, usually under the auspices of the Commerce Clause. There are problems with this approach, including the possibility of states preferring the death penalty and perceived individual states' rights than to receipt of federal funding. Additionally, this technique would raise questions as to how the legislative branch should determine which treaties should trigger financial restrictions imposed by the federal government.

Most importantly, the United States must abandon its vigorous defense of its failures to comply with the Vienna Convention and redirect the intensity of that effort into ensuring compliance. The litigation stance of the United States in domestic courts and the ICJ has been to acknowledge that the treaty has been violated, yet to refuse to acknowledge any consequences for that violation or accept any remedial responsibility — even to the point of asserting that a foreign state cannot sue in U.S. courts for an admitted violation of a ratified treaty by the United States. Consular notice is a minimally burdensome procedural requirement with significant, far-reaching, and difficult to rectify consequences for the individual and U.S. international relations. It is unequivocally in the best interests of the

¹⁹⁶ See Richardson, *supra* note 191, at 126.

¹⁹⁷ See Aceves, *supra* note 195, at 274–75. See generally Iraola, *supra* note 36 (discussing the regulations implemented by the Department of Justice and the guidance provided by the Department of State).

United States and its citizens to enforce the Vienna Convention safeguards as vigorously as they have thus far been contested. To give just one example, there is no mention in the Federal Rules of Criminal Procedure of the consular notice requirement. Amendment of the rules to include the notice requirement would at least ensure that *federal* law enforcement officers were on full notice that there must be compliance.¹⁹⁸

It is undisputed that heinous crimes were committed by many of the foreign nationals raising a Vienna Convention claim to reverse their convictions and sentences. While there is understandably little sympathy for the perpetrators of the crimes, our own court system must observe the rule of law and all of the laws to which the United States has agreed to be bound, if the same protection is to be expected for U.S. nationals abroad. These are only a few suggestions which, if implemented, could work to adjust the federalist system to effectuate the rights provided under the Vienna Convention. Notwithstanding any domestic law issues, the international community will hold the federal government liable for the actions of other entities with government powers.¹⁹⁹ Nearly ten years after *Breard*, it has become imperative that a workable solution be found.

The ramifications of noncompliance with treaties providing such fundamental rights can lead to disastrous results for U.S. citizens. If the United States, a dominant world influence, continues to ignore its obligations under the Vienna Convention, other countries may begin to do the same, in effect denying Americans their right to consular assistance when detained in a foreign country.²⁰⁰ The United States' compliance with these international treaties is critical because when it fails to satisfy its obligations, its highly visible example encourages similar conduct by other countries bound by the treaty.²⁰¹ Because more than 130 nations have accepted the Vienna Convention, the consequences internationally would be disastrous if other nations began to disregard these agreed-upon rights.²⁰² To uphold the integrity of international law *and* to safeguard the interests of its own citizens, the United States federal government must do everything within its constitutional power to require states to comply with the Vienna Convention requirements.

¹⁹⁸ The author is presently drafting such an amendment to the Federal Rules for submission to the Federal Rules Committee, a step which could have been easily taken years ago by the Executive branch. Materials on file with the author. For more views on the future options of the federal government to assure Article 36 compliance, see generally Schiffman, *supra* note 35.

¹⁹⁹ Aceves, *supra* note 195, at 296.

²⁰⁰ See Brief of Amicus Curiae Union Internationale Des Avocats at 5, Republic of Paraguay v. Allen, 134 F.3d 622 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998) (No. 96-2770).

²⁰¹ *Id.* at 2.

²⁰² *Id.* at 4-5.

II. THE *ATKINS* ANALYSIS

Until there is a significant change in the U.S. approach to Vienna Convention compliance, litigation to compel compliance and remedy its failure will continue. There are four developments in death penalty jurisprudence and practice which suggest that a Supreme Court challenge to the failure to provide consular notice is not only timely but likely to prevail: (1) the Court's analysis in *Atkins v. Virginia*, (2) the Court's pending case on the juvenile death penalty, (3) the jury's sentencing decision in *Commonwealth v. Malvo*, and (4) the decision of the ICJ in *Mexico v. United States*. Additionally, the recognition by a majority of the Supreme Court that international law is relevant, at the very least, in interpreting constitutional provisions may be the most critical indicator that this treaty violation must be deemed to create a right to re-sentencing or a new trial as a matter of due process.

The Court in *Atkins v. Virginia* declared that the execution of mentally retarded offenders is cruel and unusual for purposes of the Eighth Amendment.²⁰³ The petitioner, Daryl Atkins, was convicted for the abduction, armed robbery, and capital murder of Eric Nesbitt.²⁰⁴ The petitioner argued, by way of IQ testing, that he was mentally retarded and argued that his execution would be a violation of his Eighth Amendment rights.²⁰⁵ The jury concluded, and the Virginia Supreme Court affirmed, that although Atkins may be mildly retarded, this fact did not mitigate the violent nature of the offense, and sentenced him to death.²⁰⁶ The United States Supreme Court remanded the case to the Virginia Supreme Court,²⁰⁷ holding that the execution of mentally retarded offenders is "excessive" and violates the Eighth Amendment protection against cruel and unusual punishment.²⁰⁸

The Court, in an opinion authored by Justice Stevens, focused on several factors in reaching this outcome. First, the Court discussed the growing national consensus against executing mentally retarded individuals, shown by new state legislation on the matter, jury polls, and national opinion polls on society's "evolving standards of decency."²⁰⁹ Second, the Court focused on the effects of mental retardation on

²⁰³ *Atkins v. Virginia*, 536 U.S. 304 (2002), *remanded to* 581 S.E.2d 514 (Va. 2003).

²⁰⁴ *Id.* at 307–08.

²⁰⁵ Specifically, Atkins scored a fifty-nine on an IQ test, where a score of seventy or lower defines mild mental retardation according to some experts. *Id.* at 309–10.

²⁰⁶ *Atkins v. Commonwealth*, 581 S.E.2d 514 (Va. 2003).

²⁰⁷ The Supreme Court did not decide the factual issue of Atkins's mental retardation. The case was remanded to the Virginia Supreme Court, which directed the Circuit Court for York County, Virginia, to empanel a new jury for the "sole purpose of making a determination of [Atkins'] mental retardation.

²⁰⁸ *Atkins*, 536 U.S. at 321. Since *Gregg v. Georgia*, 428 U.S. 153 (1976), it has been established that imposition of the death penalty must be evaluated by both the nature of the offense and the character and background of the defendant.

²⁰⁹ *Atkins*, 536 U.S. at 311–17.

the understanding of the legal system and on a mentally retarded offender's capacity to protect successfully his rights.²¹⁰ The Court reasoned that a mentally retarded offender, while competent to stand trial, has "diminished capacities to understand and process information, to communicate . . . and to understand the reactions of others."²¹¹ Although their diminished capacity does not render the offenders exempt from all criminal sanctions, it does "diminish their personal culpability."²¹² Furthermore, the Court found that the death penalty fails to serve a deterrent purpose in the case of mentally retarded offenders in that most mentally retarded offenders cannot be deterred by that which they cannot comprehend as a possible punishment.²¹³

Perhaps the Court's most compelling argument in relation to consular notification is that mentally retarded offenders may be sentenced to death due to procedural errors that damage the offender's opportunity to mitigate the aggravating factors required for a death sentence.²¹⁴ For instance, the Court points out that mentally retarded offenders are more likely to give false or coerced confessions, and may be less able to assist in the defense.²¹⁵ Furthermore, because such an offender often cannot process and understand the proceedings, he is more likely to exhibit a lack of remorse, which juries will take into consideration during sentencing.²¹⁶

This aspect of the Court's reasoning can easily be extended to the case in which a foreign national is detained or arrested for a capital offense and is not informed of the right to have consular assistance. Under Article 36(1)(b) of the Vienna Convention on Consular Relations, at the request of a detained foreign national, the detaining state has the obligation to inform the national's consulate of his detainment and, furthermore, has the obligation to allow communication between the national and the consul.²¹⁷ The provision is meant to counteract the unique difficulties foreign nationals confront upon entering the American legal system. For instance, foreign nationals may not be fluent in English and have considerable difficulty understanding complex legal and procedural language. Also, foreign nationals often may not have a working understanding of our legal system (i.e., *Miranda* rights, implications of statements made after arrest, right to counsel, etc., as well as general cultural assumptions regarding innocence and guilt), which may jeopardize their right to a fair trial. Furthermore, foreign nationals are often without a familial basis of support, and thus are likely to have few people, if any, to turn to in case of legal troubles and a need for support and information. The

²¹⁰ *Id.* at 317–21.

²¹¹ *Id.* at 318.

²¹² *Id.*

²¹³ *Id.* at 320.

²¹⁴ *Id.*

²¹⁵ *Id.* at 320–21.

²¹⁶ *Id.*

²¹⁷ *See* Vienna Convention, *supra* note 15.

combination of these factors creates an aura of chaos surrounding a detained or arrested foreign national, and inevitably leads to diminished protection of rights critical from arrest onwards. Article 36 of the Convention protects against these problems by allowing detained foreign nationals to contact and confer with a member of their state's consulate.²¹⁸ Correspondence with the consulate provides much needed assistance in the way of language translation, counsel regarding the American legal process, and finding appropriate legal counsel. Without such assistance, a detained foreign national is likely to fail to take advantage of the rights afforded to him/her under U.S. law.

