

Order of Original Jurisdiction

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SUPREME COURT OF THE UNITED STATES

No. 127, Orig. (A-736)

THE FEDERAL REPUBLIC OF GERMANY ET AL. *v.*
UNITED STATES ET AL.

ON APPLICATION FOR TEMPORARY RESTRAINING ORDER OR
PRELIMINARY INJUNCTION AND ON MOTION FOR LEAVE TO
FILE A BILL OF COMPLAINT

[March 3, 1999]

The motion of the Federal Republic of Germany, et al. (plaintiffs) for leave to file a bill of complaint and the motion for preliminary injunction against the United States of America and Jane Dee Hull, Governor of the State of Arizona, both raised under this Court's original jurisdiction, are denied. Plaintiffs' motion to dispense with printing requirements is granted. Plaintiffs seek, among other relief, enforcement of an order issued this afternoon by the International Court of Justice, on its own motion and with no opportunity for the United States to respond, directing the United States to prevent Arizona's scheduled execution of Walter LaGrand. Plaintiffs assert that LaGrand holds German citizenship. With regard to the action against the United States, which relies on the *ex parte* order of the International Court of Justice, there are imposing threshold barriers. First, it appears that the United States has not waived its sovereign immunity. Second, it is doubtful that Art. III, §2, cl. 2 provides an anchor for an action to prevent execution of a German citizen who is not an ambassador or consul. With respect to the action against the State of Arizona, as in *Breard v.*

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Greene, 118 S.Ct. 1352, 1356 (1998), a foreign government's ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment principles. This action was filed within only two hours of a scheduled execution that was ordered on January 15, 1999, based upon a sentence imposed by Arizona in 1984, about which the Federal Republic of Germany learned in 1992. Given the tardiness of the pleas and the jurisdictional barriers they implicate, we decline to exercise our original jurisdiction.

JUSTICE SOUTER with whom JUSTICE GINSBURG joins, concurring.

I join in the foregoing order, subject to the qualification that I do not rest my decision to deny leave to file the bill of complaint on any Eleventh Amendment principle. In exercising my discretion, I have taken into consideration the position of the Solicitor General on behalf of the United States.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

The Federal Republic of Germany has filed a motion for leave to file a complaint, seeking as relief an injunction prohibiting the execution of Walter LaGrand pending final resolution of Germany's case against the United States in the International Court of Justice (ICJ) — a case in which Germany claims that Arizona's execution of LaGrand violates the Vienna Convention. The Federal Republic also seeks a stay of that execution "pending the Court's disposition of the motion to file an original bill of complaint after a normal course of briefing and deliberation on that motion." The International Court of Justice has issued an order "indicat[ing]" that the "United States should take all measures at its disposal to ensure that

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Walter LaGrand is not executed pending the final decision in these [ICJ] proceedings.”

The Solicitor General has filed a letter in which he opposes any stay. In his view, the “Vienna Convention does not furnish a basis for this Court to grant a stay of execution,” and “an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief.” The Solicitor General adds, however, that he has “not had time to read the materials thoroughly or to digest the contents.”

Germany’s filings come at what is literally the eleventh hour. Nonetheless, Germany explains that it did not file its case in the International Court of Justice until it learned that the State of Arizona had admitted that it was aware, when LaGrand was arrested, that he was a German national. That admission came only eight days ago, and the ICJ issued its preliminary ruling only today. Regardless, in light of the fact that both the International Court of Justice and a sovereign nation have asked that we stay this case, or “indicate[d]” that we should do so, I would grant the preliminary stay that Germany requests. That stay would give us time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved, including further views of the Solicitor General, after time for study and appropriate consultation.

The Court has made Germany’s motion for a preliminary stay moot by denying its motion to file its complaint and “declin[ing] to exercise” its original jurisdiction in light of the “tardiness of the pleas and the jurisdictional barriers they implicate.” It is at least arguable that Germany’s reasons for filing so late are valid, and the jurisdictional matters are arguable. Indeed, the Court says that it is merely “*doubtful* that Art. III, § 2, cl. 2 provides an anchor” for the suit and that a foreign government’s ability to assert a claim against as State is “without *evident*

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support in the Vienna convention and in *probable* convention of Eleventh Amendment principles” (emphasis added). The words “doubtful” and “probable,” in my view, suggest a need for fuller briefing.

For these reasons I would grant a preliminary stay.