Nos. 97-1390 (A-738) and 97-8214 (A-732)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

REPUBLIC OF PARAGUAY, ET AL., PETITIONERS

v.

JAMES S. GILMORE, III, GOVERNOR OF VIRGINIA, ET AL.

ANGEL FRANCISCO BREARD, PETITIONER

v.

FRED W. GREENE, WARDEN

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. In No. 97-1390, whether the Vienna Convention on Consular Relations grants a foreign country or its representatives a judicially enforceable remedy of vacatur of a criminal conviction and sentence of one of its nationals, based on a past violation of Article 36(1)(b) of the Convention, requiring notification to an arrested foreign national of his right to have his country's consular representatives informed of his arrest.

2. In No. 97-1390, whether the Treaty of Friendship, Commerce, and Navigation of 1859 between the United States and Paraguayan requires United States authorities to inform Paraguayan consular officials whenever a Paraguayan national is arrested in this country; and if so, whether that Treaty grants Paraguay or its representatives a judicially enforceable remedy of vacatur of a criminal conviction and sentence of one of its nationals based on a past violation of the Treaty.

3. In No. 97-8214, whether petitioner may raise, in his instant habeas corpus petition, a claim that his conviction and sentence must be set aside because of a past violation of Article 36(1)(b) of the Vienna Convention.

4. Whether, in either No. 97-1390 or No. 97-8214, petitioners are entitled to a stay of execution.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States in these cases.

STATEMENT

1. These cases principally involve questions concerning the application in domestic courts of the United States of Article 36 of the Vienna Convention on Consular Relations, April

24, 1963, 21 U.S.T. 77, 100-101. Petitioners also seek to implicate Article XII of the Treaty of Friendship, Commerce, and Navigation (FCN) between the United States and the Republic of Paraguay, Feb. 4, 1859, 12 Stat. 1092.

Article 36(1)(b) of the Vienna Convention, 21 U.S.T. at 100-101, provides:

> With a view to facilitating the exercise of consular functions relating to nationals of the sending State: * * *
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forward by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph[.] * * *

In bilateral consular conventions with several nations, the United States has agreed to the effect that "[a] consular officer [of the sending state] shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained within his district." Consular Convention, June 6, 1951, United States-United Kingdom, 3 U.S.T. 3426; see also 97-1390 Pet. App. A38-A39 (similar; consular conventions with USSR and China). Although Paraguay is not party to any such bilateral agreement with the United States, it contends that its consular officers are also entitled to mandatory notification of a Paraguayan national's arrest in the United States pursuant to

Article XII of the FCN Treaty, which provides that "[t]he diplomatic agents and consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any other nation whatever."

2. On August 17, 1992, Petitioner Breard was arrested by Arlington County, Virginia, police for attempted rape. Further investigation led the police to connect Breard with the earlier murder and attempted rape of Ruth Dickie in February 1992. Although Breard is a citizen and national of Paraguay, neither Arlington nor Virginia authorities advised him, at any point before his trial, of any right to have the Paraguayan consulate informed of his arrest. Nor did Arlington or Virginia authorities inform the Paraguayan consulate that Breard had been arrested. 97-1390 Pet. App. A3.

After a jury trial in the Circuit Court for Arlington County, Breard was convicted of capital murder and attempted rape and was sentenced to death. The conviction and sentence were affirmed by the Virginia Supreme Court on direct review, and this Court denied certiorari in 1994. 97-1390 Pet. App. A3-A4. Breard also pursued collateral review of his conviction and sentence in the Virginia state courts, unsuccessfully; the Virginia Supreme Court denied his petition for leave to appeal in January 1996. Id. at A4. At no point in his trial, his initial appeal, or his state collateral proceedings did Breard raise a claim that state authorities had violated the Vienna Convention

Paraguay's concerns in diplomatic channels. It is not unusual

by failing to inform him of a right to have the consulate informed of his arrest. Ibid.

3. At some point after the Virginia Supreme Court's denial of review of Breard's collateral challenge to his conviction, diplomatic and consular representatives of the Republic of Paraguay became aware of Breard's conviction and sentence and sought to confer with Breard, as provided for by the Vienna Convention. Once that request was made, Virginia authorities agreed, and since that time Paraguayan officials have been granted free access to Breard, in conformity with the Convention. 97-1390 Pet. App. A4.

4. In April 1996, Breard filed a petition for a writ of habeas corpus in federal district court, contending for the first time that his conviction and sentence were invalid because of Virginia's failure to comply with the Vienna Convention. The district court held that federal review of that claim on habeas corpus was barred by Breard's procedural default in failing to raise the claim in state court. 97-8124 Pet. App. 23. The court of appeals agreed. 97-1390 Pet. App. A27-A30. The court further concluded that Breard had not shown cause that might excuse his procedural default, and in particular, that Breard had not shown that "the factual basis for his Vienna Convention claim was unavailable" at the time of his trial. Id. at A30. The court also found no potential "miscarriage of justice" to excuse the procedural default, noting that no reasonable juror could

have found that Breard was actually innocent of the crime or not eligible for the death penalty. Id. at A30-A31.

5. In September 1996, the Republic of Paraguay, the Ambassador of Paraguay, and the Paraguayan Consul General filed a complaint in federal district court, seeking a declaration that Virginia authorities had violated the Vienna Convention and the FCN Treaty with Paraguay, a declaration that Breard's conviction was void because of those alleged violations, and an injunction requiring vacatur of Breard's conviction. 97-1390 Pet. App. A55. The plaintiffs asserted two causes of actions based directly on the Convention and the FCN Treaty; the Consul General also asserted a cause of action under 42 U.S.C. 1983, based on the alleged deprivation of the Consul General's asserted right (under the FCN Treaty) to be informed of Breard's arrest and his asserted right (under the Vienna Convention) to have Breard informed of his own right to have the consular post informed of his arrest. 97-1390 Pet. App. A52-A54.

The district court dismissed the complaint for lack of subject-matter jurisdiction, based in large part on its conclusion that the action was barred by the Eleventh Amendment. The district court noted that the complaint did not allege that the state defendants continue to refuse to allow consular officials to give Breard assistance; "[n]ow that defendants have given Paraguayan officials access to Mr. Breard, they are no longer in violation of the treaties." 97-1390 Pet. App. A17-A18.

The court of appeals likewise held that Paraguay's action was barred by the Eleventh Amendment. The court concluded, centrally, that the action did not fall within the exception to the States' Eleventh Amendment immunity from suit for injunctions against continuing violations of federal law, recognized in Ex parte Young, 209 U.S. 123 (1908), because "the violation [of the treaties] alleged here is not an ongoing one * * * [and] the essential relief sought is not prospective." 97-1390 Pet. App. A8-A9. The court agreed with respondents that "there is no ongoing violation of Paraguay's rights * * * because Paraguay is presently on notice of Breard's situation and [Virginia] is not now preventing Paraguay from giving whatever aid and counsel to Breard it desires." Id. at A9. The court emphasized that "the actual violation alleged is a past event that is not itself continuing," ibid., and it distinguished various cases relied on by Paraguay as involving "examples of presently experienced harmful consequences of past conduct, hence of ongoing violations of federally protected constitutional rights," id. at A9-A10. By contrast, the court concluded, the relief sought in this case "is quintessentially retrospective: the voiding of a final state conviction and sentence. * * * [I]ts effect would be to undo accomplished state action and not to provide prospective relief against the continuation of the past violation." Id. at A11.

