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Federalism and Foreign Affairs: How to Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too

Joshua A. Brook
U.S. Court of Appeals for the Second Circuit

FEDERALISM AND FOREIGN AFFAIRS: HOW TO REMEDY VIOLATIONS OF THE VIENNA CONVENTION AND OBEY THE U.S. CONSTITUTION, TOO

Joshua A. Brook*

This Note discusses various ways to bring the United States into better compliance with the 1963 Vienna Convention on Consular Relations The introduction to this Note discusses how violations of the Vienna Convention are currently treated in the United States. In particular, the introduction discusses the unsuccessful attempts to prevent the execution of Karl and Walter LaGrand, two German nationals sentenced to death in Arizona. The LaGrands were convicted after a violation of their rights under the Vienna Convention because they were not informed without delay of their right to consular notification and assistance. In later appeals, United States courts refused to review or reconsider the sentence on the basis of the Vienna Convention violation, because the LaGrands had procedurally defaulted the claim. The introduction notes that after the death of Karl and Walter LaGrand, the World Court declared the United States had violated the Vienna Convention, and that it must allow reconsideration and review of death sentences in future cases where consular rights have not been given.

Section one of this Note argues that the federal government has the power to force the States into compliance with the Vienna convention. Subsequent sections of the Note discuss how various branches of the federal government might attempt to force the States to comply.

Section two discusses how the judicial branch might seek to enforce the Vienna Convention upon the states. Section two argues that the United States Courts can and should employ the World Court's view of the scope of consular rights contained within the Vienna Convention. This section also addresses the thornier problem of sovereign immunity and argues that the Eleventh Amendment should not prevent the federal government from enforcing the Vienna Convention, because the States may not raise the Eleventh Amendment to avoid the effects of a international treaty. Section two argues that even if the Eleventh Amendment does apply to binding international treaties, it does not apply to cases like LaGrand, *because these cases clearly fall into the exception to the Eleventh Amendment established by* Ex Parte Young.

* Law Clerk to the Honorable Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit; B.A. 1994, Yale University; J.D. 2002, University of Michigan Law School. During the summer of 2000 the author was an intern at the International Law Commission of the United Nations and assisted Professor (now Judge) Bruno Simma and the German legal team with preparations for oral arguments in the *LaGrand* case. He would again like to thank Judge Simma for his mentorship and wise counsel. In addition, he would like to thank Evan Caminker, James Hathaway, Robert A. Katzmann, and Eric Stein for their helpful suggestions. The author dedicates this Note to the memory of Senator Daniel Patrick Moynihan.

Section three discusses whether the executive branch could stay or commute a State death sentence for a foreign national, on the ground that the sentence was rendered in violation of the Vienna Convention. This section concludes that an attempt by the executive to delay an execution on these grounds would probably fail because it would fall outside of the President's authority to see the laws are "faithfully executed."

Section four of this Note discusses the power of Congress to enforce the Vienna convention against the States. The primary obstacle to such an attempt would be the anti-commandeering doctrine of Printz v. United States. *This section argues that the anti-commandeering doctrine does not extend to the treaty power. It goes on to propose several routes congress could use to ensure compliance with the Vienna Convention. Congress could enforce the Vienna convention by: using the conditional spending power; expanding federal habeas corpus jurisdiction; creating an independent federal cause of action for violations of the Vienna convention; expressly granting the President limited clemency power; or directly pre-empting State death penalty law with a federal law tracking the Vienna Convention.*

[I]f the United States . . . should fail in its obligation of consular notification . . . an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.[1]

—International Court of Justice

"[If] we are to be one nation in any respect, it clearly ought to be in respect to other nations."[2]

—James Madison

1. Germany v. United States, 2001 I.C.J. 104 (2001) [hereinafter *ICJ-LaGrand*] at para. 125.

2. Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825 n.4 (1998) (quoting THE FEDERALIST No. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961)).

INTRODUCTION

On June 27, 2001, the International Court of Justice ("ICJ" or "World Court") in the Hague handed down its judgment in the *LaGrand* case,[3] a complex international legal dispute involving the death penalty, treaty interpretation, criminal procedure, federalism, and remedies for wrongful acts of States. The Court found that the United States had violated its international treaty obligations to Germany when agents of the Arizona state government failed to comply with provisions of the 1963 Vienna Convention on Consular Relations[4] ("VCCR," "Vienna Convention," or "the Convention"). The World Court also ruled that the United States is under an obligation to remedy such violations, though it left the means of such remedy to the discretion of the United States.[5] When state officials violate an international treaty, two fundamental principles of American constitutional government collide: the federal government's power to conduct international relations[6] and the limitations on what the federal government can do to compel the states to implement national policy.[7] This Note addresses this tension, and discusses ways for the United States to implement the World Court's judgment without offending the federal system provided for in the U.S. Constitution.

Although the *LaGrand* case eventually came before the world's highest judicial body, it began as a small-time heist on January 7, 1982, when Karl and Walter LaGrand held up the Valley National Bank in Marana, Arizona. In the course of the botched holdup, the brothers stabbed to death Ken Hartsock, the 63-year old bank manager.[8]

Even though they had lived virtually their entire lives in the U.S., the LaGrands were German nationals; they were born in West Germany to a German mother and American fathers, both U.S.

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3. *ICJ-LaGrand*, 2001 I.C.J. at 104.

4. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 71, 34 U.N.T.S. 262.

5. *ICJ-LaGrand*, 2001 I.C.J. at para. 125.

6. For a well-documented discussion of the federal government's "vast foreign affairs power," see Chad Thornberry, Comment, *Federalism vs. Foreign Affairs: How the United States Can Administer Article 36 of the Vienna Convention on Consular Relations Within the States*, 31 MCGEORGE L. REV. 107, 128 n.152–53 and accompanying text (1999).

7. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999); Printz v. United States, 521 U.S. 898 (1997).