Foreign nationals denied the right to confer with their consulate, at a minimum, should have the remedy of overturning their death sentences for the same reasons that mentally retarded offenders cannot be executed under *Atkins*. The diminished capacity of mentally retarded offenders is analogous, in that the same confusion and inability to understand the legal process taking place may be experienced by the detained foreign national. For example, foreign nationals who do not understand their *Miranda* rights would perhaps confess, or be more susceptible to coercive police investigations.

A detained foreign national may encounter stark cultural differences, for example, as the *Atkins* Court noted with mentally retarded offenders,²¹⁹ foreign nationals often may not comprehend the death penalty as a possible punishment. Most foreign nations no longer allow the death penalty as a criminal sentence; as a result, it is likely that many foreign nationals may not fully appreciate that, while they could not be put to death in their country for committing a crime, they would be subject to such a sentence in the United States, and not just in theory. Again, the *Atkins* Court's reasoning applies in that "cognitive and behavioral impairments" rendering a detainee less culpable will "also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."²²⁰ Given the language and cultural barriers present in the legal system, the specific and general deterrent purposes that are the cornerstone of criminal punishment are not served.

Similar to the *Atkins* Court's finding of a national consensus against executing mentally retarded offenders,²²¹ the concept that individuals in a foreign country should be entitled to access to their consulate upon arrest is firmly rooted in general notions of due process. The United States signed the Vienna Convention on Consular Relations in 1963, and a foreign national's rights to speak to the consulate mirror a U.S. citizen's *Miranda* rights in many ways. There is a fundamental recognition in our criminal system that no detainee should be forced to undergo

²¹⁸ *Id.*

²¹⁹ 536 U.S. 304 (2003).

²²⁰ *Id.* at 320.

²²¹ *Id.* at 314–17.

investigation without the assistance of counsel, and as a *Miranda* violation results in the preclusion of evidence, so should the denial of a foreign national's consular rights. The dissent in *Atkins* focused on the lack of proof that there was in fact a national consensus in favor of prohibiting the execution of mentally retarded offenders. However, given the international underpinnings of the right to consular access, its near universal acceptance and longstanding incorporation into U.S. law, and the consensus that a person arrested in a foreign country has a right to "contact the embassy," there is an international and national consensus that notice be provided. The proper redress for a violation of Article 36 must be, at a minimum, reversal of the death sentence; for it is offensive to the Eighth Amendment and "evolving standards of decency" to sentence an offender who has neither the ability to understand the proceedings against him, nor access to those who do.

Inevitably, the *Atkins* decision led to speculation that the death penalty for juveniles would be deemed cruel and unusual punishment. As Victor Streib commented, "the death penalty's Siamese twins [are] juvenile offenders and mentally retarded offenders."²²² When Kevin Stanford's death penalty case came before the Supreme Court for a second time in the fall of 2002, four Justices — Stevens, Breyer, Ginsburg, and Souter — dissented to the denial of certiorari in an opinion that called for "an end to this shameful practice" of imposing the death penalty on those under the age of eighteen.²²³ The factor on which all nine of the Justices rely in determining the "standards of decency" dictating what constitutes cruel and unusual punishment is legislation.²²⁴ As discussed in Parts I and IV, the Vienna Convention, as interpreted in multiple international decisions by which the United States is bound, requires consular notification not just as a matter of "decency," but as a matter of fundamental due process.

III. THE IMPLICATIONS OF *MALVO* FOR THE JUVENILE DEATH PENALTY IN *SIMMONS v. ROPER*

A comparison of the trials of John Allen Muhammad and Lee Boyd Malvo demonstrates that jurors, judges and the general public are becoming uncomfortable with the imposition of the death penalty on juvenile offenders. As has been noted elsewhere, twenty-two states still allow for imposition of the death penalty on juveniles, but only two, Texas and Virginia, have sentenced and executed juveniles since the 1990 decision in *Stanford v. Kentucky*.²²⁵ Moreover, Virginia has had only one juvenile offender sentenced to death since 2002, and has only one

²²² Victor L. Streib, *Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of Atkins v. Virginia*, 33 N.M. L. REV. 183, 183 (2003).

²²³ *In re Stanford*, 537 U.S. 968, 972 (2002) (Stevens, J., dissenting).

²²⁴ See, e.g., *Atkins*, 536 U.S. at 312.

²²⁵ Streib, *supra* note 222, at 192.

juvenile offender now on death row.²²⁶ Muhammad and Malvo were both charged with capital murder by the state of Virginia after being linked as principals to the sniper shootings that took place in the fall of 2002. Although both men were convicted, only the jurors in the Muhammad trial recommended the death penalty.

Muhammad was charged with the capital murder of Dean Meyers, a Prince William County resident who was a victim of one of the sniper attacks.²²⁷ The state charged Muhammad under two capital murder statutes,²²⁸ one requiring the jury to find that Muhammad killed more than one person in a three year period,²²⁹ the other requiring the jury to find that Muhammad killed Meyers in the commission of an act of terrorism.²³⁰ Muhammad pleaded not guilty to all four charges on October 14, 2003.²³¹ The following four days were spent selecting a jury, which resulted in a composition of ten women, five men and only two racial minorities.²³² Opening statements were set to begin on October 20, 2003.²³³

Before opening statements began, Muhammad approached the judge with a request to represent himself.²³⁴ Muhammad's attorneys, described as some of the best defense lawyers in Northern Virginia, have over fifty years of combined

²²⁶ 492 U.S. 361 (1989) (plurality opinion); Streib, *supra* note 222, at 192.

²²⁷ Josh White, *Muhammad: 'Not Guilty'; Suspect Publicly Denies Culpability for First Time*, WASH. POST, Oct. 15, 2003, at A1 [hereinafter *Suspect Publicly Denies Culpability*].

²²⁸ *Id.* The state also charged Muhammad with conspiracy to commit murder and a firearms violation. *Id.*

²²⁹ VA. CODE ANN. § 18.2-31(8) (Michie 2004) (a "willful, deliberate, and premeditated killing of more than one person within a three-year period" constitutes capital murder in the state of Virginia).

²³⁰ VA. CODE ANN. § 18.2-31(13) (Michie 2004). The Virginia legislature included the "willful, deliberate and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism" in its capital murder statute after the September 11th attacks. *See* 2002 Va. Acts ch. 588. Terrorism is defined as "an act of violence . . . committed with the intent to (i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation." VA. CODE ANN. § 18.2-46.4 (Michie 2004).

²³¹ *Suspect Publicly Denies Culpability*, *supra* note 227.

²³² Carol Morello & Marcia Slacum Greene, *Capital Case Jurors Find Own Beliefs on Trial: As Ultimate Judgement Looms, Panel Members Confront Personal Doubts, Lawyers' Queries*, WASH. POST, Oct. 18, 2003, at B1. All fifteen jury members heard the entire case, but three were randomly chosen to be excused before the jury began to deliberate on the guilt of Muhammad. *Id.*; Josh White, *Muhammad's Case Goes to Jury; Malvo's Begins: Prosecutors Allege Terror Reign; Defense Says There's No Proof*, WASH. POST, Nov. 14, 2003, at A1.

²³³ Josh White, *Muhammad Takes Over His Own Defense: Judge Advises Against Move, Then Allows It*, WASH. POST, Oct. 21, 2003, at A1 [hereinafter *Muhammad Takes Over Defense*].

²³⁴ Josh White, *Muhammad Swayed Judge With "I Know Me,"* WASH. POST, Oct. 21, 2003, at A8 [hereinafter *Muhammad Swayed*].

experience.²³⁵ Muhammad, however, told the judge that he was the best individual to speak for himself and could adequately represent his case.²³⁶ Muhammad's self-representation only lasted for two days,²³⁷ but in that brief time Muhammad gave an opening statement and cross-examined several of the prosecution's witnesses, including an expert, a survivor of one the sniper attacks, and a police officer.²³⁸ Reporters called Muhammad's days of self-representation "awkward," noting the discomfort and disapproval of jurors, especially when Muhammad tried to sympathize with family members of the victims.²³⁹ Muhammad's inexperience also showed, with fewer objections and challenges to evidence than might have occurred had his attorneys been in control.²⁴⁰ Muhammad also made some blunders during his opening statement that could have given the jury the impression that he was present at the shootings.²⁴¹ Yet several commentators suggested that Muhammad's self-representation was not a sure failure.²⁴² Even the prosecution was not sure how the jury would react, making sure to tell the jurors in opening statements not to hold Muhammad's decision against the state.²⁴³

Over the next few weeks, the prosecution called 136 witnesses and presented more than 406 exhibits and 450 pieces of evidence in order to prove that Muhammad was responsible for the death of Dean Meyers and the fifteen other sniper attacks.²⁴⁴ Survivors of shootings, family members of victims, witnesses

²³⁵ *Muhammad Takes Over Defense*, *supra* note 233.

²³⁶ *Muhammad Swayed*, *supra* note 234.

²³⁷ Josh White, *Muhammad Reinstates Lawyers in Sniper Trial: Witnesses Identify Malvo as Assailant in 2 Attacks*, WASH. POST, Oct. 23, 2003, at A1.

²³⁸ Josh White, *Sniper Trial Witness Tells How He Was Shot, Robbed*, WASH. POST, Oct. 22, 2003, at A1 [hereinafter *Sniper Trial Witness*]; *Muhammad Takes Over Defense*, *supra* note 233.

²³⁹ *Sniper Trial Witness*, *supra* note 238 (While cross-examining a witness, Muhammad said, "I have some questions to ask you, but I'm not asking these questions to disrespect you. . . . I understand how you feel when your life is on the line." In response one juror rolled her eyes and several others looked down.).