6. The Department of State is the agency of the federal government with lead responsibility for issues arising under the Vienna Convention, including Article 36. The Department

historically has issued periodic guidance to law enforcement officials about the requirements of consular access and notification, to further compliance with Article 36 by such officials. In addition, the State Department works with foreign consular officials and federal, state, and local law enforcement officials in the United States to address issues of non-compliance when they arise. In January 1998, the State Department issued a new publication, Consular Notification and Access, which provides comprehensive guidance on consular notification and access requirements, and in February 1998 it began distributing to law enforcement officials a pocket card setting forth the basic requirements for notification in cases of arrest and detention of foreign nationals.[1]

Some time after April 18, 1996, the United States Department of State received official notice of Breard's case through a diplomatic note of that date from the Embassy of Paraguay. That diplomatic note did not allege a breach of the Vienna Convention, but it did request the State Department's assistance in facilitating efforts to obtain information about the case from Virginia and in arranging a visit at the place of Breard's detention. Such assistance was provided. On June 4, 1996, the Department forwarded to the Governor of Virginia appeals for clemency that were received by the United States Embassy in

[1] That brochure is the State Department's most definitive statement on how consular notification and access obligations should be honored by law enforcement officials. A copy of the brochure has been lodged with the Clerk.

Paraguay. On October 15, 1996, State Department representatives discussed the case at a meeting with representatives of Paraguay and its counsel. On December 10, 1996, the Assistant Secretary of State received a request from the Paraguayan Ambassador for assistance in obtaining a new trial for Breard.

Because of the State Department's responsibilities relating to U.S. compliance with Article 36 of the Vienna Convention, and because the Department considered it important to address Paraguay's concerns seriously in diplomatic channels, the State Department decided to undertake an investigation of the case. The Department reviewed the critical portions of the trial transcript, including Breard's testimony, and an affidavit from Breard's defense attorneys concerning their efforts on his behalf. That review persuaded the Department, critically, that Virginia authorities' failure to comply with Article 36 of the Convention prior to trial did not affect the outcome of Breard's trial or sentencing proceeding. In particular, the Department concluded that Breard had had the kinds of assistance that consular officers generally seek to ensure. The State Department came to the following specific conclusions, among others:

Breard had almost immediate and thereafter continuing contact with his family, who were involved in his defense;

Breard could not have been ignorant of American culture, as he had lived in this country since 1986 and had been married briefly to a United States citizen;

Breard had a good command of English and therefore would not have needed consular assistance in interpretation;

Breard was ably represented by criminal defense attorneys experienced in death penalty litigation, who worked closely with his family, some of whom traveled from Paraguay to assist in the defense;

Breard decided to plead not guilty and to testify at his trial contrary to the competent advice of his attorneys, who were far better able to explain the U.S. legal system to him than any consular officer would have been;

Breard's mother, who was also Paraguayan, understood that Breard's decision to plead not guilty and to testify was a strategic error and advised him not to do what he did, and so it was implausible that cultural misunderstandings accounted for his decision;

The evidence at trial demonstrated that Breard unquestionably committed the crime, and that the jury and judge could easily have imposed the death penalty even if Breard had not testified, given ample evidence that the murder was "aggravated" within the meaning of Virginia law; and

Breard had the full protection of the criminal justice system.

See App. A, infra, 33-38 (record of April 7, 1998, proceeding before International Court of Justice; United States' submission).

On July 7, 1997, after the State Department's review of the Breard case was completed, the Department reported its conclusions, including many of the above-mentioned facts, to the Paraguayan Ambassador. The Department expressed "deep regret" that Breard apparently had not been advised of his right to have consular authorities informed of his arrest and detention, as required by the Convention. The Department also advised, however, that it had found no basis for concluding that consular assistance would have altered the outcome of Breard's trial. The Department nevertheless invited Paraguay to call additional relevant information to its attention. App. A, infra, at 38; App. B, infra (correspondence between Paraguayan Ambassador and State Department). The Embassy of Paraguay neither responded officially to the Department's letter nor attempted to address the Department's analysis or conclusions.

The Department has intensified its efforts to ensure that federal, state, and local law officials in the United States are aware of and comply with the consular notification and access requirements of the Vienna Convention. The Department has issued new comprehensive guidance on the subject, which has been personally provided by the Secretary of State to the Governor of every State of the United States (a copy of that guidance has been lodged with the Clerk). This guidance and a pocket-sized reference card for law enforcement officers to carry on the street have also provided to the Attorney General of every State. The State and Justice Departments have also begun to conduct

briefings on the requirements of consular notification and access for prosecutors and law enforcement officials, focusing initially on areas with high concentrations of foreign nationals. App. A, infra, 38-39.

7. On March 30, 1998, the Government of Paraguay officially notified the United States that, unless the United States could stay Breard's execution and engage in consultations, it would file suit in the International Court of Justice (ICJ) on April 3, seeking an order that the execution be stayed. We are informed that the Department of State agreed to consultations and made a request through counsel to the Governor of Virginia, on behalf of the Secretary of State, requesting that Virginia stay Breard's execution. After consultation with the Governor, counsel for the Governor replied that Virginia was not at that time prepared to grant the Department's request, in part because of the pendency of these cases before this Court. We are informed that the State Department advised the Government of Paraguay of the Governor's response on the following morning.

On April 3, 1998, Paraguay filed an application with the International Court of Justice (ICJ), requesting a declaration from that court that the United States had violated Article 36 of the Vienna Convention by failing to inform Breard of his right to have the Paraguayan Consulate notified of his arrest, and an order directing the reestablishment of the "status quo" before that violation, including vacatur of Breard's conviction. See 97-8214 Supplemental Brief in Support of Application for a Stay

of Execution, Exh. B. Paraguay requested the ICJ to indicate provisional measures pending the outcome of the case. Ibid. On April 7, 1998, the ICJ heard oral arguments on Paraguay's request for the indication of provisional measures. On April 9, 1998, the ICJ issued an order, indicating that the United States "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." Id. Exh. C, ¶ 41 (ICJ order).

On April 9, 1998, the Legal Adviser to the Department of State wrote to the Governor of Virginia, bringing the order of the ICJ to his attention. The Legal Adviser requested that the Governor give consideration to the ICJ's indication of provisional measures. App. C, infra (letter from Legal Adviser to Governor). The Secretary of State is also requesting that the Governor of Virginia stay Breard's execution, in light of the ICJ's order indicating provisional measures. App. F, infra.

DISCUSSION

The United States takes very seriously both the obligations embodied in the Vienna Convention on Consular Relations and instances of violations of those obligations. In this case, the Executive Branch has conceded that the Vienna Convention was violated insofar as it required that Breard be notified that he could have the assistance of a consular officer. But the Executive Branch has also concluded that there was no affirmative interference in Breard's ability to consult with Paraguayan consular officials (his family or his attorney could have done so

at any time) and that there is no basis for concluding that the assistance of a consular officer would have changed the outcome of the criminal proceedings. It has ascertained that the essential kinds of assistance that consular notification is intended to ensure were, in fact, provided to Breard notwithstanding the failure of notification. It has also determined that the remedy Paraguay seeks is not supported by the Convention's text, its negotiation history, or the subsequent practice of state parties. In view of these considerations and the fact that a consular officer has no obligation to provide any particular level of services, the Executive Branch has concluded that Paraguay's claim as to the relevance of consular notification in Breard's case are speculative and unpersuasive, and that there is in any event no basis for requiring the undoing of the lawfully imposed sentence of the courts of Virginia. The State Department has accorded Paraguay the traditional remedy among nations for failures of consular notification: it has investigated the facts, determined that there was a breach, formally apologized on behalf of the United States, and undertaken to improve future compliance.[2]

Moreover, notwithstanding the importance of the Vienna Convention, we also believe that the Convention does not provide

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[2] The State Department is aware of no State of the United States that takes the official position that it is not required to honor the obligations of Article 36. Suggestions to the contrary by Paraguay and Breard have been considered by the Department and found to be unwarranted. The Department of State would address any evidence of deliberate noncompliance brought to its attention.

a judicial cause of action, at the behest of either a foreign national or his sending state, to have a criminal conviction or sentence vacated, either on direct appeal or on a collateral proceeding. That construction of Article 36 of the Convention by the State Department, which is responsible for its implementation, is "entitled to great weight." United States v. Stuart, 489 U.S. 353, 369 (1989). There is no indication in the text or negotiating history of the Convention, or in its implementation by contracting states, that a violation of Article 36 could vitiate an otherwise valid conviction, and such a result would be inconsistent with the inherently discretionary nature of consular relations. Furthermore, this Court has never addressed whether any remedy should be available in a criminal case for a violation of Article 36, and it would be inappropriate for this Court to decide that issue for the first time in the context of a collateral habeas corpus proceeding, especially where the issue was not raised at trial or the initial appeal. This Court should therefore deny the certiorari petitions as well as petitioners' related motions for relief under the Court's original jurisdiction.