8. *See* State v. LaGrand, 733 P.2d 1066 (Ariz. 1987) (affirming the convictions and death sentences of the LaGrand brothers).

servicemen. As such, Arizona was required by the Vienna Convention to inform the brothers without delay of their right to assistance from the German consulate.[9] However, Arizona officials did not inform the brothers of this right and the two were subsequently tried, convicted, and sentenced to death. The LaGrands appealed to the Arizona Supreme Court, which affirmed their convictions and sentences.[10] The brothers then filed habeas corpus petitions with the U.S. District Court for the District of Arizona.[11] The District Court denied the petitions and the U.S. Court of Appeals for the Ninth Circuit affirmed on the grounds that, because the LaGrands had not raised the VCCR violation in state proceedings, the rule of procedural default barred them from raising it on habeas corpus review before the federal courts.[12]

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9. *Id.* The relevant portion of the Vienna Convention, Article 36, reads:

COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers 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 forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

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

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

10. *See LaGrand*, 733 P.2d at 1073.
11. LaGrand v. Lewis, 883 F.Supp. 469 (D. Ariz. 1995).
12. LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998).

Karl LaGrand was executed by lethal injection on February 24, 1999. Then, in an attempt to save Walter, Germany filed a claim before the World Court only hours before his scheduled execution. The Court issued a provisional measure calling upon the United States to "take all measures at its disposal to ensure that Walter LaGrand is not executed."[13] Germany also filed suit in the U.S. Supreme Court, appealing for a stay of execution on the basis of the provisional order of the ICJ.[14] In a per curiam opinion, the Court declined to exercise its original jurisdiction:[15]

> 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. . . . [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. . . . Given the tardiness of the pleas and the jurisdictional barriers they implicate, we decline to exercise our original jurisdiction.[16]

Justice Souter (with Justice Ginsburg) concurred, writing separately to note that his decision did not rest on Eleventh Amendment principles and that he had "taken into consideration the position of the Solicitor General" that provisional measures of the ICJ are not binding orders and that the VCCR does not provide a basis for the relief sought by Germany.[17] Justice Breyer (joined by Justice Stevens) dissented, arguing that the execution should be stayed so the Court could receive complete briefing on the issues.[18]

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13. *See* Concerning the Vienna Convention on Consular Relations (Germany v. United States), 1999 I.C.J. 9, 38 I.L.M. 308 (1999) (Request for the Indication of Provisional Measures, Mar. 3, 1999, Gen. List No. 104).

14. Germany v. United States, 526 U.S. 111 (1999).

15. *Id.* The Supreme Court has original jurisdiction "[i]n all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party." U.S. CONST. art. III, § 2, cl. 2.

16. *Germany*, 526 U.S. at 112.

17. *Id.* at 112 (Souter, J., concurring in the judgment).

18. *Id.* at 113 (Breyer, J., dissenting) ("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.").

Following the Supreme Court's rejection of the stay, Walter LaGrand was asphyxiated in the Arizona gas chamber as scheduled.[19]

Under domestic law, most legal issues would be mooted by the deaths of Karl and Walter LaGrand. However, under international law Germany could still pursue its claim based on the wrong it suffered as a result of the treaty violation. Both Germany and the U.S. are parties to the Optional Protocol,[20] which gives the ICJ jurisdiction to hear cases "arising out of the interpretation or application of the [Vienna] Convention."[21] Germany opted to continue its pursuit of the case, in order to protect its citizens from future VCCR violations and to shine the spotlight on (what it considered to be) the barbaric practice of capital punishment.

Oral arguments were held in November, 2000, in the Hague. Germany asked the court, not only to declare that the United States had violated its obligations under the Vienna Convention, but also to order the United States to "provide an assurance that it will not repeat its unlawful acts and that, in any future cases . . . the United States will assure in law and practice the effective exercise of the rights under Article 36."[22] The United States petitioned the court to find that there was a VCCR violation, but that the U.S. apology was a sufficient remedy.[23]

On June 27, 2001, the World Court announced two holdings that are significant for prospective cases of foreign nationals on death row. First, the Court held that "orders on provisional measures under Article 41 [of the Statute of the ICJ] have binding effect" in international law.[24] Thus, in a case in which the ICJ issues provisional measures calling on the United States to take all measures at its disposal to stay the execution of a foreign national, the United States would be under a legal duty to comply with that order. Second, in a case of a conviction and death sentence tainted by a VCCR violation, the United States is under an obligation "to allow the review and reconsideration of the conviction and sen-

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19. *German Man is Executed in Arizona's Gas Chamber; His Brother was put to Death Last Week for the Same Murder in 1982*, ST. LOUIS POST-DISPATCH, Mar. 4, 1991, at A5.

20. Optional Protocol to the Vienna Convention on Consular Relations, Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 77, 168, 596 U.N.T.S. 487.

21. *Id.* at art. I.

22. Germany v. United States (LaGrand), Memorial of the Federal Republic of Germany, §. II, para 7.02, *available at* http://www.icj-cij.org.

23. Germany v. United States (LaGrand), Counter-Memorial of the United States of America, para. 175, *available at* http://www.icj-cij.org.

24. *ICJ-LaGrand*, 2001 I.C.J. at para. 109.

tence by taking account of the violation of the rights set forth in the Convention"[25] thereby avoiding procedural default.

The World Court's judgment defined the scope of America's international obligations under the VCCR. However, the Court left the "choice of means [of compliance]... to the United States."[26] While a state's internal political structure may not be invoked to evade its obligations under international law,[27] the United States must still find a way to comply with its obligations while respecting the unique federal structure set forth in the American Constitution.

This Note sets forth possible ways for the United States to comply with its international obligations under the Vienna Convention as interpreted by the ICJ in *LaGrand,* given the constraints that federalism places on the power of the national government. Part I argues that the Constitution assigns the federal government the preeminent position vis-à-vis the states in conducting foreign affairs. Part II considers remedies that could be undertaken by the judicial branch. Part III discusses possible action by the executive branch. Part IV considers action by the legislative branch, i.e. what laws Congress could constitutionally enact to implement *LaGrand.* The Note concludes with an assessment of which solution would be optimal.

I. THE NATIONAL GOVERNMENT IS PARAMOUNT IN FOREIGN RELATIONS

A. Writings of the Framers

The Framers of the Constitution took care to preclude the individual states from conducting foreign policy, which they rightly saw as the prerogative of the national government. States are prohibited from entering into treaties[28] and the Supremacy Clause of Article VI provides that "[A]ll treaties made ... shall be the supreme Law of the Land; and the Judges in every State shall be

25. *Id.* at 52.