²⁴⁰ *See Muhammad Takes Over Defense*, *supra* note 233.

²⁴¹ *Id.* (Muhammad said, "We know something happened. . . . They wasn't there. I was. I know what happened, and I know what didn't happen."). This statement would later be called the "800 pound gorilla sitting in the court room" by former federal prosecutor Andrew White. Scott Higham, *After Short Case, Defense Prepares to Address Jurors: Brief Presentation of Five Witnesses Could Backfire on Muhammad's Lawyers, Experts Say*, WASH. POST, Nov. 13, 2003, at A18.

²⁴² Anne M. Coughlin, a law professor at the University of Virginia, found Muhammad's decision to be a "very chancy" move that might relay to the jury that he is either "humanized" or "even more coldblooded." *Sniper Trial Witness*, *supra* note 238.

²⁴³ *Muhammad Takes Over Defense*, *supra* note 233 (The prosecutor said in his opening statement, "We have a duty to do, and I hope, and I ask, that none of you hold his decision to represent himself against us in any way.").

²⁴⁴ Josh White, *Muhammad Prosecution Rests: Judge to Rule on Defense Motion for*

to shootings, police officers, an expert on sniper tactics, fingerprint and DNA experts, individuals testifying to the relationship between Muhammad and Malvo, and private and crime scene investigators were among the many witnesses testifying for the prosecution.²⁴⁵

After the prosecution rested its case on November 10, 2003, Muhammad's attorneys immediately challenged the applicability of Virginia's death penalty statute to Muhammad with two motions to dismiss the capital murder charges.²⁴⁶ The first motion argued that Muhammad was not eligible for the death penalty because there was no proof that he pulled the trigger or directed Malvo to pull the trigger.²⁴⁷ The second motion challenged the application of the Virginia death penalty statute's terrorism provision to Muhammad, contending that it was never intended to apply to such a case.²⁴⁸ The judge, however, ruled that Muhammad was eligible for the death penalty because the prosecution produced enough evidence to show that he could have been a principal in the first degree and the act was part of a "purposeful series" of events.²⁴⁹

Dismissal of Capital Charges, WASH. POST, Nov. 11, 2003, at B1 [hereinafter *Prosecution Rests*]; *The Day in Court*, WASH. POST, Nov. 11, 2003, at B5.

²⁴⁵ See Scott Higham, *Slowly Building Pieces into a Whole: In Sniper Trial, Prosecution's Circumstantial Case Begins to Coalesce*, WASH. POST, Oct. 30, 2003, at A1; *The Day in Court*, WASH. POST, Oct. 28, 2003, at B4; *The Day in Court*, WASH. POST, Oct. 29, 2003, at A12; *The Prosecution's Circumstantial Case*, WASH. POST, Oct. 30, 2003, at A8; Josh White, *Sniper Victim's Shock Described: Cabdriver's Slaying at Maryland Gas Station Detailed at Trial*, WASH. POST, Oct. 28, 2003, at B1; Josh White, *Witnesses Say They Saw, Reported Caprice*, WASH. POST, Oct. 30, 2003, at B1.

²⁴⁶ *Prosecution Rests*, *supra* note 244.

²⁴⁷ *Id.*

²⁴⁸ *The Day in Court*, WASH. POST, Nov. 11, 2003, at B5; *The Day in Court*, WASH. POST, Nov. 13, 2003, at A18.

²⁴⁹ Josh White, *Sniper Suspect Eligible for Death: Judge Won't Require Proof That Muhammad Fired the Fatal Shot*, WASH. POST, Nov. 13, 2003, at A1. The so-called "triggerman" rule that the defense argued stems from the Virginia cases *Johnson v. Commonwealth*, 255 S.E.2d 525 (Va. 1979), and *Coppola v. Commonwealth*, 257 S.E.2d 797 (Va. 1979), which stated that "only the immediate perpetrator of a homicide, the one who fired the fatal shot, and not an accessory before the fact or a principal in the second degree, may be convicted of capital murder," 257 S.E.2d at 806. The judge's ruling in the Muhammad trial was debated by the legal community. William Sullivan, a former assistant U.S. attorney that has experience in prosecuting, suggested that "[t]here's more than enough evidence," but Alexandria defense lawyer John Zwerling, suggested the "commonwealth [was] basically asking this judge to expand the current state of the law to include someone who may be a puppeteer." Scott Higham, *Judge Weighs Muhammad's Eligibility for Death: Outside Lawyers Divided on Whether Prosecutors Met Two Legal Requirements for Execution*, WASH. POST, Nov. 13, 2003, at B5. Zwerling's opinion was shared by other attorneys and law professors who pointed out that the prosecution did not prove that Muhammad personally killed anyone. *Id.* An alternative analysis exists, however, for subjecting Muhammad to the death penalty as the "triggerman." When an individual utilizes

Muhammad's attorneys presented his defense in three hours, calling only five witnesses to challenge the prosecution's testimony.²⁵⁰ On November 17, 2003, after two days of deliberating, the jury found Muhammad guilty of all charges.²⁵¹ In the sentencing phase, which began on November 20, 2003, the judge limited the prosecution's victim impact testimony to evidence relevant to the death of Dean Meyers, impeding the prosecution's original plan to introduce emotional testimony to at least three shootings.²⁵² Along with the limited emotional testimony, the prosecution introduced several pieces of evidence and testimony to show that Muhammad was a danger to society, such as a map marked with future targets and testimony from a corrections officer that Muhammad was plotting a prison escape.²⁵³ Muhammad's attorneys presented evidence, such as home videos, and called several witness in an effort to humanize Muhammad.²⁵⁴ The jury began sentencing deliberations on November 20, 2003.²⁵⁵

After four hours of disagreement on the verdict, the jury asked the judge what would happen if they did not reach a unanimous verdict and whether they could deliberate into the next week.²⁵⁶ The judge avoided the first question, instead encouraging them to find a unanimous verdict, but told the jury they could deliberate into the following week if needed.²⁵⁷ One jury member also asked if she could do legal research over the weekend and look at other cases.²⁵⁸ She was told

a legally incompetent person to commit a crime (such as a child or an otherwise illegally competent person), the individual "puppeteer" is considered the principal in the first degree. If Malvo were found to be legally incapable of a shooting (due to insanity, or perhaps duress), Muhammad could be deemed the principal in the first degree. Malvo is, however, of sufficient age to be held responsible for a crime.

²⁵⁰ Scott Higham, *After Short Case, Defense Prepares to Address Jurors*, WASH. POST, Nov. 13, 2003, at A18.

²⁵¹ Carol Morello, *Defendant Stoical Through the End: Muhammad Keeps Emotions to Himself*, WASH. POST, Nov. 18, 2003, at A11.

²⁵² Josh White, *Muhammad Guilty on All Counts: Prosecutors Begin Case for Sniper's Death*, WASH. POST, Nov. 18, 2003, at A1.

²⁵³ Josh White, *Muhammad Planned More Shootings, Jury Is Told: Prosecutors Seeking Death Penalty Also Describe Attempted Escape*, WASH. POST, Nov. 19, 2003, at B1. The Virginia death penalty statute sentencing guidelines require that the jury find a "probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman." VA. CODE ANN. § 19.2-264.2 (Michie 2004).

²⁵⁴ Josh White, *Lawyers Argue Fate of Sniper: Muhammad Jury to Weigh Penalty*, WASH. POST, Nov. 21, 2003, at A1.

²⁵⁵ Josh White, *Muhammad Jurors Told to Keep Working: Panel Asks What Happens in Deadlock*, WASH. POST, Nov. 22, 2003, at B1.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

that jurors could not do any outside legal research or seek out any other information on the death penalty.²⁵⁹ By November 25th the jury was able to come to a consensus and recommended the death penalty for both capital murder convictions.²⁶⁰ Interviews with jurors revealed that the jury was initially divided eight-to-four on whether the death penalty should be imposed and several jurors struggled with imposing the death penalty.²⁶¹ The judge followed the recommendation of the jury and formally sentenced Muhammad to death on March 9, 2004.²⁶²

As the prosecution's case in the Muhammad trial was coming to a close, the trial of Lee Boyd Malvo was just beginning. Malvo was charged with two counts of capital murder for the death of a different victim, Linda Franklin of Fairfax County, Virginia.²⁶³ Like Muhammad, Malvo was charged under the multiple killing and terrorism provisions of the Virginia death penalty statute.²⁶⁴ Malvo also pleaded not guilty to the charges but, instead of refuting the evidence, he claimed he was temporarily insane when the sniper shootings occurred.²⁶⁵ Malvo's jury of nine women and seven men was selected on November 11, 2003, and included a more racially diverse composition than Muhammad's, with two African-American men, two African-American women and one Asian man.²⁶⁶ Opening statements took place on November 13, 2003,²⁶⁷ and the prosecution began its case on November 17th.²⁶⁸

²⁵⁹ *Id.*

²⁶⁰ Josh White, *Jury Sentences Muhammad to Death: Defendant Stoical, Panel Emotional as Sniper Trial Ends*, WASH. POST, Nov 25, 2003, at A1.

²⁶¹ *Id.* See also, Marc Fisher, *Flawed Process Produced a Fair Jury*, WASH. POST, Nov. 25, 2003, at B1. One juror asked his fellow jurors in the jury room, "[h]ow many more bodies do we need to add to this pile we already have?" *Id.* Another jury member voiced that she will probably become an anti-capital punishment activist now that the trial is over. *Id.*

²⁶² Josh White, *Defiant Muhammad Sentenced to Death for Sniper Slaying*, WASH. POST, Mar. 10, 2003, at A1.