I. NEITHER PARAGUAY NOR ITS OFFICIAL REPRESENTATIVES HAVE A CAUSE OF ACTION THAT WOULD AFFORD A JUDICIAL REMEDY IN DOMESTIC COURTS OF VACATUR OF A CRIMINAL CONVICTION OF A PARAGUAYAN NATIONAL

A. Paraguay May Not Proceed Under the Vienna Convention

1. a. Although the court of appeals disposed of Paraguay's action on Eleventh Amendment grounds, the United States' principal concern here is with the Convention itself. Specifically, the important question for the United States is whether the Convention provides a judicial cause of action or remedy in domestic courts, at the behest of a sending state or its representatives, to obtain the vacatur of a conviction on the basis of the past failure of authorities to inform an arrested national of the sending state of his right to have his consular representative informed of his arrest. That question must be distinguished from the entirely different question whether a sending state such as Paraguay (or an arrested foreign national) might have recourse to the courts for an order directing cessation of an ongoing refusal of authorities to allow consular notification or access, as guaranteed by the Convention.[3] Thus, while we do not necessarily endorse the court of appeals' distinction between "past" and "ongoing" violations of the Convention for Eleventh Amendment purposes in this setting, we do

[3] This case also does not raise any questions concerning the ability of the United States to sue in order to enforce compliance with the Vienna Convention. See United States v. Arlington County, 669 F.2d 925 (4th Cir.), cert. denied, 459 U.S. 801 (1982).

agree that Paraguay and its representatives were properly denied the judicial relief that they seek.

In answering that question with respect to Paraguay's suit, we start from the presumption, articulated by this Court in The Head Money Cases, 112 U.S. 580 (1884), that "[a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provision on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress. * * * It is obvious that with all this the judicial courts have nothing to do and can give no redress." Id. at 598; see also Charlton v. Kelly, 229 U.S. 447, 474 (1913); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 306 (1829) ("The judiciary is not that department of the government, to which the assertion of its interest against foreign powers is confided."). This Court has consistently stated that the power to determine whether the United States has, or has not, acted in accordance with a treaty's obligations to a foreign nation "ha[s] not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws." Whitney v. Robertson, 124 U.S. 190, 194-195 (1888).

These considerations are the appropriate ones in the circumstances of this case, where the United States has addressed

Paraguay's concerns in diplomatic channels. It is not unusual for a treaty to "only set forth substantive rules of conduct * * * [and] not create private rights of action * * * [that would permit suit] in United States courts." Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989). While in some circumstances parties to a treaty may intend that there be judicial enforcement of its provisions, such judicial remedies are generally reserved for treaties "which are capable of enforcement as between private parties in the courts of the country," Head Money Cases, 112 U.S. at 598, and not when one nation challenges the governmental conduct of another. Thus, for example, treaties "which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance" may be invoked by aliens in domestic courts as controlling law. Ibid.

This case, however, involves a claim by a foreign government that a State of the United States should be prevented by domestic courts from carrying out its sovereign authority to enforce the sentencing judgment of its criminal courts, notwithstanding the view of the Executive Branch that such a remedy is unwarranted. Such a claim is extraordinary, and could be recognized only if there were clear evidence that the parties to the Vienna Convention had intended such a judicial remedy to be available.[4]

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[4] It is important to distinguish the question whether the Vienna Convention creates a judicial remedy for Paraguay from the question whether the Convention is "self-executing." The United States agrees that the Vienna Convention is self-executing, in

(continued...)

b. (i) In construing a treaty, as in construing a statute, the Court looks first to its terms to determine its content. United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992). Nothing in the text of the Convention provides that past violations of Article 36 are to be remedied through judicial actions by sending states or their nationals to vacate criminal convictions. Article 36(1)(b) does state that arresting authorities are to inform an arrested foreign national of "his rights" to have a consular post informed of his arrest or detention, but this case does not involve an attempt to enforce those rights presently; neither Paraguay nor Breard is seeking to

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*(...continued)
the sense that it can be implemented by government officials without implementing legislation. That issue is distinct from the question whether the Convention creates enforceable rights that may be raised and adjudicated in a particular judicial setting. See, e.g., Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298-1299 (3d Cir. 1979); Dreyfus v. Von Finck, 534 F.2d 24, 29-30; United States v. Bent-Santana, 774 F.2d 1545, 1550 (11th Cir. 1985). Further, in this case, there is an important distinction between the availability of a cause of action to obtain consular notification (or to prevent ongoing interference with the right to obtain such notification) and the existence a cause of action to vacate a criminal conviction and sentence based on a prior failure of consular notification. See generally Restatement (Third) of the Foreign Relations Law of the United States § 111, cmt. h ("Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."); id. § 907, cmt. a ("International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts, but there are exceptions with respect to both rights and remedies."); C. Vasquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695, 719-722 (1995) (right of action question "is analytically distinct from the 'self-execution' concept").

have the Paraguayan consulate informed of his arrest.[3] Similarly, although Article 36(1)(c) states that consular officers "shall have the right to visit a national of the sending State who is in prison," no current interference with that right is at issue here, for Virginia has afforded Paraguayan officials access to Breard. Article 36(2) further states: "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." As we have just explained, however, enforcement of "the rights accorded under this Article" (Article 36) is not the object of this litigation.

(ii) The negotiating history of the Convention also gives no indication that the contracting parties intended that the Convention itself would mandate that a failure of consular notification would affect the validity of a criminal conviction or would permit a sending state to obtain an injunction against the execution of a criminal sentence in a receiving state. Cf. Alvarez-Machain, 504 U.S. at 665 (considering negotiating history of U.S.-Mexico extradition treaty). The initial draft of Article 36 was based on a proposal of the International Law Commission,

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[3] It is also noteworthy that the parties to the Convention expressly "realiz[ed] that the purpose of [consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." 21 U.S.T. at 79.

which would have required that countries automatically notify the relevant consulate whenever an alien was arrested. Several delegations (including the United States delegation) opposed that requirement, emphasizing that mandatory notification in all cases would impose an obligation beyond the capacity of many receiving countries to fulfill, given the large number of aliens residing in or visiting those countries, and that mandatory notification might be contrary to the wishes of some arrested persons, who might not want their consular post to be informed of their arrest. App. D, infra (Volume I, Official Records, United Nations Conference on Consular Relations, Vienna, 4 March--22 April 1963) at 336-337. Other delegates, however, felt that, to protect the consular function, consular authorities should always be informed of their nationals' arrests, without the need for an express invocation of the right to such notification by the arrested national. Originally, proposals to make consular notification dependent on a request by the arrested person were rejected. Id. at 342. A month later, however, the Conference reconsidered Article 36, and accepted both a 17-power amendment to make notification of the consular post dependent on the request of the arrested individual, and an amendment submitted by the United Kingdom requiring that an arrested alien be informed of his right to have consular notification made. Id. at 82-87.