26. *Id.*

27. Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331 ("[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

28. "No State shall enter into any Treaty, Alliance, or Confederation." U.S. CONST. art. I, § 10, cl. 1.

bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."[29]

The original Articles of Confederation had no equivalent to the Supremacy Clause, and many Framers considered the national government's inability to compel treaty compliance by states to be a severe defect of the Articles. At the Constitutional Convention in Philadelphia, James Madison raised concern about violations of international law by states:

> Will [the Constitution] prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars? The tendency of the States to these violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed.[30]

In *The Federalist*, John Jay asserted that one advantage of a national government would be to reduce treaty violations.[31] Alexander Hamilton even argued that the national government should be supreme in foreign relations lest "an unjust sentence against a foreigner" imposed by a state court incur retaliation by the foreigner's home country.[32]

B. The "External Sovereignty" Doctrine of Curtiss-Wright Export

In the classic case of *United States v. Curtiss-Wright Export Corporation*[33] the Supreme Court differentiated the power of the national

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29. U.S. CONST. art. VI, cl. 2. Some American officials are not aware of this Constitutional Clause. *See, e.g., NPR Morning Edition: International Legal Rights Dispute* (Nat'l Pub. Radio broadcast, Dec. 9, 1998) (quoting then-Governor George W. Bush, saying, "[t]he State of Texas is not a signatory to the Vienna Convention on Consular Relations").

30. The Records of the Federal Convention of 1787, 316 (Max Farrand ed., rev. ed. 1966) (quoted in Thomas Healy, Note, *Is* Missouri v. Holland *Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726, 1728 n.17 (1998)).

31. THE FEDERALIST No. 3, at 44 (John Jay) (Clinton Rossiter ed., 1961) (arguing that treaty violations "are less to be apprehended under one general government than under several lesser ones, and in that respect the former most favors the safety of the people").

32. "It is at least problematical whether an unjust sentence against a foreigner ... would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty." THE FEDERALIST No. 80 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (quoted in Christopher E. van der Waerden, Note, *Death and Diplomacy:* Paraguay v. United States *and the Vienna Convention on Consular Relations*, 45 WAYNE L. REV. 1631, 1656 n.154 (1999)).

33. 299 U.S. 304 (1936).

government to conduct international relations from its other enumerated powers. The Court held that, whereas the powers enumerated in Article I, § 8, of the Constitution were sovereign powers originally held by the several states and surrendered, or delegated, to the national government by ratification of the Constitution, the federal government's powers to conduct international relations originated elsewhere. "The two classes of powers are different, both in respect of their origin and their nature."[34] Justice Sutherland found that the powers of "external sovereignty"—i.e. the power to conduct international relations—passed directly from the British Crown to the government of the United States. These were not powers ever held by the individual states and yielded up to the national government:

> [S]ince the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the Colonial period, these powers were possessed exclusively by and were entirely under the control of the Crown.
>
> As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.
>
> It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with over sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.[35]

Although Justice Sutherland's account of colonial history has been widely challenged,[36] the doctrine remains controlling law.

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34. *Id.* at 315.

35. *Id.* at 316–18 (internal citations omitted).

36. *See, e.g.*, A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877, 916 (2000).

C. Supreme Court Decisions Recognizing Treaties as Supreme Law

Early Supreme Court decisions gave teeth to the Supremacy Clause by striking down state laws that conflicted with international treaties of the United States. In its first major treaty decision, the Supreme Court invalidated a Virginia statute that was at odds with the Treaty of Paris (by which Great Britain recognized the independence of the United States).[37] "[E]very treaty made, by the authority of the *United States*, shall be superior to the *Constitution* and *laws* of *any individual State*. . . . [The] *laws* of any of the States, contrary to a treaty, shall be disregarded."[38]

In *Crosby v. National Foreign Trade Council*,[39] the Supreme Court affirmed the invalidation of a Massachusetts statute that imposed sanctions against the government of Burma (Myanmar). The Court found that the state law was preempted by federal legislation authorizing the President to impose sanctions on Burma if certain criteria were met. "[T]he state Act is at odds with the President's intended authority to speak for the United States among the world's nations. . . . [It] compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments."[40] The Court noted that foreign governments had filed formal objections with the national government to protest the state statute.[41]

D. Supreme Court Decisions on the Scope of the Treaty Power

1. Missouri v. Holland Establishes an Expansive Treaty Power— Under the Constitution, the President has the power "by and with the advice and consent of the Senate, to make treaties, provided

37. Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (striking down a Virginia law that canceled debts owed to British subjects).

38. *Id.* at 237; *see also* Hauenstein v. Lynham, 100 U.S. 483 (1879) (holding that state law limiting the tie period during which aliens could inherit property was invalidated and superceded by a treaty provision to the contrary).

39. 530 U.S. 363 (2000).

40. *Id.* at 380-81.

41. *Id.* at 382-83. Dicta in other Supreme Court cases confirm the primacy of the national government in international relations. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) ("[R]ules of international law should not be left to divergent . . . and parochial state interpretations."); United States v. Pink, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the states; it is vested in the national government exclusively."); United States v. Belmont, 301 U.S. 324, 331 (1937) ("[I]n respect of our foreign relations generally, state lines disappear. As to such purposes, the state . . . does not exist.").

two-thirds of the senators present concur."[42] In the landmark case of *Missouri v. Holland*,[43] the Supreme Court ruled that a congressional statute enacted to implement an international treaty did not violate the Tenth Amendment's reservation to the states or the people of those "powers not delegated to the United States."[44] Holmes read the Treaty Clause, the Supremacy Clause, and the Necessary and Proper Clause as together delegating to Congress the power to enact legislation pursuant to a valid treaty:

> [T]he power to make treaties is delegated expressly, and by Article VI treaties . . . are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.[45]

The power of Congress to implement an international treaty, therefore, represents a power in addition to the conferrals of power contained in Article I, § 8. To implement a treaty, Congress may enact a regulatory scheme that would be beyond the scope of its legitimate power under the Commerce Clause or the other enumerated powers.

Holmes was careful to note that the treaty power, like the enumerated powers, was not without its limits. For example, the opinion implies that a treaty contravening an express prohibition of the Constitution (e.g. a treaty that established a national religion or conferred titles of nobility) would not be legitimate.[46]

However, *Holland* holds that the Court should ascertain limits on the treaty power using a different methodology than is employed when measuring the scope of the enumerated powers. "We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way."[47] Thus, a statute could be held unconstitutional as beyond the scope of congressional power if enacted under Article I, § 8, while an identical statute would be constitutional if enacted under the treaty power.[48]

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42. U.S. CONST. art. II, § 2, cl. 2.