²⁶³ Tom Jackman, *Malvo Pleads Not Guilty; Jury Process Underway: Muhammad Subpoenaed to Aid Case, Attorneys Say*, WASH. POST, Nov. 11, 2003, at B1 [hereinafter *Malvo Pleads*]. Linda Franklin was shot on October 14, 2002.

²⁶⁴ VA. CODE ANN. § 18.2-31(8), (13) (Michie 2004). See *Malvo Pleads*, *supra* note 263. Malvo was also charged with a weapons count. *Id.*

²⁶⁵ *Malvo Pleads*, *supra* note 263.

²⁶⁶ Tom Jackman, *In Malvo Trial, Defense Will Focus on "Why": With Jurors Empaneled, Case Is Ready to Begin*, WASH. POST, Nov. 13, 2003, at B1 [hereinafter *Focus on Why*]. After the guilt phase of the trial the jury was cut down to eight women and four men. Tom Jackman, *Malvo Guilty of Capital Murder: Sniper Trial Jury to Choose Life or Death as Sentence*, WASH. POST, Dec. 19, 2003, at A1 [hereinafter *Jury to Choose Life or Death*].

²⁶⁷ Henri E. Cauvin, *Neither Side Holding Back in Malvo Case: Lawyers Aggressive at the Start*, WASH. POST, Nov. 14, 2003, at B1.

²⁶⁸ Tom Jackman, *Malvo Jury Won't Hear 911 Call*, WASH. POST, Nov. 18, 2003, at A10.

Throughout the prosecution's five-day case, over eighty-five witnesses gave testimony and 240 exhibits were introduced.²⁶⁹ Among the prosecution's most influential pieces of evidence were tape-recordings and transcripts of interrogations of Malvo.²⁷⁰ The interrogations included several incriminating statements by Malvo declaring that he intended to kill the victims and that he was the one who fired the shots.²⁷¹ Malvo also told detectives that he and Muhammad planned to kill individuals until the government either caught them or paid them ten million dollars.²⁷² Malvo's attorneys claimed that Malvo only gave the statement in order to protect Muhammad and pointed out several factual errors given by Malvo in order to discredit his confessions, but the prosecution's evidence was still damaging to Malvo.²⁷³ The prosecution also called several witnesses, such as a jail guard, to testify that Malvo admitted to them that he killed several others in addition to Linda Franklin.²⁷⁴ Some of the evidence the prosecution introduced was being used by the jury in Muhammad's trial, so the jury only saw photographs until the evidence was available.²⁷⁵

The defense began presenting Malvo's case on November 24th and rested on December 15, 2003.²⁷⁶ Over nine and a half days, Malvo's attorneys called forty-five witnesses and introduced ninety-nine exhibits.²⁷⁷ Witnesses included several people who knew Malvo at various stages of his life, both in Jamaica and in the United States.²⁷⁸ Malvo's father and other family members were among the witnesses, telling the jury that Malvo was an obedient child who was good-natured before he met Muhammad.²⁷⁹ Other witnesses, such as Muhammad's ex-wives and son, were called to show that turmoil in Muhammad's life led him to commit the sniper attacks and that he had the ability to manipulate and brainwash Malvo into

²⁶⁹ Tom Jackman, *Malvo's Father Recalls 'My Prized Son': Defendant Ignores Crying Witness, First to Recount His Troubled Past*, WASH. POST, Nov. 25, 2003, at B1 [hereinafter *Father Recalls*]; *Malvo Trial: The Day in Court*, WASH. POST, Dec. 17, 2003, at A30.

²⁷⁰ Tom Jackman, *Jury Hears Tape of Malvo Interrogation*, WASH. POST, Nov. 19, 2003, at A1.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ Tom Jackman & Patricia Davis, *Jail Guard Says Malvo Talked of Trail of Bodies*, WASH. POST, Nov. 21, 2003, at A29.

²⁷⁵ Patricia Davis, *Malvo Jury Sees Photos, but Not Actual Evidence*, WASH. POST, Nov. 24, 2003, at B1.

²⁷⁶ *Father Recalls*, *supra* note 269; Tom Jackman, *Prosecution Psychologists Say Malvo Was Not Insane: Both Sides Rest Cases; Closing Arguments Set for Today*, WASH. POST, Dec. 16, 2003, at B1 [hereinafter *Prosecution Psychologists*].

²⁷⁷ *Father Recalls*, *supra* note 269.

²⁷⁸ *Malvo Trial: The Day in Court*, WASH. POST, Nov. 25, 2003, at B5.

²⁷⁹ Tom Jackman, *Witnesses Call Malvo 'Obedient'; Defense Relies on Effect of Muhammad's Influence*, WASH. POST, Nov. 26, 2003, at B1.

joining him.²⁸⁰ Testimony by three mental health experts and an expert on cults was introduced in an effort to show that Muhammad's indoctrination of Malvo made him temporarily insane and unable to distinguish right from wrong.²⁸¹

The prosecution called two mental health rebuttal witnesses over the next few days, followed by the closing arguments, and by December 17, 2003, the jury began deliberations.²⁸² The jury took only two days to find Malvo guilty on both counts of capital murder, but questions late in the first day demonstrated that the decision was not easy for the jury.²⁸³

During the sentencing phase of the trial, the prosecution was able to bring in several pieces of emotional testimony that were not allowed in the guilt phase.²⁸⁴ In contrast to the judge in the Muhammad trial, the Fairfax county judge ruled that some of the emotional evidence, such as the 911 tape of Linda Franklin's husband after she was shot, was irrelevant to the guilt phase of the trial.²⁸⁵ The prosecution's case was very emotional to both the witnesses and the jurors. Reporters noted that over half of the jurors cried while they listened to the testimony of the victims' family members.²⁸⁶ The prosecution also told the jurors of an escape attempt by Malvo in order to convey that he was a threat to society.²⁸⁷

Malvo's attorneys presented similar testimony in the sentencing phase as they did in the guilt phase.²⁸⁸ Past teachers, friends, family members and others who spent time with Malvo before the sniper shootings gave testimony as to why he did not deserve the death penalty.²⁸⁹ After two days of deliberations, the jury imposed only a life sentence on Malvo.²⁹⁰

²⁸⁰ *Id.* See also Tom Jackman, *Malvo Defense Portrays Muhammad's Turning Point*, WASH. POST, Dec. 2, 2003, at B1; Tom Jackman, *Muhammad a 'Manipulator': At Malvo Trial, Sniper's Son Describes Being Influenced*, WASH. POST, Dec. 3, 2003, at A1.

²⁸¹ Henri E. Cauvin, *Mental Health Experts Can Often Tell Defendant's Tale: Malvo's Insanity Plea Allows for Hearsay*, WASH. POST, Dec. 9, 2003, at B2; Tom Jackman, *2 Psychiatrists Testify That Malvo Was Insane: Teen Had Mental Disease, Sniper Jury Told*, WASH. POST, Dec. 11, 2003 at B1; Tom Jackman, *Disparities in Malvo's Interviews Questioned*, WASH. POST, Dec. 12, 2003, at B1.

²⁸² *Prosecution Psychologists*, *supra* note 276; Tom Jackman, *Malvo's Case in Hands of Virginia Jury: Insanity Argued in Sniper Trial*, WASH. POST, Dec. 17, 2003, at A1.

²⁸³ *Jury to Choose Life or Death*, *supra* note 266.

²⁸⁴ Tom Jackman, *Emotions Run High in Malvo Courtroom: Suffering Described in Penalty Phase*, WASH. POST, Dec. 20, 2003, at A1.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Malvo Trial Begins Penalty Phase*, WASH. POST, Dec. 20, 2003, at A13.

²⁸⁸ *Id.*

²⁸⁹ Serge F. Kovalski, *High School Educators Praised Malvo: Attorney Introduces Letters from Teacher, Principal*, WASH. POST, Dec. 23, 2003, at B1.

²⁹⁰ Tom Jackman, *Malvo Is Spared Death Penalty; Jury Gives Teen Life Sentence for His Role in Sniper Slayings*, WASH. POST, Dec. 24, 2003, at A1 [hereinafter *Malvo Is Spared*]. Malvo was formally sentenced on March 10th. Tom Jackman, *Malvo Is Sentenced to Life:*

Although the charges against Malvo were almost identical to the charges brought against Muhammad, the trial proceedings and outcomes were significantly different. The prosecution's case against Malvo was arguably stronger than the case against Muhammad, yet the jury in Malvo's trial did not impose the death penalty. The prosecution had evidence of Malvo's fingerprints on the alleged murder weapon²⁹¹ and several witnesses saw Malvo at the scenes of various shootings.²⁹² The extensive interrogations of Malvo not only allowed the jury to hear Malvo's confessions, but gave the jury reasons to doubt that he was insane or childish.²⁹³ The jury's reluctance to impose the death penalty on Malvo does not square with the strength of the prosecution's case. When Malvo's age is brought into the picture, however, the jury's ability to set aside the confessions and fingerprints to spare Malvo the death penalty makes sense.²⁹⁴ Malvo's youth was a constant focus before, during, and after the trial, and proved to have a considerable impact on the sentencing aspect of the case in particular.

