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THE EXECUTION OF ANGEL BREARD:

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I. INTRODUCTION

To quote the famous case, *The Paquete Habana*, "International law is a part of our law."[1] When the Commonwealth of Virginia executed Angel Breard, the United States violated international law. Not only did the Commonwealth of Virginia violate the treaty obligations of its federal government, but the United States failed to comply with the Order of Provisional Measures set forth by the International Court of Justice (ICJ). The outpouring of official dualism through all stages of the case as well as the failure to afford the decision of the ICJ its due respect were affronts to the international community. Mr. Breard had individual rights under the Vienna Convention which, at the minimum, justified compliance with the Order of the ICJ and a delay of his execution. The federal government was empowered to comply with the Order of the ICJ through the formal means of habeas corpus review as well as internal diplomatic measures or application of the Supreme Court's Rules. None of these measures were taken. By failing to comply with the provisional measures indicated by the ICJ, the United States violated international law and compromised its accountability in the international community.

II. FACTUAL AND PROCEDURAL BACKGROUND TO THE EXECUTION OF ANGEL BREARD

On June 24, 1993, the Circuit Court in Arlington County, Virginia, convicted Angel Breard, a citizen of Paraguay who came to the United States in 1986, of the attempted rape and capital murder of Ruth Dickie.[2] In addition to forensic evidence placing him at the scene of the crime and other apparently clear evidence,[3] Breard's confession served as the basis of

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[1] The Paquete Habana, 175 U.S. 677, 700 (1990).

[2] Breard v. Greene, 118 S. Ct. 1352 (1998).

[3] *Id.* at 1353.

his conviction. The State of Virginia sentenced Breard to death and set his date of execution for April 14, 1998.

Following his conviction in the Circuit Court, Breard exhausted his state remedies. Breard filed a habeas corpus petition in the Federal District Court for the Eastern District of Virginia which was dismissed.[4] The Fourth Circuit affirmed this dismissal.[5]

Although he invoked the services of two sets of court-appointed counsel, Breard did not claim a violation of his rights under the Vienna Convention on Consular Relations. Article 36(1)(b) of the Vienna Convention on Consular Relations of April 24, 1963 obligates the United States, including the Commonwealth of Virginia, to advise persons of their right to communicate with, and receive assistance from, the consular officers of their Nation.[6] The Vienna Convention on Consular Relations (Vienna Convention) is a self-executing, globally-ratified treaty to which both the United States and Paraguay are parties.[7] By common admission,[8] Mr. Breard was not advised of his right to communicate with and receive assistance from the State of Paraguay, as required by the Vienna Convention. Absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.[9] It is the rule in the United States that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas proceedings; otherwise, such claims are considered defaulted.[10] Breard's failure to assert his Vienna Convention claim in state court constituted a failure to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia.[11] Therefore, Breard's treaty-based claim was waived.

In parallel proceedings, Paraguay sued the Commonwealth of Virginia in the United States District Court for the Eastern District of Virginia for violation of the treaties between the United States and Paraguay, the vacatur of the capital conviction and death sentence imposed by Virginia

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[4] Breard v. Netherland, 949 F. Supp. 1255 (E.D. Va. 1996).
[5] Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998).
[6] Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 500 U.N.T.S. 95 [hereinafter Vienna Convention].
[7] *Id.*
[8] Henry J. Richardson, *The Execution of Angel Breard by the United States; Violating an Order of the International Court of Justice*, 12 TEMP. INT'L & COMP. L.J. 121, 122 (1998).
[9] Breard v. Greene, 118 S. Ct. 1352, 1355 (1998); *see* Sun Oil Co. v. Wortman, 486 U.S. 717, 723 (1988); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988).
[10] *Greene*, 118 S. Ct. at 1355 (citing Wainwright v. Sykes, 433 U.S. 72 (1977)).
[11] *Id.* at 1355.

in violation of the treaties, and an injunction against further violations.[12] The U.S. District Court dismissed Paraguay's claim for lack of subject-matter jurisdiction[13] and the Fourth Circuit affirmed.[14] The dismissal was affirmed on the grounds that the violation of the Vienna Convention was not "ongoing" or "continuing" and Paraguay was not seeking "prospective" relief, both of which would be required under the Ex parte Young[15] exception to the Eleventh Amendment immunity doctrine.[16]

In the context of the procedural default rule, Breard's failure to raise his treaty claim makes Paraguay's claim that its embassy and consular officials did not learn of the arrest of Breard until two years later[17] irrelevant. This procedural failure also strips the significance of Paraguay's claim that had its assistance been available from the beginning of Mr. Breard's trial, it would have supplied him with legal counsel who would have advised him to plead guilty prior to trial in return for a life sentence in prison.[18] Paraguay appealed the decision of the Fourth Circuit, as Breard appealed the Eastern District of Virginia's dismissal of his state habeas corpus petition[19]and the subsequent affirmance by the Fourth Circuit.[20] On the petitions for certiorari, the Supreme Court of the United States heard both cases on April 14, 1998.[21]

Due to the application of the procedural default doctrine, the Republic of Paraguay's only remaining source of redress for the United States' violation of the Vienna Convention was to pursue the matter in the ICJ. Paraguay filed an Application with the ICJ stating a dispute over alleged violations by the United States of the Vienna Convention in that the United States, as the country responsible for the acts or omissions of its federal states, failed to provide the notification required by the Vienna Convention.[22]