43. 252 U.S. 416 (1920).

44. U.S. CONST. amend. X.

45. *Holland*, 252 U.S. at 432.

46. "The treaty in question does not contravene any prohibitory words to be found in the Constitution." *Id.* at 433 (implying that the court would reach a different result if considering a treaty that did contravene an explicit constitutional prohibition).

47. *Id.*

48. "It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an

This is particularly true where the treaty seeks to accomplish an aim "where the States are individually incompetent to act."[49]

2. Limits of the Treaty Power—Later case law fleshed out some of the "qualifications" to the treaty power alluded to by Holmes in *Missouri v. Holland.* A treaty may not violate the Bill of Rights,[50] or cede the territory of a state without the state's consent.[51] In addition, many scholars have suggested that a treaty must concern international matters and may not be a "sham marriage" entered into solely to enable the national government to enact legislation that would otherwise be beyond the scope of its Article I, § 8 powers.[52]

The Supreme Court has not yet ruled on whether and how the "new federalism" of the Rehnquist Court, which limits the power of the national government vis-à-vis the states, is applicable to the treaty power. In particular, scholars disagree as to whether the doctrine that the federal government may not commandeer state officials to implement a federal program, as articulated by the Court in *New York*[53] and *Printz*,[54] should apply to international treaties.[55] Also at issue is whether a treaty can trump the state sovereign immunity doctrine reinvigorated by *Alden v. Maine.*[56]

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act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." *Id.* (internal citation omitted).

49. *Id.*

50. Reid v. Covert, 354 U.S. 1 (1957) (holding that a treaty may not deprive citizens of the Sixth Amendment right to a trial by jury).

51. Geofroy v. Riggs, 133 U.S. 258, 267 (1890) ("It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent." (internal citation omitted.)).

52. Healy, *supra* note 30, at 1732 n.45–51, and accompanying text.

53. 505 U.S. at 144 (holding that States may not be forced to take title to hazardous waste because the take title clause exceeded U.S. Const. amend. X restrictions).

54. 521 U.S. at 898.

55. *See, e.g.*, Molora Vadnais, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 UCLA L. REV. 307, 324 (1999) ("[T]he issue of whether the treaty power is also limited by constitutional provisions other than the Bill of Rights remains unresolved."); Carlos Manuel Vazquez, *Breard, Printz and the Treaty Power*, 70 U. COLO. L. REV. 1317, 1318 n.7–8 and accompanying text (1999) (documenting the disagreement among scholars as to whether the anti-commandeering principle applies to exercises of the treaty power as well as exercises of the legislative power); Healy, *supra* note 30 at 1727, ("Since . . . *Missouri v. Holland*, it has been widely assumed that the treaty power is not limited by concerns of federalism. Yet in light of the Court's recent federalism jurisprudence, that assumption may no longer be valid.").

56. 527 U.S. 706 (1999) (holding that the Eleventh Amendment rendered the states immune from suit by state employees under the Fair Labor Standards Act).

II. JUDICIAL REMEDIES

Vienna Convention litigation is not new to U.S. domestic courts.[57] Despite the extensive efforts of the U.S. State Department to educate state law enforcement officers, the right of defendants to be informed of the opportunity for consular notification continues to be widely disregarded.[58] Most courts have imposed a less stringent remedy for a breach of Article 36 than is required under international law.[59] Part II will discuss the effect domestic courts should give to the World Court's judgment.

A. The Rulings of the ICJ are not Directly Enforceable in U.S. Courts, but are Persuasive Authority on Treaty Interpretation.

Some commentators have suggested that ICJ judgments should be directly enforceable in U.S. domestic courts. Their argument rests on the ground that Article 94 of the United Nations Charter states that "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."[60] By signing the Statute of the ICJ, the United States recognized the World Court "to be orderly and fair, and not detrimental to the nation's interest."[61] Since the United Nations Charter, the Vienna Convention, and the Statute of the ICJ are supreme law according to the Supremacy Clause, some commentators have suggested that ICJ decisions should be directly enforceable in U.S. domestic courts.[62] However, this view is not widely accepted for a variety of persuasive reasons.

First, in the only case to consider the question of judicial enforcement of the U.N. Charter, the U.S. Court of Appeals for the

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57. *See generally* Kelly Trainer, Comment, *The Vienna Convention on Consular Relations in the United States Courts*, 13 TRANSNAT'L LAW. 227 (2000).

58. Amnesty International, "Violation of the Rights of Foreign Nationals Under Sentence of Death," AI Index: AMR 51/01/98, Jan. 1998.

59. *See generally*, Joan Fitzpatrick, *The Unreality of International Law in the United States and the* LaGrand *Case*, 27 YALE J. INT'L L. 427 (2002).

60. U. N. CHARTER art. 94, para. 1.

61. Jehanne E. Henry, Comment, *Overcoming Federalism in Internationalized Death Penalty Cases*, 35 TEX. INT'L L.J. 459, 480 (2000).

62. Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal Courts in the United States:* Breard v. Greene, HASTINGS INT'L & COMP. L. REV. 27, 52–57 (1999).

D.C. Circuit held that the treaty is non-self executing,[63] and that compliance with international tribunals presents non-justiciable questions better resolved by the political branches.

Further, some scholars have argued that the language of the ICJ statute does not establish enforcement by domestic courts.[64] Others have suggested that conferring binding authority on an international tribunal would violate the hierarchy of federal courts established by Article III of the Constitution.[65] In one case, *Narenji v. Civiletti*,[66] the United States Court of Appeals for the D.C. Circuit held that an ICJ ruling was preclusive on the question of whether international law had been violated. Since the *LaGrand* decision, at least one U.S. District Court has found the ICJ decision to be binding on the issue of whether the VCCR creates individual rights.[67] However, the Supreme Court has never explicitly ruled on this question. In fact, in both *Breard* and *LaGrand*, the Court declined to engage in any discussion of the legal effect of the ICJ order on provisional measures, preferring to dispose of the cases on other grounds.