Malvo's youth altered perceptions from the beginning. Before the trial began, the *Washington Post* published a lengthy article depicting Malvo as an abandoned and abused child who had several guardians throughout the years.²⁹⁵ The story focuses on Malvo's youth and suggests he was indoctrinated into participating in the sniper charade because of his obedient nature and unstable home life.²⁹⁶ Additionally, Malvo's appearance in the courtroom was that of a young boy. Reporters wrote that he looked "more like a Gap kid than the remorseless, coldblooded murderer portrayed by the prosecutors."²⁹⁷ In addition to Malvo's crewneck sweater and Dockers, the press commented on his "youthful doodling" and childlike demeanor in the court room.²⁹⁸ The legal community commented that creating such "empathy and sympathy with the jurors" who "are parents themselves" was not only a strategy to prove Malvo's insanity, but also to make the imposition of the death penalty on Malvo more difficult.²⁹⁹

Teen Convicted in Fairfax May Plead Guilty in Other Sniper Attacks, WASH. POST, Mar. 11, 2004, at A1.

²⁹¹ *Focus on Why*, *supra* note 266.

²⁹² *Id.*

²⁹³ Serge F. Kovaleski, *Doodling and Dress Called Defense Ploy: Some See an Effort to Stress Malvo's Youth*, WASH. POST, Nov. 14, 2003, at B7 [hereinafter *Doodling*].

²⁹⁴ Henri E. Cauvin, *Malvo's Age Was the Deciding Factor*, WASH. POST, Dec. 24, 2003, at A1 [hereinafter *Malvo's Age*].

²⁹⁵ Henri E. Cauvin, *Malvo's Restless Journey for Belonging and Direction*, WASH. POST, Nov. 9, 2003, at A1.

²⁹⁶ *Id.*

²⁹⁷ *Doodling*, *supra* note 293.

²⁹⁸ *Id.*

²⁹⁹ *Id.* Malvo's attorneys denied that Malvo's appearance was a ploy to make him look especially young.

Throughout the guilt and sentencing phases of the trial, Malvo's attorneys continuously focused on Malvo's juvenile-like ways. In most trials, the defendant's age is not a factor until the sentencing phase, but in this case Malvo's attorneys were able to bring the issue to the jury in both phases due to the insanity defense.³⁰⁰ In both the guilt and sentencing phases, the jury heard extensive testimony about Malvo's troubled youth, and how such abuse, neglect and his age allowed him to be so easily indoctrinated by Muhammad.³⁰¹ According to the Chief of Capital Cases for the Federal Public Defender for the Eastern District of Virginia, Gerald Zepking, the inclusion of this evidence from the beginning allowed Malvo's attorneys to make more of a case to spare Malvo's life than if this evidence had been introduced to the jury for the first time during the sentencing phase.³⁰² A law professor who studies the penalty phase of capital trials commented that during the penalty phase, "a defendant's youth and impressionability work very much in their favor. 'A key strategy is to remind the jury that he is somebody's child and that he could be their child.'"³⁰³

After the trial was complete, several jurors commented on how Malvo's youth impacted their decision to impose the life sentence. One juror stated that she "didn't feel [Malvo] would have been in this circumstance but for John Muhammad"³⁰⁴ and another found "[h]is background, his age [and] the psychiatric testimony" to be convincing mitigating factors.³⁰⁵ Although feelings of both disgust and relief were felt after the trial, the legal community agreed that Malvo's age was the crucial factor in the decision.³⁰⁶ The prosecuting attorney commented that Malvo "is very lucky that he looks a lot younger than he is."³⁰⁷ Others commented on the impact of the jury's sentence recommendation, noting that it "sends a strong message to legislators . . . that public opinion is shifting about executing teenagers."³⁰⁸ Former director of the NAACP Legal Defense Fund's criminal justice project, George Kendall, suggests that states might want to rethink spending money on bringing

³⁰⁰ *Focus on Why*, *supra* note 266. See also Tom Jackman, *Muhammad's Case Goes to Jury; Malvo's Begins: Lawyers Offer 2 Views of Teen: 'Clever Killer' or Obedient Boy*, WASH. POST, Nov. 14, 2003, at A1.

³⁰¹ See *Malvo Pleads*, *supra* note 263; *Focus on Why*, *supra* note 266.

³⁰² Henri E. Cauvin, *Malvo Guilty of Capital Murder: At the Core of the Case: Should a Life be Spared?*, WASH. POST, Dec. 19, 2003, at A1; *Jury to Choose Life or Death*, *supra* note 266.

³⁰³ Serge F. Kovalski, *Attorneys Introduce Letters from Malvo Principal, Teacher*, WASH. POST, Dec. 23, 2003, at B4 (quoting Welsh S. White, a law professor at the University of Pittsburgh).

³⁰⁴ *Malvo Is Spared*, *supra* note 290.

³⁰⁵ Carol Morello, et al., *Tormented Jurors Argued, Cried and Wavered Before Agreeing to Life*, WASH. POST, Dec. 24, 2003, at A9.

³⁰⁶ *Malvo's Age*, *supra* note 294.

³⁰⁷ *Malvo Is Spared*, *supra* note 290.

³⁰⁸ *Malvo's Age*, *supra* note 294.

capital cases against juveniles after this case because it “was a very clear sign that this country is turning away from using the death penalty generally, but clearly in cases involving youthful offenders.”³⁰⁹

What must now be added to the legislative calculus in the *Atkins* analysis is the refusal of a Virginia jury to sentence Lee Boyd Malvo, perhaps the most notorious juvenile offender in decades, to the death penalty. The circumstances surrounding his trial and sentencing, whether formally relevant in all respects to the court’s determination or not, will reinforce the significance of Virginia’s failure to execute a juvenile offender since 2002. The blatant forum-shopping that went on between prosecutors in Alabama, Maryland, Washington, D.C., Virginia and the federal government made it apparent that Virginia was selected for the first Malvo trial because it was the only one of those jurisdictions that had executed juveniles since 1973.³¹⁰ While in federal custody, Malvo refused to talk to investigators on the advice of his attorneys. During a seven hour interrogation in Virginia when Malvo was initially without an attorney, however, he gave a confession, which was quickly leaked to the press, in which he admitted pulling the trigger in several of the shootings and even planning some of the killings. Muhammad, in contrast, never spoke to interrogators, suggesting yet another reason why juvenile offenders may merit more protection from the death penalty.³¹¹ The result of Malvo’s trial, in comparison to Muhammad’s trial, also demonstrates that juries are uncomfortable with imposing the death penalty on juveniles. Although the prosecution in Malvo’s case had both a confession and evidence of Malvo’s fingerprints on the alleged murder weapon, whereas the prosecution in Muhammad’s case had to establish that Muhammad was a principal despite not being the triggerman, only the jury in Malvo’s trial declined to impose the death penalty.

The six Justices in the *Atkins* majority considered actual jury verdicts and executions in rejecting the death penalty for mentally retarded individuals, which not only opens the door to consideration of the jury verdict in *Malvo* but also to the

³⁰⁹ *Id.*

³¹⁰ *Id.* Alabama was the only other forum of those that even allowed for the juvenile death penalty. Only Virginia and Texas have executed multiple juvenile offenders since 1990 — Virginia, three; Texas, eleven. *Id.*; Joseph W. Goodman, *Overturning Stanford v. Kentucky: Lee Boyd Malvo and the Execution of Juvenile Offenders*, 2003 MICH. ST. DCLL. REV. 389, 407–08 (2003).

³¹¹ See Goodman, *supra* note 310, at 408–10.

The need for extra constitutional protections for juveniles is demonstrated in the way that prosecutors purportedly took advantage of Malvo’s youth, vulnerability, and inexperience to gain his confession. . . . [and] [t]he difference between Malvo’s actions (that is, his confession) at the hands of prosecutors and Muhammad’s actions (that is, his silence) under similar circumstances highlights the difference between a juvenile’s judgment and an adult’s judgment.

Id. at 409–10.

broader circumstances of the sentencing as reflecting on the third factor of community considerations in assessing evolving standards of decency.³¹² Even if Malvo is tried again, in Virginia or Alabama, and sentenced to death, it will continue to be significant that the initial jury in such a notorious case, in such proximity to the most extensive and well known of the killings, refused to sentence Malvo to death. That another jury in virtually the same time period did sentence Muhammad to death, despite the lack of a confession and substantial questions as to whether he was the triggerman, provides as much of a control group test of public rejection of the death penalty for juveniles as can ever be expected.

Prior to the *Malvo* sentencing, several commentators had made the arguments for why the *Atkins* decision should lead to the Court's prohibition of the death penalty for juveniles. The legal significance of the *Malvo* verdict and sentencing under the *Atkins* factors has been delineated above. The Missouri Supreme Court ruling in *State ex rel. Simmons v. Roper*³¹³ is a textbook-like application of the *Atkins* factors to imposition of the death penalty on juvenile offenders, holding that its imposition is cruel and unusual punishment. After noting that *Stanford v. Kentucky*³¹⁴ was decided the same day as *Penry v. Lynaugh*,³¹⁵ a case overruled by *Atkins*, the court's analysis begins by noting that the legislative action against the juvenile death penalty is evidence that a national consensus now exists against the death penalty for juvenile offenders.³¹⁶ The decision then proceeds to the actual imposition of the death penalty, emphasizing that more mentally retarded offenders have been executed, and in more states, since 1977 than juvenile offenders.³¹⁷ In considering the views of respected organizations, the court also found,

that the views of the international community have consistently grown in opposition to the death penalty for juveniles. Article 37(a) of the United Nations Convention on the Rights of the Child and several other international treaties and agreements expressly prohibit the practice. According to Amnesty International, officially sanctioned executions of juveniles have occurred in only two other countries in the world in the last few years, Iran and the Republic of Congo (DRC). Of the last seven juvenile offender executions, five occurred in the United States.³¹⁸

³¹² See *Atkins v. Virginia*, 536 U.S. 304, 323 (2002).