The Vienna Conference was well aware that aliens might frequently find themselves subject to other countries' criminal processes, especially in countries "which had large numbers of

resident aliens or which received many tourists and visitors." App. D, infra, at 82, ¶ 62 (Egyptian delegate). In light of the potential burden of consular notification on receiving countries, the compromise eventually adopted was intended to ensure "that the authorities of the receiving State would not be blamed if, owing to pressure of work or to other circumstances, there was a failure to report the arrest of a national of the sending State." Ibid. Given the concerns expressed about burdens on receiving countries, it is difficult to believe that the Conference would have accepted a proposal that would have led to invalidation of criminal convictions. And, in fact, no such proposal was advanced, much less adopted.[4]

(iii) The practice of other contracting states in implementing the Convention also gives no indication that a violation of Article 36 may be remedied through judicial vacatur of a conviction. Cf. Alvarez-Machain, 504 U.S. at 665. Throughout the two-year period in which the Department of State and the Embassy of Paraguay have been discussing Breard's case, Paraguay has failed to identify a single country that would grant the remedy that Paraguay seeks from the United States courts. Moreover, when Breard's case came to the attention of the State Department, the Department made inquiries to all United States

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[4] Indeed, some delegates objected even to the adopted compromise on the ground that "[t]he convention was concerned with consular privileges and immunities and not with national laws," and that "[n]o receiving State could admit interference in its internal judicial affairs." App. D, infra, at 84, ¶ 81 (Romanian delegate).

embassies worldwide, and through them, to foreign countries, as to the availability of remedies for the failure of governments to comply with Article 36. Although the results of that survey remain incomplete, the survey also did not reveal a single instance in which a foreign country had provided a status quo ante remedy of vacating a criminal conviction for a failure of consular notification (at the behest of either the arrested foreign national or his government). See App. A, infra, at 32. Our legal research has revealed only one case abroad in which that claim was even considered, and it was rejected on the grounds that, under the Convention, consular authorities had only a "complementary and subsidiary" power to assist the accused in obtaining legal counsel, and that the accused in that case had legal counsel (which is also true of Breard). See App. E, infra (excerpt and discussion of Re Yater, 77 I.L.R. 541-542 (Italy, Court of Cassation 1973)).

(iv) Finally, the absence of any judicially enforceable remedy of vacatur is not surprising given the nature of the interests at stake. The Convention does not make consular assistance essential to the host country's criminal justice system, and there is no reason why criminal proceedings cannot continue without the presence of a consular officer. Consular officers do not act as attorneys for their nationals in the United States, nor do American consular officers act as attorneys for United States citizens in foreign courts. Moreover, consular officers have broad discretion to determine how they will

discharge their function, once they are informed of a national's arrest; they may do nothing at all, or they may simply see to it that the arrested national has competent counsel (which Breard had) and contact with his family (which Breard also had). It would be wrong automatically to vacate a criminal conviction based on a lack of consular notification, given that such notification might have resulted in no essential (or even significant) consular assistance at all. And there is no workable way to determine whether consular notification would have made a difference at a defendant's trial, given the inviolability of consular archives and the privileges and immunities of consular officers. Furthermore, compliance with Article 36 varies widely worldwide, and violations of the obligation to inform arrested nationals of their right to consular notification are perhaps inevitable, given the large numbers of persons who reside in and visit countries other than their own. It is difficult to believe that the contracting parties to the Vienna Convention would have agreed to Article 36 if they had anticipated that lapses in adherence to the notification requirement would vitiate the results of their domestic criminal justice systems.

2. Paraguay has relied on Santovincenzo v. Egan, 284 U.S. 30 (1931), Wildenhus's Case, 120 U.S. 1 (1887), and Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6 (1794), for the proposition that a foreign consul may seek enforcement of his rights in the courts of the United States (97-1390 Pet. 8 n.1). Those decisions,

however, do not support the proposition that Paraguay has a judicially enforceable remedy under the Vienna Convention to vacatur of a criminal conviction or sentence.

In Santovincenzo, the Court held that the Consul General of Italy was entitled, by operation of a bilateral treaty with the United States, to take possession of the assets of an Italian national, domiciled in the United States, who had died in New York intestate and without identified heirs. The question in that case was not whether the treaty provided the Italian Consul with a right of access to the courts, for under New York law, the decedent's estate was submitted to the courts for administration as a matter of course, pursuant to established state law procedures. The Italian Consul appeared in court as would any private party claiming a distribution from the estate, and such distributions were inherently likely to occur in probate court. The only issue to be decided in Santovincenzo was whether the treaty had given Italy a particular substantive right. See id. at 34-38.

In The Sloop Betsey, the Court rejected the contention, made by a French privateer who had captured a Swedish ship and brought it to Baltimore as prize, that the district court lacked admiralty jurisdiction to determine rights in the ship because exclusive jurisdiction (it was contended) lay only with French authorities. See 3 U.S. (3 Dall.) at 8-9 (argument of counsel). The Court, sua sponte, inquired of the parties whether French consuls in the United States might exercise prize jurisdiction

over captured ships brought here by French parties, in the absence of a treaty expressly providing for such jurisdiction, and answered that question in the negative. Id. at 15-16. The Court did not suggest that a French consul might invoke the jurisdiction of the federal courts in the first instance to have that question answered. The case was initiated in district court by a private libellant, pursuant to the customary manner of invoking admiralty jurisdiction by private parties. Id. at 6 (statement of case).

In Wildenhus's Case, the Court concluded that the Belgian Consul might rely on federal statutory provisions governing the writ of habeas corpus to vindicate his asserted right, under a bilateral convention with the United States, to exclusive jurisdiction over merchant seamen. 120 U.S. at 17. That convention and similar ones, however, were intended to curtail domestic criminal jurisdiction over aliens in certain circumstances. Id. at 14-16. Thus, although Belgium's substantive argument was ultimately rejected in that case, it was not difficult to conclude that the treaty provided the Belgian Consul with a judicial remedy to prevent New Jersey's allegedly unlawful interference with his exclusive jurisdiction and usurpation of jurisdiction over his charges. Nothing in the Vienna Convention confers a corresponding right on the consul of a foreign nation to obtain custody of one of its nationals who is detained by authorities in the receiving state; to the contrary,

the Convention plainly contemplates that the alien will remain in the custody of domestic authorities, in accordance with its laws.

Accordingly, no decision of this Court suggests that consular officials may sue in our domestic courts for a remedy for a past violation of rights afforded to consuls under a treaty, much less for vacatur of a criminal conviction. Whereas Santovincenzo and Wildenhus's Case did recognize, in certain circumstances, the possibility that consuls would be able to present their interests, secured by treaties, in courts, both of those cases involved treaties that were inherently directed at judicial proceedings (in Santovincenzo, probate proceedings, and in Wildenhus's Case, local criminal jurisdiction). The Vienna Convention does not have a similar focus on judicial proceedings and cannot reasonably be read to grant foreign consuls a cause of action in domestic courts.

3. The decision below does not conflict with any decision of any federal court of appeals or any state court of last resort. The only other federal appellate court that has addressed whether a foreign country may obtain judicial redress for a past violation of Article 36 has, like the court of appeals in this case, found such a claim to barred by the Eleventh Amendment. United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997), petition for cert. pending, No. 97-1365 (filed Feb. 18, 1998).

Paraguay has pointed to Republic of Argentina v. City of New York, 25 N.Y.2d 252 (1969), in which the New York Court of

Appeals held that, as a matter of customary international law, premises owned by a foreign country and devoted to consular purposes are exempt from municipal real property taxes.[5] That case, like Santovincenzo, did not require the recognition of an affirmative cause of action in U.S. courts at the behest of a foreign country, because Argentina invoked the generally applicable forms of action available under state law to entities seeking a declaration of tax immunity. See id. at 256. Thus, Argentina was in a position no different from, for example, a charitable institution contending that its property was immune from tax under domestic law. Indeed, the New York Court of Appeals denied Argentina's request for a refund of taxes paid in the past, because it had failed to comply with the generally applicable provisions of the City's Administrative Code for such refunds. Id. at 265.