However, if ICJ judgments are not directly enforceable, then even if a particular fact pattern violates the Vienna Convention for purposes of international law, that would not necessarily mean a violation of the Convention for purposes of domestic law. Although the U.S. is under an international obligation to rectify this situation, a court might reasonably conclude that it falls to the political branches to enact legislation enabling courts to reach the desired result.

Individual defendants seeking to raise claims under the Vienna Convention face four hurdles: They must raise the issue in a timely fashion, establish that the treaty establishes individual rights (not only rights for states party), show that the violation worked prejudice, and propose an appropriate remedy.[68] Since the *LaGrand*

63. Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988).

64. "[I]t seems that ICJ judgments were not intended to be directly enforceable in domestic courts. . . . Where the judgments of international tribunals are directly enforceable domestically, the founding instruments of those tribunals contain express language to that effect." Weisburd, *supra* note 36, at 889–90 n.71 (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 53 (5th ed. 1998)).

65. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, §. 1. For a comprehensive discussion of why international review of U.S. domestic courts would violate Article III, see Weisburd, *supra* note 36, at 891–930.

66. 617 F.2d 745 (D.C. Cir. 1979).

67. United States ex rel. Madej v. Schomig, 223 F. Supp. 2d 968 (N.D. Ill. 2002).

68. Trainer, *supra* note 57, at 231 n.16–19, and accompanying text.

ruling, a number of foreign nationals sentenced to death have relied on the ICJ decision as a basis for their appeals. So far, however, no U.S. court has granted relief on this basis, though some judges have urged deference to the ICJ's interpretation of the Vienna Convention.[69]

B. The 11th Amendment Should not bar suits by Foreign States under the Vienna Convention.

The Supreme Court's per curiam opinions in both *Breard*[70] and *LaGrand*[71] allude to—without ruling on—possible Eleventh Amendment bars to the suits filed by Paraguay and Germany, respectively. The Eleventh Amendment, ratified in response to the Supreme Court's ruling in *Chisholm v. Georgia*,[72] provides sovereign immunity to states against suits filed by "citizens or subjects of any foreign state."[73] The Supreme Court ruled in *Ex Parte Young*,[74] though, that states did not enjoy immunity from suits seeking to enjoin "continuing violation[s] of federal law."[75] Two questions arise in the context of Vienna Convention litigation: (1) Does the Eleventh Amendment bar suits by foreign governments to enforce a binding international treaty? (2) Is the *Ex Parte Young* exception satisfied in a case of a foreign national facing execution?

1. The Eleventh Amendment Should not Bar Suits by Foreign Governments to Enforce a Binding International Treaty—The Supreme Court most recently considered the scope of state sovereign immunity in *Alden v. Maine*, which held that the federal government could not compel states to waive their sovereign immunity in their own state courts, even where enforcement of a federal labor law was at issue. Although the Court strengthened the concept of state sovereign immunity, the opinion was careful not to overrule *Fitzpatrick v.*

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69. *See, e.g.*, State v. Issa, 752 N.E.2d 904, 931 (Ohio 2001) (Lundberg Stratton, J., dissenting).

70. "The Eleventh Amendment provides a separate reason why Paraguay's suit *might* not succeed." Breard v. Greene, 523 U.S. 371, 377 (1998) (emphasis added).

71. "[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." *Germany*, 526 U.S. at 112.

72. 2 U.S. (2 Dal.) 419, 1 L. Ed. 440 (1793).

73. U.S. CONST. amend. XI.

74. 209 U.S. 123 (1908).

75. *Id.*

Bitzer[76] which held that Congress, acting pursuant to the authority conferred on it by Section Five of the Fourteenth Amendment, could abrogate state sovereign immunity. Taken together, these cases stand for the proposition that the question of whether Congress may constitutionally abrogate state sovereign immunity rests, at least in part, on which power Congress invokes. Given this doctrine, there are persuasive reasons to conclude that, when acting under the treaty power, Congress may abrogate state sovereign immunity.

Justice Kennedy's majority opinion in *Alden* recognizes that the Constitution established "a National Government with broad, often plenary authority over matters within its recognized competence."[77] As discussed in Part I, the power to conduct international relations clearly falls within the "broad, often plenary authority" of the National Government.

The *Bitzer* Court reasoned that in adopting the Fourteenth Amendment:

> [T]he people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution. . . . When Congress enacts appropriate legislation to enforce this Amendment . . . federal interests are paramount, and Congress may assert an authority over the states which would otherwise be unauthorized by the Constitution.[78]

Since the power to conduct international relations was an attribute of sovereignty which the states never possessed at all,[79] it follows that Congress may abrogate state sovereign immunity through an international treaty or through legislation to enforce a treaty. This is particularly true if, as with the VCCR, the behavior of state officials can cause the United States to incur international responsibility.

2. The Ex Parte Young *Exception Should be Deemed to be Satisfied in Suits to Halt Executions of Foreign Nationals*—Even if the Court were to rule that Congress could not abrogate state sovereign immunity when acting under the treaty power, a foreign state's petition could still be granted under the Eleventh Amendment exception estab-

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76. 427 U.S. 445, 446 (1976).
77. *Alden*, 527 U.S. at 713.
78. *Id.* at 756 (quoting *Bitzer*, 427 U.S. at 456).
79. *Curtiss-Wright Export*, 299 U.S. at 304.

lished by the Court in *Ex Parte Young*. The Young exception allows federal courts to enjoin state officials from violating the Constitution.[80]

In the *Breard* case, the U.S. Court of Appeals for the Fourth Circuit held that the *Young* exception did not apply to suits brought by foreign states under the Vienna Convention. The court reasoned that the two requirements for overcoming the Eleventh Amendment's grant of state sovereign immunity—that the violation be "ongoing" and that the relief sought be "prospective"—were not met.[81] This logic is flawed.

If courts were to interpret the Vienna Convention as requiring the relief ordered by the ICJ in *LaGrand*—and under the *Charming Betsy* canon of interpretation[82] there would be ample grounds for doing so—then the violation of the treaty would clearly be "ongoing" until there is reconsideration of the sentence and conviction. Certainly a petition to downgrade a death sentence to life imprisonment should be considered a request for "prospective" relief.

III. EXECUTIVE REMEDIES

There is some question as to whether the President may order state officials to refrain from actions that would put the United States in breach of an international treaty. Arguably, such an order would be unconstitutional.