³¹³ 112 S.W.3d 397 (Mo. 2003), *cert. granted*, 124 S. Ct. 1171 (U.S. Jan. 26, 2004) (No. 03-633).

³¹⁴ 492 U.S. 361 (1989).

³¹⁵ 492 U.S. 302 (1989).

³¹⁶ *Roper*, 112 S.W.3d at 397, 407-09.

³¹⁷ *Id.* at 410.

³¹⁸ *Id.* at 411 (citations omitted).

This reference to an international consensus is limited to the *Atkins* factor regarding the views of respected organizations. The court does not even address the significant and substantial issue under international law *and* constitutional law as to whether the United States may continue to execute juveniles despite this overwhelming consensus.

The prohibition on the execution of juveniles is not merely a rule of customary international law — it is *jus cogens*, a customary norm of such overwhelming consensus and fundamental importance that there may be no derogation from it (recognition of *jus cogens* norms as absolute is itself a norm of customary international law). Despite the contention of some commentators that custom should not be deemed part of federal law on par with treaties and congressional legislation under the Supremacy Clause, *no* federal court, to date, has so held and there are many federal court decisions (including those of the Supreme Court, most recently in *Sosa v. Alvarez-Machain*³¹⁹) that have recognized custom as directly incorporated federal law. Customary international law prohibits juvenile executions and the norm is *jus cogens*. This norm is absolute, and is federal *law* under the Supremacy Clause which *as a matter of constitutional law* prevails over any conflicting state law. International law and the Supremacy Clause provide a separate, constitutional basis for the invalidation of the death penalty for juveniles.

Proceeding on to the fourth *Atkins* factor, the court's "independent examination" of the death penalty for juvenile offenders, the *Simmons* court found no retributive or deterrent value to the execution of juveniles, in part because of their lesser experience and education compared to adults. In addition, the court concluded that the risk of wrongful execution is greater for younger offenders "who have had less time to develop ties to the community, less time to perform mitigating good works, and less time to develop a stable work history . . . and who are far more likely than adults to waive their rights and to give false confessions."³²⁰

It has been suggested in this symposium by defenders of the death penalty for juveniles that the jury's refusal to impose the death penalty on Malvo demonstrates that juries can make meaningful distinctions between the legal culpability of juvenile offenders. The above analysis suggests otherwise, as did the prosecutor in Malvo's case. When asked in multiple interviews after the sentencing what he had learned from the case, the prosecutor replied that he had learned never to bring a death penalty case in the week before Christmas.³²¹

³¹⁹ 124 S. Ct. 2739 (2004).

³²⁰ *Id.* at 413.

³²¹ Tom Jackson, *Jury Gives Malvo Life Sentence in Sniper Case*, WASH. POST, Dec. 24, 2003, at A8.

IV. "REVIEW AND RECONSIDERATION" OF THE DEATH PENALTY
AFTER *MEXICO V. UNITED STATES*

On March 31, 2004, the ICJ ruled that the United States once again breached its obligations under Article 36 of the Vienna Convention³²² by not advising Mexican nationals, arrested and sentenced to death in the United States, of their right to communicate with Mexican consular officers.³²³ Article 36(1)(b) requires state authorities to inform detained foreign nationals "without delay" of their right to communicate with consular officers.³²⁴ Based on the object and purpose of the Vienna Convention, the ICJ interpreted the phrase "without delay" as meaning "as soon as [the authorities] realize[] that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national."³²⁵

The United States' failure to inform foreign nationals of their right to request consular notification led to other violations of Article 36. Of the fifty-one Mexican nationals not properly informed of their right to communicate with their consular officers, the United States failed to formally notify Mexican consular officers with respect to the detention of forty-nine Mexican nationals, as prescribed by Article

³²² Vienna Convention, *supra* note 15. Article 36(1)(a) states "consular officers shall be free to communicate with [their respective] nationals . . . and to have access to them." Article 36(1)(b) requires state authorities to inform "without delay" detained foreign nationals of their right to communicate with consular officers, and if requested, state authorities must contact respective consular officers. Also, any communication from the detained national must be forwarded to consular officers. *Id.* Article 36(1)(c) states "consular officers shall have the right to visit a [detained] national" to communicate and "arrange for his legal representation," unless the detained national opposes such action. Finally, Article 36(2) asserts that the rights in paragraph (1) "shall be exercised in conformity with the laws and regulations" of the State detaining the foreign national, except "that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under [Article 36] are intended." *Id.*

³²³ Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), available at <http://www.icj-cij.org/icjwww/idecisions.htm>. Mexico originally named fifty-four Mexican nationals on death row in its application, but later amended it to exclude two Mexican nationals after further investigation. *Id.* at para. 7. The ICJ found fifty-one Mexican nationals were not properly informed of their right to request consular notification. *Id.* at para. 106(1). Shortly after Mexico filed its application in January 2003, the ICJ issued a provisional order, as requested by Mexico, that the United States not execute three Mexican nationals, whose appeals were exhausted, pending the ICJ's final judgment. *Id.* (Feb. 5, 2003 provisional order granting Mexico's request for the indication of provisional measures).

³²⁴ See *supra* note 322.

³²⁵ *Avena*, 2004 I.C.J. 128, para. 88. Mexico argued "without delay" meant immediately after arrest and before interrogation. See *id.* at para. 78. The United States argued the term meant "as soon as reasonably possible under the circumstances." See *id.* at para. 81.

36(1)(b).³²⁶ This prevented Mexican consular officers from freely communicating with Mexican nationals, as required by Article 36(1)(a), and visiting Mexican nationals while detained, as required by Article 36(1)(c).³²⁷ In the cases of thirty-four Mexican nationals, consular officers were prevented from properly arranging legal representation as allowed by Article 36(1)(c).³²⁸

Mexico argued that Article 36(1) violations by the United States are often precluded from being raised in United States criminal appeals courts because of the procedural default rule,³²⁹ and this procedural bar was counter to Article 36(2) requiring “full effect” to be given to purposes of the rights accorded in Article 36 and the ICJ’s decision in *LaGrand*.³³⁰ The United States responded that judicial and executive clemency proceedings together give full effect to Article 36 and comply with the *LaGrand* requirements.³³¹ Even though the procedural default rule precludes raising breaches of Article 36(1) when not raised at the trial level, such breaches are later considered under executive clemency proceedings.³³² The ICJ agreed with Mexico that the procedural default rule was being applied counter to the “full effect” requirement under Article 36(2), but it concluded that an Article 36(2) violation occurred, and *LaGrand* applied only when judicial review was completely exhausted.³³³ In three cases the judicial process was completed; therefore, the United States was in breach of Article 36(2) in the cases of three Mexican nationals.³³⁴

The ICJ then addressed the appropriate legal remedy for the breaches made by the United States. Mexico’s requests that the convictions and death sentences imposed be immediately annulled, and that evidence obtained in breach of Article 36 be excluded in any future proceedings against the Mexican nationals, were

³²⁶ *Id.* at para. 106(2). No violation was found in two cases because one Mexican national chose not to have consular officers notified after being informed of his right “40 hours after his arrest,” and another Mexican national was not informed of his right, but state authorities did formally notify consular officers. *See id.* at paras. 93, 97.

³²⁷ *Id.* at para. 106(3).

³²⁸ *Id.* at para. 106(4).

³²⁹ *Id.* at para. 111. The procedural default rule is defined as “a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*.” *Id.*

³³⁰ *Id.* at paras. 107, 109. *See supra* note 322, for the text of Article 36(2). *See also* *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

³³¹ *Avena*, 2004 I.C.J. 128, para. 110, available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>.

³³² *Id.*

³³³ *Id.* at para. 113.

³³⁴ *Id.* at para. 114. These three Mexican nationals were the same individuals subject to the ICJ provisional order prohibiting their executions while the ICJ’s final judgment was pending, issued in February 2003 shortly after Mexico submitted its application. *See id.* at para. 3.

denied by the ICJ as intrusive in the U.S. criminal justice system and not supported by the object and purpose of the Vienna Convention.³³⁵ Failure to inform foreign nationals of their right to request consular notification, and further breaches stemming from that failure, was the violation of the Vienna Convention, not the convictions and sentences themselves.³³⁶ The ICJ held that the United States must, as required by *LaGrand* and Article 36(2), “by means of its own choosing, [provide] review and reconsideration of the convictions and sentences of the Mexican nationals . . . by taking account” of the violations of Article 36.³³⁷ The review and reconsideration should be a “judicial process,”³³⁸ and the “clemency process, as currently practised within the United States criminal justice system, does not appear to meet the requirements” of review and reconsideration and “is therefore not sufficient.”³³⁹ Lastly, the procedural default rule should not act as a bar to raising Vienna Convention violations “where it . . . is the failure of the United States itself to inform [of the right to request consular notification] that may have precluded counsel from being in a position to have raised the . . . violation . . . in the initial trial.”³⁴⁰ In such cases review and reconsideration by U.S. criminal appeals courts is prevented.³⁴¹ Under these guidelines the United States must proceed to review and reconsider the convictions and sentences of the Mexican nationals by taking into account its violations of Article 36 of the Vienna Convention.