4. In sum, although Article 36 of the Vienna Convention is unquestionably of great significance to the United States government, we believe that review is not warranted of Paraguay's contention that the Vienna Convention provides it with a cause of action by which it may obtain a judicially enforceable remedy in U.S. courts -- and here, the extraordinary remedy of setting aside a criminal conviction and sentence or enjoining execution of that sentence -- for a past violation of Article 36 with respect to one of its nationals. It is most implausible that the

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[5] At the time of the decision in that case, the Senate had not yet ratified the Vienna Convention, which expressly makes consular premises exempt from municipal taxes. 25 N.Y.2d at 260.

contracting parties to the Convention intended such a remedy, and it is therefore not surprising that the decision below is not contrary to any decision of this Court, any federal court of appeals, any state supreme court, or (as far as we are aware) the court of any foreign nation.

B. Paraguay May Not Proceed Under The Treaty Of Friendship, Commerce, and Navigation

Paraguay also contends that Virginia authorities violated Article XII of the February 4, 1859, Treaty of Friendship, Commerce, and Navigation between the United States and Paraguay, 12 Stat. 1092 (FCN Treaty), when they failed to inform the Paraguayan consular post that Breard had been arrested. Article XII states that the "consuls of the Republic of Paraguay in the United States of American shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any nation whatever." Ibid. Although that article does not explicitly refer to consular notification, Paraguay contends that, under Article XII's most-favored-nation clause, its consuls enjoy the right to be informed of the arrest of any Paraguayan national in the United States, because a similar right has been extended by the United States to other nations' consuls in bilateral consular conventions. See 97-1390 Pet. App. A37-A39 (consular conventions between U.S. and United Kingdom, USSR, and China).

Paraguay's argument fails on the merits. First, Article XII's reference to consular "privileges, exemptions, and immunities" does not encompass consular notification when

nationals are detained, but rather is intended to ensure that the United States does not impede the performance of official consular duties through judicial process or taxation. Thus, for consular officers, "privileges, exemptions, and immunities" extended by treaty clauses have traditionally included the inviolability of consular premises and archives, immunity from civil and criminal jurisdiction for official acts, and duty-free import and export of personal property. By contrast, the United States has traditionally limited mandatory consular notification to cases where alien detainees are nationals of a country with whom the United States has a bilateral agreement specifically requiring such notification. That practice is consistent with the position taken by the United States delegate at the Vienna Conference, where that delegate suggested that consular notification should be at the election of the alien detainee rather than automatic, because some aliens might not want their consular posts to be notified of their arrest.

Second, longstanding international practice has been to require countries claiming such "conditional" most-favored-nation benefits to trigger the process by sending a diplomatic note requesting the specific treatment given to a third nation and undertaking to accord reciprocal treatment to the United States. See F. McDowell, Digest of United States Practice in International Law 256 (1975). We have been informed by the Department of State that Paraguay has made no such request.

Thus, Paraguay cannot claim the most-favored-nation right allegedly at issue here.

Even if Paraguay's argument were correct on the merits, Paraguay nonetheless would not have a judicially enforceable cause of action to vacate Breard's conviction. As with the Vienna Convention, the text of the FCN Treaty gives no indication that the contracting parties intended it to provide judicially enforceable remedies for past violations as might be relevant here, and the same is true of various other consular conventions relied on by Paraguay requiring consular notification. Nor are we aware of any negotiating history to the FCN Treaty or other consular conventions or subsequent state practice that would suggest the availability of a judicial cause of action to remedy a past violation of a foreign country's right to consular notification.

C. Paraguay's Consul General May Not Proceed Under 42 U.S.C. 1983

There remains the question whether Paraguay's Consul General in the United States has a cause of action against Virginia authorities under 42 U.S.C. 1983 to remedy their violation of his asserted right to be informed of Breard's arrest, and his asserted right that Breard be advised of his own right to have the consular post notified of the arrest. That claim cannot be sustained. As an initial matter, it is clear that Paraguay itself could not proceed under Section 1983. Section 1983 protects the "rights" of "any citizen of the United States or other person within the jurisdiction thereof" from deprivation

under color of state law. Whereas a foreign country can be a "person" within the meaning of some federal statutes using that term, see Pfizer, Inc. v. India, 434 U.S. 308, 315-318 (197 (India is a "person" within the coverage of the Sherman and Clayton Acts), Section 1983 was not intended to include sovereigns within its reach. Section 1983 was enacted to allow the enforcement by "private parties" of their civil rights against governmental actors, see Moor v. County of Alameda, 411 U.S. 693, 699 (1973), but political entities have no such civil rights. See South Carolina v. Katzenbach, 383 U.S. 301, 323-324 (1966) ("person[s]" protected by the Due Process Clause of the Fifth Amendment do not include States); cf. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) (State not a "person" that may be sued under Section 1983). And foreign countries like Paraguay are further excluded by the plain language of Section 1983 because they are not "within the jurisdiction of the United States." Therefore, the Convention does not extend to Paraguay any "rights" enforceable against the state respondents with respect to Breard's conviction by an action brought under Section 1983.

Consul General Gonzalez, acting in his official capacity, has no greater ability to proceed under Section 1983 than does the country he represents. Any rights the Consul General might have by virtue of the Vienna Convention or the FCN Treaty exist for the benefit of Paraguay, not for him as an individual. Thus, the Consul General has not sued because he has been deprived of

any rights he holds as a person, but only because the government of Paraguay is said to have certain treaty rights (such as gaining access to detained nationals), and he is the official agent of Paraguay authorized to exercise those rights. See 97-1390 Pet. App. A43 (noting that plaintiffs Ambassador and Consul General "bring this action in their official capacities as diplomatic and consular officers and on behalf of the Republic of Paraguay"). If Consul General Gonzalez were no longer the Paraguayan consul, he would have no access rights to Breard; his successor in office would have those rights, and indeed, the action under Section 1983 was brought by his predecessor in office, former Consul General Jose Antonio Dos Santos. See 97-1390 Pet. App. A43.

Moreover, like Paraguay, its official representative the Consul General is not a person "within the jurisdiction of the United States" who may bring suit under Section 1983. Consular officers have in all cases immunity for their official acts, and full diplomatic immunity when they are assigned to embassies. United States v. Wong Kim Ark, 169 U.S. 649, 678-691 (1898), is not to the contrary. Wong Kim Ark concerned the citizenship of a child born to alien parents (not a consul) in the United States. In the course of its lengthy discussion of past precedents, the Court explained that "consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, are not considered as entrusted with authority to represent their sovereign in his intercourse with foreign

States or to vindicate his prerogatives, or entitled by the law of nations to the privileges and immunities of ambassadors or public ministers, but are subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside." Id. at 678-679. Insofar as that statement in Wong Kim Ark suggested that consuls may be prosecuted for their violations of domestic law (absent a treaty or other source of international law to the contrary), it is unexceptionable, but it is beside the point here. A consul may be "within the jurisdiction of the United States" in his individual capacity, but not his official capacity. Thus, if a consul were personally subject to arbitrary arrest by a state officer, he might be able to proceed on a Fourth Amendment claim under Section 1983; but he cannot use Section 1983 to vindicate the sovereign interests of the country he represents.

D. Considerations About This Court's Original Jurisdiction

Paraguay has suggested that a factor militating in favor of certiorari is that its petition falls within the Court's nonexclusive original jurisdiction as a "Case[] affecting Ambassadors, other public Ministers and Consuls." U.S. Const. art. III, § 2, cl. 2. Paraguay suggests that the Court should "presumptively" review cases within its original jurisdiction that arrive in the Court on petition for a writ of certiorari. 97-1390 Pet. 23. That submission is without merit.

First, although Consul General Gonzalez might be able, in some circumstances, to invoke the Court's original jurisdiction,

it is far from clear that the Court would have original jurisdiction over Paraguay's own asserted causes of action. Section 1651(b)(1) of Title 28 states: "[T]he Supreme Court shall have original but not exclusive jurisdiction of * * * [a]ll actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties." That language does not include actions involving foreign nations themselves as parties. The language of Article III, Section 2, Clause 2, creating original jurisdiction over cases "affecting * * * Consuls," might be read more broadly than the statutory language (which focuses on the parties to the case rather than whom the case "affect[s]"). Nevertheless, the petition in No. 97-1390, which is in essence an action brought by Paraguay itself to have the conviction of one of its nationals set aside, rather than to protect the right of its consul as such, does not appear to be within the core of the Court's original jurisdiction, if within it at all.