For example, consider this hypothetical: A foreign national is on death row in one of the states of the United States. He was never informed by state authorities of his rights under the Vienna Convention and did not contact his consulate until after he had exhausted state appeals. Therefore, the doctrine of procedural default prevented him from raising the VCCR violation on his habeas appeals in the federal courts.

According to the ruling of the ICJ in *LaGrand*, international law requires that the United States allow for "review and reconsideration of the conviction and sentence by taking account of the

80. *See Alden*, 527 U.S. at 747.

81. Republic of Paraguay v. Allen, 134 F.3d 622, 627–28 (4th Cir. 1998). *See also* Henry, *supra* note 61, at 462.

82. The *Charming Betsy* canon holds that statutes should be interpreted so as to comply with international law. Alexander Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

violation of the rights set forth in the Convention."[83] The convict's home government does not question his guilt, but opposes the death sentence on human rights principles. The convict appeals for clemency to the state governor, but his petition is denied.

The President issues an order forbidding state officials from going ahead with the execution and commanding the governor to commute the sentence to life imprisonment. Invoking the original jurisdiction of the Supreme Court, the state petitions for an injunction to block enforcement of the President's executive order as unconstitutional. How should the Court rule?

Several factors weigh in favor of the constitutionality of the President's executive order. The President is under a constitutional duty to "take care that the laws be faithfully executed."[84] As a duly ratified treaty, the Vienna Convention is undoubtedly the "supreme law of the land."[85] Furthermore, as the executive of the national government, the President enjoys preeminence in conducting the foreign relations of the United States.[86] Executing the foreign national would put the U.S. in breach of international law, and expose the United States to adverse diplomatic consequences.[87] In an extreme case, the execution of a foreign national could even lead to war.

The problem with this argument is that although the President has a duty to enforce the law, it remains the prerogative of the judiciary to interpret the law. The ICJ has ruled that, in cases where severe penalties attach, the appropriate remedy for a VCCR violation is reconsideration of the conviction and sentence. Most U.S. courts that have considered this issue have declined to order such a potent remedy.[88] U.S. courts may reconsider these rulings in light of the ICJ's opinion in *LaGrand,* which is at least persuasive, if not controlling authority. But they may not.[89]

Thus, an execution of a foreign national could violate the VCCR as interpreted by the ICJ, while complying with the VCCR as inter-

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83. *ICJ-LaGrand,* 2001 I.C.J. at para. 125.

84. U.S. CONST. art. II, § 3.

85. *Id.* art. VI, cl. 2.

86. *See, e.g.,* American Ins. Ass'n v. Garamendi, 123 S.Ct. 2374, 2386 (2003); Zschernig v. Miller, 389 U.S. 429 (1968).

87. An analogous legal situation could result if the governor of New York declined to honor diplomatic immunity by refusing to release a foreign diplomat jailed for violating a state law. Here, the President's interest in conducting foreign policy should trump the state's interest in enforcing its own law—where the law conflicts with a supreme international treaty.

88. *See* Fitzpatrick, *supra* note 59.

89. *See, e.g., Issa,* 752 N.E.2d at 931.

preted by the U.S. domestic courts that have jurisdiction over the defendant. In such cases, the President's authority to see that the laws are "faithfully executed" would extend only to enforcement of the law as interpreted by U.S. state and federal courts, not an international tribunal.[90]

Professor Carlos Manuel Vazquez has argued that the Vienna Convention, the United Nations Charter, and the Statute of the ICJ—when read together—authorize the President to order compliance with a ruling of the International Court of Justice, if he determines that compliance would be in the national interest.[91] However, this interpretation has been challenged on the grounds that there is no express delegation language in any of the texts, and that such "delegation" would involve both legislative and judicial powers.[92]

For all these reasons, it is doubtful that an executive order by the President ordering a stay of execution or commutation of a death sentence would be deemed constitutional.

IV. LEGISLATION

The United States finds itself in the awkward situation when a state executive can put the U.S. in breach of an international obligation, even though the decision to incur international responsibility should properly rest with the national government. State officials' continuing disregard of the Vienna Convention, even after *LaGrand*, has harmed America's relations with other governments.[93] Given the constitutional uncertainties attendant in executive and judicial remedies for VCCR violations under current law, Congress should enact a statute clarifying the status of Article 36 rights, providing for effective remedies where the treaty has

90. *See supra* Part II. As a practical matter, if the President sought to avoid executions of foreign nationals whose consular rights had been violated, he could direct the Justice Department to file amicus briefs urging judges to impose the remedy of new trial and/or new sentencing phase as required by international law. Since courts tend to defer to the executive branch's interpretation of international treaties, such amicus briefs would likely be very influential. *See* El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 167 (1999).

91. Carlos Manuel Vazquez, Breard *and the Federal Power to Require Compliance With ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683 (1998).

92. Weisburd, *supra* note 36, at 928–29 (arguing that the U.N. Charter, the ICJ Statute and the VCCR should be read together as a non-self-executing treaty).

93. *See, e.g.*, Ginger Thompson, *An Execution in Texas Strains Ties With Mexico and Others*, N.Y. TIMES, Aug. 16, 2002, at A6.

been breached. Congress has the constitutional power to enact such legislation under the doctrine announced in *Missouri v. Holland*. However, since Article 36 effectively commandeers state officials to implement a federal policy, the anti-commandeering principle of *New York* and *Printz* could pose an obstacle to such legislation.

A. The Anti-Commandeering Principle Should not Apply to the Treaty Power

Although the question has not yet been resolved by the Supreme Court, there are several compelling reasons why the anti-commandeering doctrine should not apply to treaties or legislation enacted under the treaty power.[94]

1. Historical Arguments—Since the dawn of the Republic, the United States has entered into international treaties requiring enforcement by state officials.[95] Therefore, "either a practice extending over more than two centuries turns out to have been forbidden by the Constitution, or *Printz*'s absolute prohibition of federal imposition of duties on state officials cannot be applied in the treaty context without modification."[96]

Language in the two opinions themselves suggest their inapplicability to the treaty power. The *Printz* Court explicitly looked to historical practice to fill in the gap left by the absence of Constitutional text concerning the permissibility of commandeering.[97] Using this methodology, the Court should have no problem concluding that the anti-commandeering doctrine does not extend to treaties.