As Mark Warren noted in his article, the ICJ’s growing frustration with the United States’ non-compliance with the Convention was even more evident in *Avena*.³⁴² In *Avena*, the provisional order demanded that the United States “shall take all measures necessary to ensure” that the specific individuals would not be executed before the Court’s final judgment on the merits.

³³⁵ *Id.* at paras. 116–27. The requested actions by Mexico “ha[ve] to be examined under the concrete circumstances of each case by the United States courts concerned in their process of review and reconsideration.” *Id.* at para. 127.

³³⁶ *Id.* at para. 123.

³³⁷ *Id.* at para. 153(9).

³³⁸ *Id.* at para. 140.

³³⁹ *Id.* at para. 143. The United States unsuccessfully argued a combination of judicial review and executive clemency proceedings.

³⁴⁰ *Id.* at para. 113.

³⁴¹ *Id.* The United States unsuccessfully argued it had complied with *LaGrand* through its good faith efforts of notifying and training law enforcement agencies of the consular rights of foreign nationals under the Vienna Convention. *Id.* at para. 145. The ICJ appreciated these “noteworthy” efforts, but they were not sufficient. *See id.* at paras. 147, 152.

³⁴² Warren, *supra* note 162, at 329–31.

V. SUPREME COURT RECOGNITION THAT “INTERNATIONAL LAW IS PART OF OUR LAW, AND TO BE ASCERTAINED AND ADMINISTERED BY THE COURTS”³⁴³

One other, more general, development in the Supreme Court’s jurisprudence suggests that international norms will be considered more fully in the pending juvenile death penalty case of *Simmons* when the Supreme Court decides the case on its merits. Four Justices — Stevens, Souter, Ginsburg, and Breyer — said in opposition to the denial of certiorari in *Stanford II* that execution of juveniles must end.³⁴⁴ Justices Kennedy and O’Connor joined these four in the *Atkins* opinion.³⁴⁵ In the dissimilar cases of *Atkins*, *Grutter v. Bollinger*,³⁴⁶ and *Lawrence v. Texas*,³⁴⁷ both of these Justices took into consideration (as did the Missouri Supreme Court in *Simmons*) norms of customary international law in interpreting constitutional provisions. As several other articles in this symposium demonstrate, customary international law prohibits execution of juveniles.

In *Bollinger*, Justices Breyer and Ginsburg discussed the International Convention on the Elimination of All Forms of Racial Discrimination, a treaty ratified by the United States, as support for the Court’s observation that affirmative action programs “must have a logical end point.”³⁴⁸ The Supreme Court has also considered foreign precedent when discussing the right to engage in sodomy in the privacy of one’s own home, the history of assisted-suicide law, the application of the Eighth Amendment to the death penalty, and the conflict between campaign finance laws and the First Amendment.³⁴⁹ In the last five years, Justices Stevens, Breyer, and Kennedy have cited foreign decisions as support in their opinions, and Justice O’Connor has publicly endorsed increased reliance on both international law and foreign court decisions.³⁵⁰

Approximately fifty House Republicans have entered the judicial fray by proposing a non-binding resolution that judicial decisions may not be based on foreign laws or court decisions, transparently in response to liberalization of the

³⁴³ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

³⁴⁴ *In re Stanford*, 537 U.S. 968, 968–69 (2002) (Stevens, J., dissenting).

³⁴⁵ *Atkins v. Virginia*, 536 U.S. 304 (2002).

³⁴⁶ 539 U.S. 306 (2003).

³⁴⁷ 539 U.S. 558 (2003).

³⁴⁸ Harold Hongju Koh, *The United States Constitution and International Law: International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 49 (2004) (quoting *Grutter v. Bollinger*, 539 U.S. 309, 342, 344 (Ginsburg, J., concurring)).

³⁴⁹ *Lawrence*, 539 U.S. at 573 (sodomy); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 403 (2000) (First Amendment); *Washington v. Glucksberg*, 521 U.S. 702, 710, 718 n.16, 785–87 (1997) (assisted suicide); *Raines v. Byrd*, 521 U.S. 811, 828 (1997) (assisted suicide); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Eighth Amendment).

³⁵⁰ Koh, *supra* note 348, at 48.

law in death penalty and gay rights cases.³⁵¹ The two co-sponsoring members of the House Judiciary Committee, Bob Goodlatte of Virginia and Tom Feeney of Florida, suggested that impeachment may even be an appropriate remedy for judges utilizing foreign law to interpret the Constitution.³⁵² It is unclear whether the resolution would also preclude reliance on British colonial precedents or other sources of Anglo-American law, which even Justices Thomas, Scalia and Rehnquist have used without questioning their validity in constitutional interpretation.³⁵³

As the amicus brief of legal historians filed in the case of *Sosa v. Alvarez-Machain*³⁵⁴ demonstrates unequivocally, customary international law was assumed by the Framers, the first Congresses, and the earliest American courts to be part of our federal law.³⁵⁵ Treaties are expressly in the Constitution as the “supreme law of the land.”³⁵⁶ Congress is given the additional power “[t]o define and punish piracies and felonies committed on the high seas, and offences against the law of nations.”³⁵⁷ When Articles III and VI of the Constitution speak of the “Laws of the United States,” the drafting history of those provisions demonstrates that the phrase encompassed customary international law on par with federally created law.³⁵⁸ Incorporation of international law into constitutional interpretation is consistent with the original intent of the Framers, whatever non-binding resolutions, “nationalist” Justices, and the current administration might otherwise suggest. International norms have been utilized by the Court since 1780 to protect and expand upon established civil liberties. They have not, and could not, be utilized to reduce established constitutional rights or to establish new ones without any other constitutional foundation. Nothing less than a constitutional amendment would be necessary to isolate the U.S. Constitution from the influence of interna-

³⁵¹ See H.R. Res. 568, 108th Cong. (2004). A similar resolution, H.R. Res. 446, 108th Cong. (2003), was also introduced in the 108th Congress.

³⁵² Tom Curry, *A Flap Over Foreign Matter at the Supreme Court: House Members Protest Use of Non-U.S. Rulings in Big Cases*, MSNBC, Mar. 11, 2004, at <http://www.house.gov/feeney/msnbsresolutionarticle.htm>.

³⁵³ The broader of the two resolutions provides:

[that it is] the sense of the House of Representatives that Judicial determinations regarding the meaning of the laws of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the laws of the United States.

H.R. Res. 568, 108th Cong. (2004).

³⁵⁴ 124 S. Ct. 2739 (2004).

³⁵⁵ Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents, *Alvarez-Machain* (No. 03–339).

³⁵⁶ U.S. CONST. art. VI.

³⁵⁷ U.S. CONST. art. I, § 8.

³⁵⁸ Koh, *supra* note 348, at 44 & n.5.

tional norms in derogation of the Framers' original intent and the express language of the Constitution.

The Supreme Court cannot avoid the internationalization of domestic law, as the five prominent international law cases on its docket this past term demonstrate.³⁵⁹ Justices Thomas, Scalia, and Chief Justice Rehnquist, who Koh refers to as the "nationalist Justices,"³⁶⁰ have been the most resistant to the utilization of foreign law and international law.³⁶¹ Justice Thomas has said "this Court . . . should not impose foreign moods, fads, or fashions on Americans."³⁶² Justice Scalia declared "irrelevant" what other countries thought about the execution of the mentally impaired.³⁶³ Their "notions of justice are (thankfully) not always those of our people."³⁶⁴ Chief Justice Rehnquist has joined in opinions and dissents by Thomas and Scalia finding international law irrelevant,³⁶⁵ but joined with Scalia in citing the judicial approval in Canada of homosexual marriage in his dissent in *Lawrence v. Texas*.³⁶⁶ Moreover, as Koh points out, Rehnquist has stated:

When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.³⁶⁷

³⁵⁹ See Lori Fislser Damrosch & Bernard H. Oxman, *Agora: The United States Constitution and International Law: Editor's Introduction*, 98 AM. J. INT'L L. 42, 42 n.3 (2004). The five cases are: *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (U.S. Jan. 9, 2004) (No. 03-6696); *Rumsfeld v. Padilla*, 352 F.3d 695 (2nd Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (U.S. Feb. 20, 2004) (No. 03-1027); *Rasul v. Bush*, 215 F. Supp. 55 (D.C. Cir. 2002), *cert. granted*, 124 S. Ct. 534 (U.S. Nov. 10, 2003) (No. 03-334); *Sosa v. Alvarez-Machain*, 331 F.3d 604 (9th Cir. 2001), *cert. granted*, 124 S. Ct. 807 (U.S. Dec. 1, 2003) (No. 03-339); and *State ex rel Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), *cert. granted*, 124 S. Ct. 1171 (U.S. Jan. 26, 2004) (No. 03-633).

³⁶⁰ Koh, *supra* note 348 at 52 & n.62, 54.

³⁶¹ *Id.*

³⁶² *Id.* at 52 n.66 (quoting Thomas's concurrence in denial of certiorari in *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002)).

³⁶³ *Atkins v. Virginia*, 536 U.S. 304, 348 (2004) (Scalia, J., dissenting).

³⁶⁴ *Id.*

³⁶⁵ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586, 598 (2003) (Scalia, J., dissenting); *Atkins*, 536 U.S. 304, 337-54 (Scalia, J., dissenting); *Atkins*, 536 U.S. at 324-25 (Rehnquist, J., dissenting).