Second, contrary to Paraguay's contention (Pet. 24), Article III does not indicate an intent by the Framers that any case involving the United States' treaty obligations to foreign sovereigns should presumptively be heard by this Court. The extension of federal judicial power in Article III, Section 2, Clause 1 to "all cases affecting Ambassadors, other public Ministers and Consuls" was likely intended for the principal purpose of ensuring that controversies potentially affecting the inviolability of ambassadors, foreign ministers, and consuls,

would be heard by the federal courts, which would give due consideration to the sovereign interests of the foreign country that were at stake. "It was deemed fit and proper that the courts of the government, with which rested the regulation of all foreign intercourse, should have cognizance of suits against the representatives of such foreign governments." Davis v. Packard, 32 U.S. (7 Pet.) 276, 284 (1833) (emphasis added); see also Valario v. Thompson, 7 N.Y. 576, 580 (1853) (Act of Congress providing exclusive federal jurisdiction over cases to which consuls are parties "prescribes the tribunal in which a consul in this country is to be called on to answer"). The Framers did not, however, vest original jurisdiction in this Court for cases affecting foreign nations, or cases involving treaty interpretation. And Congress, by giving the district courts concurrent jurisdiction over cases to which consuls are parties, as with other federal-question cases, has concluded that as a general matter, the lower courts may dispose of cases affecting consuls, subject to this Court's exercise of its certiorari jurisdiction under its usual standards.

Third, this Court has never stated that it presumptively reviews, by certiorari, cases that would fall within its original jurisdiction. To the contrary, the Court has declined original jurisdiction over many cases precisely because those cases could be adequately handled by the lower courts. A crucial factor affecting the Court's decision to exercise its nonexclusive original jurisdiction is "whether recourse to that jurisdiction *

* * is necessary for the [invoking party's] protection." Washington v. General Motors Corp., 406 U.S. 109, 113 (1972). In the absence of a showing that an inferior court could not afford adequate relief, "the availability of the federal district court as an alternative forum * * * suggest[s] that [the Court] remit the parties to the resolution of their controversies in the customary forum." Id. at 114; see also United States v. Nevada, 412 U.S. 534, 538 (1973) (per curiam) ("We seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim."). Eleventh Amendment considerations aside, there is no doubt that the lower federal courts would have had adequate means to provide redress to Paraguay, had Paraguay presented a meritorious case. Thus, the mere fact that Consul General Gonzalez might theoretically have been able to invoke the original jurisdiction of this Court is not a compelling reason for the Court to grant certiorari on Paraguay's petition.

II. PETITIONER BREARD MAY NOT, IN HIS HABEAS CORPUS PETITION, SEEK TO INVALIDATE HIS CONVICTION AND SENTENCE BECAUSE OF A PAST VIOLATION OF THE VIENNA CONVENTION.

Petitioner Breard contends (97-8214 Pet. 15-23) that he is entitled to have his capital murder conviction and death sentence vacated because of the failure of Virginia authorities to apprise him following his arrest of the right of consular notification under Article 36(1) of the Vienna Convention. There are, however, insurmountable obstacles to Breard's ability to raise that contention in a petition for a writ of habeas corpus (whether in his petition filed originally in district court or his petition for an original writ filed in this Court). The court of appeals ruled that Breard's effort to raise that claim was barred by his procedural default in having failed to raise it at trial or on direct appeal. That ruling was correct, is not in conflict with any decision of this Court or any other court of appeals, and represents a straightforward application of well-settled principles governing the writ of habeas corpus.

Moreover, for essentially the same reasons as those set forth in our discussion of the Vienna Convention -- especially the preamble to the Convention, which expresses the contracting parties' "realiz[ation] that the purpose of [consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States," 21 U.S.T. at 79 -- we do not believe that Breard could obtain relief from his conviction and sentence because of a violation of the Vienna Convention even on direct

consuls in the United States might exercise [illegible]

appeal. The Court need not reach that question in this case, however, for it is clear that a remedy for a violation of Article 36 is not available here on habeas corpus

A. Breard concedes (97-8214 Pet. 3) that his counsel failed to raise any claim based on an alleged violation of the Vienna Convention at trial, on direct appeal, or in the state habeas proceedings. Under this Court's well settled habeas jurisprudence, Breard's consular notification claim is procedurally defaulted and is not cognizable on federal habeas corpus in the absence of an affirmative demonstration of cause and prejudice. See Gray v. Netherland, 116 S. Ct. 2074, 2080-2081 (1996); Coleman v. Thompson, 501 U.S. 722, 729-731 (1991). In comparable circumstances, this Court has recently denied a certiorari petition and a stay request in other cases in which state prisoners have sought to litigate defaulted consular notification claims. See Murphy v. Netherland, 118 S. Ct. 26 (1997); In re Montoya, 117 S. Ct. 2476 (1997). There is no reason for a different result here.

Seeking to avoid the consequences of his failure to raise the consular notification claim in a timely fashion, Breard argues that the Vienna Convention became the "supreme law of the land" upon its proclamation by the President after advice and consent by the Senate, and therefore the judicially created doctrines of procedural default that ordinarily apply in domestic litigation are necessarily inapplicable when a violation of the Convention's consular notification provisions is alleged as a

ground for relief in a criminal case. Nothing in the language of the Vienna Convention or in its negotiating history, however, suggests that United States courts may not insist that claims based on alleged violations of the Convention -- to the extent that they are cognizable at all when asserted by a criminal defendant -- be raised in a timely fashion.

Indeed, Article 36(2) expressly provides that the consular notification rights identified in Article 36(1)(b) "shall be exercised in conformity with the laws and regulations of the receiving [nation]," provided that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this [A]rticle are intended." The procedural requirements for orderly presentation of claims and objections to a trial court of criminal jurisdiction are surely valid "laws and regulations" of the United States with which any claim of a failure of consular notification must comply. Application of procedural default rules for failure to comply with those requirements does not interfere with the purposes of consular notification; in fact, by requiring the prompt presentation of claims of violations of Article 36, procedural default rules ensure that any violations of Article 36 will be swiftly brought to the attention of authorities and then resolved.

Without doubt, "Treaties made * * * under the Authority of the United States[] shall be the Supreme Law of the Land." U.S. Const., Art. VI, cl. 2. That is no less true of the Constitution

itself, however, and yet this Court has routinely applied its procedural default jurisprudence to bar consideration in habeas corpus proceedings of claims based on alleged violations of constitutional provisions. See, e.g., Gray v. Netherland, 116 S. Ct. at 2080-2081 (1996) (due process Brady claim barred by procedural default); United States v. Frady, 456 U.S. 152, 167-168 (1982) (claim that defective jury instruction unconstitutionally relieved the government of its burden of proving an element of the offense barred by procedural default). The Court has also recognized the applicability of procedural default rules to alleged Miranda violations, to which Breard analogizes (97-8214 Pet. 6) the consular notification provisions at issue here. See Ylst v. Nunnemaker, 501 U.S. 797 (1991); see also Wainwright v. Sykes, 434 U.S. 72, 87-88 (1977) (procedural default rules applicable to voluntariness claims). There is no basis for a conclusion that a claim based on a treaty provision may not be procedurally defaulted, even though claims based upon alleged violations of specific constitutional provisions are routinely subject to the operation of procedural default rules.

Furthermore, treaty provisions, when they give rise to judicially cognizable rights, are regarded "as equivalent to an act of the legislature." Foster v. Neilson, 27 U.S. (2 Pet.) at 314. This Court has noted that "the established rule with respect to nonconstitutional [i.e., statutory] claims" is that they are cognizable on habeas only if thealleged error "constituted a fundamental defect which inherently results in a

complete miscarriage of justice." Reed v. Farley, 512 U.S. 339, 354 (1994) (internal quotation marks omitted). As we discuss further below, Breard has not shown a miscarriage of justice in his case; accordingly, it is doubtful his treaty claim is cognizable on habeas at all.