The *New York* Court expressly referred to incidents of sovereignty reserved to the states by the Tenth Amendment.[98] However, the logical application of the *Curtiss-Wright Export* doctrine of external

94. *See, e.g.*, Weisburd, *supra* note 36; Vadnais, *supra* note 55; Janet R. Carter, Note, *Commandeering Under the Treaty Power*, 76 N.Y.U. L. REV. 598 (2001); Healy, *supra* note 30; Christopher E. van der Waerden, *supra* note 32.

95. "[T]he United States has been entering into treaties imposing duties on state officials since before Washington was inaugurated." (internal citation omitted). Weisburd, *supra* note 36, at 917.

96. Weisburd, *supra* note 36, at 917.

97. *Printz*, 521 U.S. at 905.

98. "[I]f a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York*, 505 U.S. at 156.

sovereignty[99] would render any Tenth Amendment rationales impotent. Since the states never possessed external sovereignty, such power could not have been "reserved" to them by the Tenth Amendment.

2. Political Safeguards of Federalism—The existence of "political safeguards" makes federal regulation of states more permissible under the treaty power.[100] Herbert Wechsler argues that the states' interests are protected in and by the U.S. Senate because of its apportionment by equal state suffrage.[101] Since two-thirds of the Senate is required for treaty ratification, state interests enjoy greater protection and are given greater consideration in the treaty ratification process than in the ordinary legislative process. Therefore, courts should afford greater leverage to the federal government vis-à-vis the states when acting under the treaty power.[102]

3. Only Treaties Can Secure the Benefits of Treaties—In *New York* and *Printz*, the Supreme Court struck down federal regulatory schemes that commandeered state officials. However, the federal government still had various means at its disposal to implement the regulatory schemes and thereby gain the benefit that the legislation sought to obtain, i.e. nuclear waste disposal and gun control, respectively. These means include the financial incentives approved by the Court in *South Dakota v. Dole*,[103] preemption under the Supremacy Clause, or conditional preemption (Congress to states: enact legislation or be preempted).[104] In addition, states could choose to regulate themselves and thereby obtain the benefits of well-disposed waste and fewer firearms.

However, such alternatives do not exist in the treaty context. The advantage to the United States of entering into a treaty is that foreign governments become bound by commitments that benefit the United States. Article 36 of the Vienna Convention, for example, commits foreign governments to afford certain protections

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99. *See supra* Part I.B.

100. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of National Government*, *in* PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 49 (1961)

101. *Id. See also* Carter, *supra* note 94, at 606–08.

102. However, the simple elegance of this argument is undermined by the fact that many political theorists reject Wachsler's thesis, particularly in light of the Seventeenth Amendment which requires direct election of Senators. Carter, *supra* note 94, at 607–08 n.52–56 and accompanying text.

103. 483 U.S. 203 (1973).

104. The "alternative means" argument was emphasized by Justice O'Connor in her concurrence in *Printz*. See *Printz*, 521 U.S. at 936 (O'Connor, J., concurring).

and rights to American citizens within their jurisdiction. Of course, the benefits of the treaty come at a price: namely, the United States commits itself to affording foreign nationals the same rights. It is doubtful that other countries would agree to protections for American citizens if they did not receive reciprocal commitments from the United States with respect to their own citizens.

Without the power to bind state officials (who, after all, are responsible for the vast majority of domestic law enforcement), the United States would be unable to gain commitments from foreign governments to respect the consular rights of American citizens. Unless the Court allows Congress to bind states when acting under the treaty power, Congress would be unable to do so using its ordinary tools. Preemption and conditional preemption would be precluded by the anti-commandeering doctrine, and *Dole* financial incentives could not guarantee compliance by all fifty states, since some might choose to forgo the funds and the regulatory scheme. Furthermore, the states themselves are prohibited from entering into treaty relations with foreign governments.[105]

Therefore, historical and policy reasons weigh strongly against extending the anti-commandeering doctrine to the treaty power. The strongest argument in favor of shielding the treaty power from the anti-commandeering doctrine is that only treaties can secure the benefit of treaties. Whereas the federal government can obtain the benefits of a particular regulatory scheme using a variety of legislative methods, the benefits of treaties—binding foreign governments—can be secured only through international treaties.

B. Congress has Several Means Available to Bring the U.S. into Compliance with its International Obligations.

The Executive together with two-thirds of the Senate may, by ratifying an international treaty, commandeer state officials to enforce the treaty, as they have with the Vienna Convention on Consular Relations. However, state officials frequently disregard their obligations under Article 36, either willfully or because of ig-

105. *See* Carter, *supra* note 94, at 610–11 ("So, while it is *possible* that domestic matters will be treated appropriately by the states acting individually, it is *impossible* that the United States will be able, through state action, to enter into formal treaty relations guaranteeing particular conduct from other countries. . . . This discrepancy cuts in favor of enhancing the federal government's power to act directly on the states, when the national interest pursued involves a treaty.").

norance. Congress may enforce the treaty and ensure compliance in the following ways.

1. Congress Could Condition Federal Spending on States' Enacting Laws to Improve Treaty Compliance—Congress could pressure states to pass legislation to improve compliance with the Vienna Convention. The state legislation could take a variety of forms—incorporating Article 36 into state law, abolishing the death penalty where a defendant was not informed of his right to consular notification, waiving state sovereign immunity for suits by foreign states to enforce the VCCR, etc.

According to the doctrine announced by the Court in *South Dakota v. Dole,* "Congress may attach conditions on the receipt of federal funds," albeit within certain limitations.[106] Most types of state legislation proposed would fall well within Congress' conditional spending power.[107] The sovereign immunity waiver option has the added virtue (from perspective of law enforcement) of only leading to review of those cases where the defendant's country is actually concerned enough to file suit on their national's behalf. This method of enforcement functions as a good (though imperfect) proxy for determining whether the defendant's home country would have helped in the original trial had the consulate been notified.

2. Congress Could Expand Habeas Jurisdiction to Allow Federal Courts to Hear Procedurally Defaulted VCCR Claims—One way for Congress to comply with the requirements of the *LaGrand* decision would be to amend the habeas corpus statute. Habeas corpus allows federal courts to review state criminal trials to remedy violations of a defendant's federal rights. Currently, habeas corpus has not been an effective means to challenge VCCR violations because of the rule of procedural default, and because courts have consistently held that the consular rights enshrined by the VCCR do not rise to the level of constitutional rights.[108] To implement *LaGrand,* Congress

106. *Dole,* 483 U.S. at 203 (holding that the federal government may condition federal payments to the state on a state's enacting certain laws, in this case a drinking age of 21 years).