³⁶⁶ See *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

³⁶⁷ Koh, *supra* note 348, at 48 (quoting William H. Rehnquist, *Constitutional Courts — Comparative Remarks* (1989), reprinted in *GERMANY AND ITS BASIC LAW: PAST, PRESENT*

The force and effect of international law, against the death penalty for juveniles and the lack of established procedural remedies for failure to provide consular notice, has reached a level of consensus and precedent that even the nationalist Justices can no longer ignore (even if only to reject its application by the other Justices). It is time, as the Chief Justice has said, for the Supreme Court to look to the constitutional courts of other countries to aid in our constitutional interpretation. Four Justices and the Missouri Supreme Court have already done so, concluding that the death penalty for juveniles is cruel and unusual punishment. Justices Kennedy and O'Connor have indicated their willingness to consider international norms, and these norms unequivocally prohibit it. If Chief Justice Rehnquist does what he says it is time to do, he would have to reach the same conclusion. As compelling as the case may be now for the Supreme Court to prohibit the death penalty for juveniles in *Simmons*, the case for mandatory re-sentencing or retrial for defendants who did not receive consular notice is equally or more compelling, even for the "nationalist" Justices, if due recognition is to be given to treaty obligations which are the "Supreme law of the land," and ICJ decisions by which the United States is bound.

CONCLUSION

The United States has acknowledged, and the ICJ has held, that the failure to provide consular notice is a violation of the Vienna Convention on Consular Relations. Treaties are the "supreme law of the land" under the Supremacy Clause.³⁶⁸ Decisions of the ICJ are binding on the parties to the case under the UN Charter to which the United States is a party.³⁶⁹ Whatever strained ambiguities the United States might seek to find in the ICJ's *Avena* opinion, it unequivocally stands for the proposition that there must be judicial review and reconsideration of the death sentence for any foreign national who did not receive consular notice. The possibility of executive clemency does not suffice.

The Inter-American Court of Human Rights has determined that Article 36 of the Vienna Convention confers individual rights of notification on foreign detainees at the time of arrest, and that any death sentence imposed without such notice violates fundamental due process guarantees and constitutes an arbitrary deprivation of the right to life.³⁷⁰ As Mark Warren's article notes, the UN General Assembly

AND FUTURE — A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993)).

³⁶⁸ U.S. CONST. art. VI.

³⁶⁹ U.N. CHARTER art. 94, para. 1.

³⁷⁰ See *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Oct. 1, 1999, Inter-Am. Ct. H.R. (Ser. A) No. 16 (1999).

has endorsed by consensus the opinion of the Inter-American Court that failure to provide consular notice violates fundamental guarantees of due process.³⁷¹

Article 36(2) of the Vienna Convention requires that "laws and regulations must enable full effect to be given to the purposes for which the rights accorded under the article are intended." The United States contends that it has done everything it can do in our federal system to ensure that notice is given and that judicial remedies are provided. That is simply not the case.

Efforts are currently underway to see that rules four and five of the Federal Rules of Criminal Procedure are amended to require consular notice in federal arrests.³⁷² This initiative has not been taken by or at the request of the U.S. government, even though the United States has a treaty obligation under the Vienna Convention to ensure that laws and regulations (at a minimum *federal* laws and regulations) give effect to the consular notice requirement.

In sum, *Avena* stands without question for the proposition that a judicial remedy must be provided to individual defendants for the failure to provide consular notice, and that decision is binding on the United States under the UN Charter, a treaty to which the United States is a party and which is the "supreme law of the land" under the Supremacy Clause. Therefore, U.S. courts can no longer take the position that the Vienna Convention does not create individual rights, or that a judicial remedy is not required. The *Avena* decision specifies that the remedy must include "review and reconsideration" of a death penalty case, and that the possibility of executive clemency does not suffice.³⁷³

Avena must be read with the decision of the Inter-American Court that failure to provide consular notice in death penalty cases violates fundamental due process guarantees and is an arbitrary deprivation of life. The United States is a party to the International Covenant on Civil and Political Rights (ICCPR) which includes the protection of the rights to life and due process in its provisions.³⁷⁴ The State Department's contention that the decision of the Inter-American Court has no force and effect because it is not charged with interpreting the Vienna Convention is disingenuous to say the least. The Court is responsible for interpreting the Charter of the Organization of American States (OAS), to which the United States is a party, which includes the protection of due process and the right to life, as does the ICCPR. In short, the Inter-American Court has said that the OAS Charter and the ICCPR, both of which are binding treaties on the United States, are violated by the failure to provide consular notice before imposition of the death penalty and

³⁷¹ Warren, *supra* note 162.

³⁷² See *supra* note 198.

³⁷³ See *supra* Part V.

³⁷⁴ International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

implicate due process.³⁷⁵ The Inter-American Court is the preeminent authority for legal interpretation of the OAS Charter.³⁷⁶ It has given the ultimate, internationally authoritative interpretation of the OAS Charter with respect to the failure to provide consular notice, and concluded that it violates due process and is an arbitrary deprivation of the right to life. It is not the ultimate authority for interpreting the ICCPR (the UN Committee on the ICCPR is) but its interpretation of the ICCPR is entitled to substantial deference at the very least.

When the failure to provide consular notice reaches the Supreme Court, the essential question will be the remedy for this acknowledged treaty violation. The *Avena* decision is binding on the United States under the Supremacy Clause, and requires “review and reconsideration” in the form of a judicial remedy.³⁷⁷ In the April 2004 annual meeting of the American Society of International Law, Justice Scalia even remarked that “foreign” law is legitimately utilized in domestic courts to “interpret a treaty to which the U.S. is a party” or to construe federal law to avoid conflict with “foreign” law.³⁷⁸ He also acknowledged, in response to a question from Professor Doug Cassell, that ICJ decisions that are binding on the United States are very different in terms of applicability than foreign law generally.³⁷⁹ In addition, to the extent that U.S. courts have refused to exclude confessions because the right to consular notice is not on par with constitutional violations, *Avena* and the Inter-American Court decisions demonstrate that the failure to provide notice is in fact a deprivation of due process under international treaties to which the United States is a party, and at the very least our constitutional requirements of due process should be interpreted consistently with the holdings of these decisions and to require no less notice than our treaty obligations of due process.

Finally, judicial prohibition of the death penalty when there has been a failure of consular notice is consistent with the *Atkins* analysis and considerations which led to its prohibition of the death penalty for the mentally retarded. A Supreme Court determination that a failure to provide consular notice would necessarily require re-sentencing, and in most cases retrial, would fulfill both U.S. obligations (notice and providing an adequate remedy) under the Vienna Convention and bring much needed consistency to death penalty jurisprudence with respect to the mentally

³⁷⁵ See The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Oct. 1, 1999, Inter-Am. Ct. H.R. (Ser. A) No. 16 (1999).

³⁷⁶ See American Convention on Human Rights: “Pact of San José, Costa Rica,” *opened for signature* Nov. 22, 1969, 114 U.N.T.S. 123 (entered into force Aug. 27, 1979).

³⁷⁷ See *supra* Part V.

³⁷⁸ Justice Antonin Scalia, Keynote Address at the American Society of International Law Annual Meeting (Apr. 2, 2004).

³⁷⁹ *Id.*

retarded, juveniles, and foreign nationals. Our own Constitution and treaty obligations require as much.³⁸⁰

³⁸⁰ As this Article was going to press, the Supreme Court granted certiorari in a case involving denial of consular rights to a Mexican national. *Medellin v. Dretke*, 125 S. Ct. 686 (2004). *Medellin* had appealed the Texas district court's denial of his habeas petition asserting that his counsel was ineffective, he was not informed of his right of consular access, and that he had not been provided exculpatory material. The Court of Appeals for the Fifth Circuit had little difficulty rejecting the petitioner's non-Vienna Convention claims. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004).

The court of appeals also concluded that the petitioner's Vienna Convention claim was defaulted, and even if it were not procedurally defaulted, the Convention, "as interpreted by this Court in the past, does not confer an individually enforceable right." *Id.* at 279 (emphasis added). The tone of this portion of the court's opinion, however, can only be characterized as a reluctant outcome necessitated by prior domestic court precedent, which has been superseded by binding international law precedents. For example with respect to procedural default, the court stated:

The Supreme Court, prior to the *Avena* and *LaGrand* decisions, however, ruled that Vienna Convention claims, like Constitutional claims, can be procedurally defaulted, even in a death penalty case. Though *Avena* and *LaGrand* were decided after *Breard*, and contradict *Breard*, we may not disregard the Supreme Court's clear holding that ordinary procedural rules can bar Vienna Convention claims.

Id. at 280 (citation omitted). Similarly, with respect to consular notice as an individual right, the court concluded:

A prior panel of this Court, however, held that Article 36 of the Vienna Convention does not create an individually enforceable right. . . . We are bound to apply this holding, the subsequent decision in *LaGrand* notwithstanding, until either the Court sitting *en banc* or the Supreme Court say otherwise.

Id.

There is an interesting contrast between this opinion on consular notice and the opinion of the Missouri Supreme Court on the juvenile death penalty in *Simmons v. Roper*. In both cases the lower courts concluded that prior Supreme Court decisions have been superseded by current international law precedents. In *Medellin*, the court reluctantly followed Supreme Court precedent; in *Simmons*, the court refuses to do so. From an international law perspective and constitutional law perspective under Article III, both courts were not only entitled, but required to reject prior precedent — in *Medellin* based on the subsequent binding decisions of the ICJ, and in *Simmons* based on the *jus cogens* norm of customary international law prohibiting execution of juveniles.