B. Breard contends (97-8214 Pet. 20-23) that his procedural default should be excused. A procedurally defaulted claim such as Breard's is reviewable on federal habeas only if the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. at 750. Breard claims he had cause for not earlier raising a claim based on a Vienna Convention treaty provision that has continuously been in effect since 1969 because the claim "was so novel that its legal basis was not reasonably available" until a reported Fifth Circuit opinion in 1996. 97-8214 Pet. 20-21 (citing Faulder v. Johnson, 81 F.3d 515 (5th Cir.), cert. denied, 117 S. Ct. 487 (1996)). Cause for a procedural default may be found "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel" at the time of the state proceedings. Reed v. Ross, 468 U.S. 1, 16 (1984). The "question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the

claim was 'available' at all." Smith v. Murray, 477 U.S. 527, 537 (1986).[6]

Breard's argument based on the novelty of his claim, however, indicates that his claim is a "new rule" not cognizable on habeas under Teague v. Lane, 489 U.S. 288 (1989). Teague holds that a procedural rule is "new" and generally unavailable on habeas unless "a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution." Lambrix v. Singletary, 117 S. Ct. 1517, 1524 (1997) (punctuation omitted). Accord O'Dell v. Netherland, 116 S. Ct. 1969, 1574-1576 (1996); Goeke v. Branch, 115 S. Ct. 1257 (1995) (per curiam); Caspari v. Bohlen, 510 U.S. 383 (1994); Graham v. Collins, 506 U.S. 461 (1993). The courts of appeals have agreed that a claim so novel as to provide cause under Reed is also a new rule that cannot be raised on habeas under Teague. See Gacy v. Welborn, 994 F.2d 305, 311 (7th Cir.)

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[6] In our view, Breard cannot satisfy this standard because (as the court of appeals noted) the Convention has been in effect since 1969, is published at 21 U.S.T. 77, has been mentioned in several reported decisions, and therefore would have been found upon a reasonably diligent search by competent counsel. See also Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir.) (collecting Vienna Convention cases), cert. denied, 118 S. Ct. 26 (1997). Breard contends, however (97-8214 Pet. 22), that state officials "ignored their legal duty" under the Vienna Convention and thereby "effectively 'concealed'" the treaty from defense counsel. This case bears no resemblance to Amadeo v. Zant, 486 U.S. 214, 224 (1988), where state authorities concealed a "handwritten, unsigned, unstamped, and undesignated" memorandum that was not "intended for public consumption." Here, unlike in Amadeo, the provision upon which petitioner relies has been on the public books for more than a quarter-century.

(en banc) ("Any claim sufficiently novel that it was unavailable during the state proceedings must be a 'new rule' under Teague"), cert. denied, 510 U.S. 899 (1993); Selvage v. Collins, 975 F.2d 131, 136 (5th Cir.) ("[A] rule found novel for cause purposes will not be available in a federal habeas proceeding, and * * * a determination that a rule will be applied precludes a finding that the claim's novelty constitutes cause"), cert. denied, 508 U.S. 952 (1993); Hopkinson v. Shillinger, 888 F.2d 1286, 1290 (10th Cir. 1989) (en banc) ("[A] holding that a claim is so novel that there is no reasonably available basis for it, thus establishing cause, must also mean that the claim was too novel to be dictated by past precedent"), cert. denied, 497 U.S. 1010 (1990).

This Court has never decided whether there should be any remedy in a criminal case for a violation of Article 36, and it would be inappropriate to decide that issue for the first time on habeas corpus. The Court has emphasized that the availability of habeas corpus "serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established [federal] standards." Teague, 489 U.S. at 306 (emphasis added; internal quotation marks omitted). But in this and other criminal proceedings involving foreign nationals, courts have conducted their proceedings in reliance on the present state of the law, which does not dictate any remedy for a violation of Article 36. "The interest in leaving concluded litigation in a state of

repose, that is, reducing the controversy to a final judgment not subject to further judicial revision," ibid., counsels against recognition of a substantial and dramatic new rule of criminal procedure based on the Vienna Convention (such as suppression of evidence or, as petitioner evidently requests, complete vitiation of the criminal trial) in a collateral proceeding.[7]

Nor could Breard's consular notification claim, if judicially recognized as a basis for vacating an otherwise valid and final criminal conviction and sentence, qualify for retroactive application on habeas corpus under Teague's exception for newly declared "watershed" legal rules. Although "the precise contours of this exception may be difficult to discern," Saffle v. Parks, 494 U.S. 484, 495 (1990), the Court stated that (1) a qualifying procedural rule "must not only improve accuracy, but [must] alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding," Sawyer v. Smith, 497 U.S. 227, 242 (1990) (emphasis and internal quotation marks omitted); (2) the right of the accused to counsel in all criminal prosecutions for serious criminal offenses represents "the paradigmatic example" of a "watershed" procedural rule under

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[7] Breard does not argue, and clearly cannot show, that holding him to his procedural default would constitute a miscarriage of justice. The court of appeals noted that petitioner Breard is not "actually innocent of the offense he committed or innocent of the death penalty in the sense that no reasonable juror would have found him eligible for the death penalty." 97-1390 Pet. App. A30-A31. To the contrary, his guilt was established not only by overwhelming forensic evidence, including DNA matching, but also by his highly inculpatory testimony at both the guilt and penalty phases of his trial.

Teague's exception (Gray v. Netherland, 116 Ct. at 2085; Saffle v. Parks, 494 U.S. at 495)); and (3) occasions for invoking the Teague exception will be necessarily rare, as it is "unlikely that many such components of basic due process have yet to emerge" (Teague, 489 U.S. at 243).

Article 36(1)'s consular notification provisions do not constitute a basic component of due process, comparable to an accused's right to be represented by counsel. While post-arrest consular notification may aid a detained foreign national in arranging for counsel and in otherwise pursuing his defense against criminal charges, Breard, like all defendants charged in federal or state courts with serious charges, was constitutionally entitled to the assistance of counsel, and in fact appointed, competent counsel was furnished to him in this case.

C. Breard has also filed a petition for an original writ of habeas corpus in this Court. That petition does not provide any basis for overlooking his procedural default. In Felker v. Turpin, 116 S. Ct. 2333 (1996), this Court noted that its "authority to grant [original] habeas relief to state prisoners is limited by [28 U.S.C.] 2254, which specifies the conditions under which such relief may be granted to a person in custody pursuant to the judgment of a State court." Id. at 2339 (internal quotation marks omitted). The procedural default rules governing the availability of habeas corpus in the lower courts under Section 2254 (and in this Court on certiorari review

therefrom) should also "inform [this Court's] authority to grant such relief as well" on a petition for an original writ. Ibid. Breard's claim based on the Vienna Convention presented on his petition for an original writ of habeas corpus should therefore be deemed barred by his procedural default.

III. NOTWITHSTANDING THE RECENT ORDER OF THE INTERNATIONAL COURT OF JUSTICE, PETITIONERS HAVE NOT SHOWN THAT A JUDICIAL STAY OF EXECUTION IS WARRANTED

A. The International Court of Justice (ICJ) has, upon an application by Paraguay against the United States, indicated provisional measures that ought to be taken, to the effect that "[t]he United States should take all measures at its disposal" to ensure that Breard is not executed pending the ICJ's final decision. The Executive Branch, on behalf of the United States, takes the order recently entered by the ICJ very seriously, even though the United States argued against that court's jurisdiction and against the indication of provisional measures. Accordingly, in response to the ICJ's order, the Secretary of State is today requesting that the Governor of Virginia stay Breard's execution. See App. F, infra.