107. However, conditioning federal funds on a state's waiver of sovereign immunity could conceivably overstep the reach of Congress' power to condition spending on state behavior. "[O]ther constitutional provisions may provide an independent bar to the conditional grant of federal funds." *Id.* at 208.

108. Linda Jane Springrose, *Strangers in a Strange Land, The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations,* 14 GEO. IMMIGR. L.J., 185, 191 n.54 (1999). *See, e.g.,* Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir. 1997). Some have even argued that consular rights should be deemed "fundamental rights" implied by the Bill of

could amend the habeas corpus statute to (1) give federal courts jurisdiction to hear procedurally defaulted Vienna Convention claims and (2) empower the district courts to order a new trial or new sentencing phase where a VCCR violation has occurred. Although as noted, most courts have held that the consular rights enshrined in the Vienna Convention do not rise to the level of constitutional rights, Congress has broad discretion to define the scope of habeas relief available in the federal courts.[109] Particularly in a situation such as this, where Congress would be acting to ensure compliance with the treaty obligations of the United States.

3. Congress Could Authorize a Cause of Action to Allow the Justice Department to Bring an Action to Enforce the VCCR Against the States—This remedy would place with the executive branch, rather than with state actors, the choice to breach international law. The President would be able to weigh the risks and costs of violating international law (loss of national prestige, diminished diplomatic influence, international litigation, retaliation, etc.) against the costs of not going ahead with the execution (lack of retributive justice, emotional damage to the victim's family, political costs, etc.).

Because it would still be possible for the President to flout international law by executing the foreign national, this remedy is unlikely to please death penalty abolitionists or ardent internationalists. However, it is consistent with the American jurisprudential tradition of deference to the national executive in issues of foreign policy.

4. Congress Could Preempt State Death Penalty Statutes with a Federal Statute to Forbid the Death Penalty where the Vienna Convention was Violated—Acting under the treaty power, Congress could enact legislation along the following lines: "No foreign national shall be put to death by the United States or by any State of the United States, unless, upon arrest, the foreign national was notified without delay of the right of consular notification as required by Article 36 of the Vienna Convention on Consular Relations." Such a statute would, according to the Supremacy Clause, preempt state death penalty statutes where they conflicted with the federal statute. Although enforcing laws and fixing punishments are areas

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Rights but it is doubtful the Court would accept this argument given its general retreat from substantive due process. *See* Springrose, *supra*, at 199–203.

109. *See* Felker v. Turpin, 518 U.S. 651, 664 (1996) ("[W]e have long recognized that the power to award the writ [of habeas corpus] by any of the courts of the United States must be found in the written law, and we have likewise recognized that judgments about the proper scope of the writ are normally for Congress to make." (internal citation omitted)).

traditionally reserved to the states, state laws that impede U.S. foreign policy may be preempted by federal laws.[110]

A statute ordering U.S. courts to directly enforce ICJ orders would raise potential constitutional problems.[111] But the ICJ's *LaGrand* ruling could be incorporated into a federal statute without any constitutional problem.

5. Congress Could Delegate to the President the Power to Grant Clemency to Foreign Nationals Facing Execution—According to the ancient common law principle, a crime is an offense against the sovereign, a "breach of the King's peace." Therefore, the prerogative of pardon or commutation resides with the sovereign against whom the offense was committed. In the case of a state crime, the offended sovereign is the state government, not the national government. Therefore, under ordinary circumstances the president does not have the power to grant pardon or clemency to state criminals.[112]

Assuming Congress could outlaw all executions of foreign nationals in cases where the Vienna Convention was violated, as discussed in the previous section,[113] Congress could also delegate to the president the authority to commute death sentences to life imprisonment.

CONCLUSION

Because the vast majority of capital prosecutions are undertaken by state jurisdictions, the situation recurs whereby a foreign national faces execution by the very state that violated his rights under the VCCR. Although most domestic courts that have considered the issue have ruled against ordering a new trial or sentencing hearing where a conviction is tainted by a VCCR violation, the International Court of Justice has ruled that—in death penalty cases—reconsideration of the conviction and sentence is required for the United States to avoid international responsibility.

Although the case can be made that the U.N. Charter and the Statute of the ICJ may require domestic courts to enforce ICJ judgments, such an interpretation would probably run afoul of the Constitution's Article III provisions establishing the hierarchy of

110. *See Crosby*, 530 U.S. at 363.
111. *See supra* Part II.A.
112. For a history of the pardon power, see *Schick v. Reed*, 419 U.S. 256, 260–66 (1974).
113. *See supra* Part IV.B.4.

the federal judiciary. At the very least, however, the *LaGrand* decision is very persuasive authority for interpretations of the Vienna Convention.

The ICJ left the United States broad discretion to comply with the ruling. Obviously, the chosen means must not violate the U.S. Constitution. The constitutionality of the enforcement methods by the judicial & executive branches, discussed in *supra* Parts II and III, is plausible but by no means certain.

Because the United States should not be left in the awkward position of having its compliance with international law determined by state officials, Congress should act swiftly to enact legislation to bring the United States into compliance with the judgment of the ICJ. This legislation could take any of the various forms discussed in *supra* Part IV.

I believe the best solution is for Congress to revise the habeas corpus statute to allow federal courts to review procedurally defaulted VCCR claims and order a new trial or new sentencing phase.

This solution would protect the defendant's Vienna Convention rights and avoid diplomatic friction. The individual states would not need to waive their Eleventh Amendment sovereign immunity, nor would the courts have to struggle with this issue. States could still execute foreign nationals provided states observe the strictures of the Vienna Convention. Furthermore, the robust remedy of a new trial or new sentencing phase would provide a strong incentive for state officials to comply with the consular notification requirement of Article 36 at the outset of criminal prosecutions.

Although Karl and Walter LaGrand are now beyond the reach of earthly justice, the case which bears their name will hopefully prompt the United States to reform the judicial procedures that violated their rights—and sealed their fate.