What the Executive Branch of the federal government may or should do in response to the ICJ's order, however, is a different question from what the Judicial Branch may do in enforcing federal law that has been made applicable to create enforceable rights in court. As we explain below, the ICJ order does not alter the essence of the Court's task on the applications for a

stay of execution. Moreover, stays of execution in capital cases are subject in general to the same standards as those governing stays in other cases. There must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari; there must a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed. Barefoot v. Estelle, 463 U.S. 880, 895-896 (1983). In addition, it may be appropriate, as in any stay application, to consider the harm to other parties that would result from the grant of a stay, and the public interest. See Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Application of those standards leads to the conclusion that a judicial stay of execution is not warranted.

B. As to the merits, we have explained above why respondents' various claims fail; we believe the law is sufficiently clear that a stay would not be warranted. Our view of the merits is not changed by the recent order of the ICJ. The indication of provisional measures by the ICJ does not represent even tentative agreement with the merits of Paraguay's argument to that court that the Vienna Convention provides a remedy of vacatur of a criminal conviction.[8] The indication of

[8] The United States has argued to the ICJ that the application brought by Paraguay does not come within that court's jurisdiction under the Optional Protocol for disputes arising under the Vienna Convention. We have argued that the case does

(continued...)

provisional measures is, therefore, significantly different from a grant of a preliminary injunction or application for a stay familiar to the Court under U.S. law. The ICJ's order notes, in fact, that "the existence of relief sought by Paraguay under the Convention can only be determined at the stage of the merits," 97-8214 Supplemental Brief in Support of Application for a Stay of Execution, Exh. C, ¶ 33, and that "measures indicated by the [ICJ] for a stay of execution would necessarily be provisional in nature and would not in any way prejudge the findings the Court might make on the merits," id. ¶ 40.

C. As to the balance of hardships, there can be no doubt of the irreparable harm to Breard from the carrying out of his sentence of execution; but that irreparable harm, in and of itself, cannot warrant a stay of execution in the absence of a reasonably persuasive showing on the merits (unless every application for a stay of execution were to be granted). And, of course, the State of Virginia would be harmed by an order preventing it from carrying out its lawfully entered judgment of execution in a timely fashion, despite the fact that the sentence complies with constitutional requirements and that the arguments presented in these cases about the Vienna Convention provide no basis for relief.

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*(...continued)
not involve the "interpretation or application" of the Convention, within the meaning of the Optional Protocol, because it is not disputed that the Convention was violated, and because the Convention does not provide the remedy that Paraguay is seeking.

D. As to the public interest, petitioners contend that this Court should stay the execution, either as a matter of comity or (they argue) because the ICJ's order is binding. Concerning the issue of comity, we emphasize again that the Secretary of State is requesting that the Governor of Virginia stay Breard's execution. There is little prospect, therefore, that the international community will view the United States government's response to the ICJ's order as indicating disrespect to that court's processes.

As to the purportedly binding effect of the ICJ's order, there is substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding. See Restatement (Third) of Foreign Relations Law of the United States § 903, Reporter's Note 6, at 369-370 (1986). The better reasoned position is that such an order is not binding. Article 41(1) of the ICJ statute provides that the ICJ shall have "the power to indicate any provisional measures which ought to be taken to preserve the respective rights of either power." Article 41(2) further states that, "[p]ending the final decision [of the ICJ], notice of the measures suggested shall forthwith be given to the parties and the Security Council." The use of precatory language ("indicate," "ought to be taken," "suggested") instead of stronger language (e.g.: the ICJ may "order" provisional measures that "shall" be taken) strongly supports a conclusion that ICJ provisional measures are not binding on the parties. The distinction in Article 41(2) between the "final decision"

ultimately foreseen and the "measures suggested" in the interim also suggests that the "measures suggested" are not binding.

Petitioners have relied on the United Nations Charter to argue that provisional measures are binding, but the language of the Charter does not support that conclusion. Article 94(1) provides that "[e]ach member * * * undertakes to comply with the decision of the [ICJ] in any case to which it is a party." (Emphasis added.) "The decision," in the context of Article 94(1) of the Charter, evidently refers to the final decision of the International Court. Article 94(2) of the Charter elaborates that "[i]f any party to a case fails to perform the obligations incumbent upon it by a judgment rendered by the [ICJ], the other party may have recourse to the Security Council." (Emphasis added.) Significantly, the Security Council has never acted to enforce provisional measures indicated by the ICJ. See Restatement, supra, at 368 (discussing Security Council's response to ICJ's order indicating provisional measures in dispute between United Kingdom and Iran).

Moreover, the ICJ itself has never concluded that provisional measures are binding on the parties to a dispute. That court has indicated provisional measures in seven other cases of which we are aware; in most of those cases, the order indicating provisional measures was not regarded as binding by the respondent. See Restatement, supra, at 368-369 (discussing Australia and New Zealand v. France, 1975 I.C.J. 99, 106; United States v. Iran, 1979 I.C.J. 20-21; Nicaragua v. United States,

1984 I.C.J. 392, 422, and United Kingdom v. Iran, 1951 I.C.J. 89, 93-94); see also 1972 I.C.J. 17 (indicating provisional measures in United Kingdom v. Iceland). The ICJ did not, in any of the final decisions in those cases, suggest that the failure of the respondent to comply with the indication of provisional measures had violated the court's earlier order.

Finally, even if parties to a case before the ICJ are required to heed an order of that court indicating provisional measures, the ICJ's order in this case does not require this Court to stop Breard's execution. That order states that the United States "should" take all measures "at its disposal" to ensure that Breard is not executed. The word "should" in the ICJ's order confirms our understanding, described above, that the ICJ order is precatory rather than mandatory. But in any event, the "measures at [the government's] disposal" are a matter of domestic United States law, and our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The "measures at [the United States'] disposal" under our Constitution may in some cases include only persuasion -- such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution -- and not legal compulsion through the judicial system. That is the situation here. Accordingly, the ICJ's order does not provide an independent basis for this Court either to grant certiorari or to stay the execution.

CONCLUSION

The petitions for a writ of certiorari should be denied. The applications for a stay should also be denied.

Respectfully submitted.

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APRIL 1998

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

April 13, 1998

Honorable William K. Suter, Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Paraguay v. Gilmore, No. 97-1390;
Breard v. Greene, No. 97-8214

Dear Mr. Suter:

Attached is Appendix F to the Brief for the United States As Amicus Curiae in the above-captioned cases.

Sincerely,

Seth P. Waxman/cs

Seth P. Waxman
Solicitor General

cc: attached service list

APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA,

v. Docket Nos. CR92-1467, 1664-1668

ANGEL BREARD,

Defendant.

ORDER

Pursuant to Section 53.1-232.1 of the Code of Virginia, having determined that the United States Court of Appeals for the Fourth Circuit has denied habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Angel Breard be carried out on the 14th day of April, 1998, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before April 14, 1998, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261

EXHIBIT
A

The Honorable Richard Trodden
Commonwealth's Attorney
Arlington County
1425 North Courthouse Road
Arlington, Virginia 22201

William G. Broaddus
McGuire, Woods, Battle & Boothe
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030

Donald R. Curry
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Entered this 25th day of February, 1998.

Judge

A COPY
TESTE: DAVID A. BELL, CLERK
BY _____
DEPUTY CLERK

FILED: March 27, 1998

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 96-25
(CA-96-366-3)

ANGEL FRANCISCO BREARD,

Petitioner - Appellant,

versus

SAMUEL V. PRUETT, Warden, Mecklenburg Correctional Center,

Respondent - Appellee.

THE HUMAN RIGHTS COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION,

Amicus Curiae.

ORDER

Appellant has filed an application to recall mandate and stay execution and appellee has filed a response in opposition.

The Court denies the application to recall mandate and stay execution.

EXHIBIT
B

Entered at the direction of Judge Hamilton, with the concurrence of Judge Williams and Senior Judge Butzner.

For the Court

/s/ Patricia S. Connor

Clerk