In connection with its Application, Paraguay also filed an urgent Request for the Indication of Provisional Measures in order to preserve its

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[12] Republic of Paraguay v. Allen, 949 F. Supp. 1269 (E.D. Va. 1996).
[13] *Id.* at 1269.
[14] Republic of Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998).
[15] *See Ex parte* Young, 209 U.S. 123 (1908) (setting forth the exception whereby federal courts may exercise jurisdiction over claims against state officials by persons at risk of or suffering from violations by those officials of federally protected rights, if (1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective); Green v. Mansour, 474 U.S. 64 (1985).
[16] *Allen*, 134 F.3d at 626.
[17] Richardson, *supra* note 8, at 122.
[18] *Id.*
[19] *See* Breard v. Netherland, 949 F. Supp. 1255, 1269 (E.D. Va. 1996).
[20] Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998).
[21] *See* Breard v. Greene, 118 S. Ct. 1352 (1998).
[22] *See* Richardson, *supra* note 8, at 123.

rights under Article 41 of the Statute of the Court.[23] In its urgent Request for Provisional Measures, Paraguay stated that it was not able to contact Mr. Breard to offer him necessary assistance; that Mr. Breard "made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation"; and he "did not comprehend the fundamental difference between the criminal justice systems of the United States and Paraguay."[24] Paraguay pled that the Court indicate that, pending final judgment, the United States should not execute Mr. Breard, and that it report to the Court all actions taken to carry out the abrogation of the execution.[25] On April 9, 1998, following arguments at the Hague by Paraguay and the United States, the ICJ issued a unanimous Opinion, which included the vote of the highly respected President of the Court-U.S. citizen Judge Schwebel. The ICJ held the following: a valid dispute does exist between Paraguay and the United States over which the Court has prima facie jurisdiction under the Optional Protocol; that Mr. Breard's execution on April 14 would render it impossible for the Court to order the relief sought by Paraguay, causing irreparable harm to its rights; that the issue of entitlement of the federal states of the United States to order the death penalty is not before the Court, nor is the Court acting as a court of criminal appeal; that proper circumstances exist for it to indicate provisional measures under Article 41 of its Statute; and that measures indicated by the Court for a stay of execution would be provisional in nature and would not prejudge any findings the Court would make on the merits.[26] The ICJ set forth "the following provisional measures: 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 and should inform the Court of all the measures which it has taken in implementation of this Order."[27]

Following the issuance of the ICJ's Order, the executive branch of the United States government initiated two divergent strategies. In response to a rare request by the Supreme Court, the Department of Justice, through the Solicitor-General, submitted a fifty-two page brief arguing that the ICJ Order did not justify halting Breard's execution nor did the violations of

[23] *See* Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic of Paraguay, Apr. 3, 1998, http://www.icj-cij.org/idocket/ipau...ipausprovisionalmeasures980403.html (visited Nov. 23, 1998) [hereinafter Request for Provisional Measures].
[24] *Id.* at 4.
[25] *Id.* at 41.
[26] *See* International Court of Justice, Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), Request for the Indication of Provisional Measures, Order, Apr. 9, 1998, http:// www.icj-cij.org/idocket/ipaus/ipausorder/ipausorder090498.htm (visited Nov. 23, 1998) [hereinafter ICJ Order].
[27] *Id.*

the Vienna Convention justify a new trial.[28] Contrary to the position assumed by the Department of Justice, the Secretary of State, Madeleine Albright, sent a letter to Virginia Governor James S. Gilmore, III, requesting him to delay Breard's execution until the ICJ ruled on the merits of the case. Citing diplomatic and political considerations, including possible effects of international reciprocity as grounds for delaying the execution, a spokesperson for Albright stated "[w]e want American citizens who travel abroad to get the best possible opportunity to have the best possible justice."[29] Although the State Department agreed with the Justice Department's assertions that there was no legal basis for the Supreme Court to halt the execution, they cited Albright's appeal to Gilmore as within the interests of diplomacy.[30] Despite the distinction made between legal and diplomatic grounds, the position taken by the Department of Justice was wholly inconsistent with the position taken by the Department of State. Following the ambiguous message sent by the Executive Branch, Governor Gilmore announced that he was reviewing Albright's letter and awaiting the Supreme Court's decision.

On the evening of April 14, 1998, the United States Supreme Court denied all petitions brought by the Republic of Paraguay and Mr. Breard.[31] The Supreme Court found that the Vienna Convention does not trump the procedural default doctrine and the state authorities' violation of consular notification provisions of the Vienna Convention had no continuing consequences which would permit Paraguay to bring suit under the Eleventh Amendment.[32] After Governor Gilmore then rejected a clemency plea, Mr. Breard was put to death by lethal injection, shortly before 11:00 p.m. on the night of April 14, 1998.[33]

III. THE UNITED STATES FEDERALIST SYSTEM

A United States violation of the Order of the ICJ hinges upon a consideration of state and national responsibilities within the United States' tradition of Federalism. Foreign affairs of the United States are the concern of the federal or national government exclusively. The United States government is responsible, as a matter of international law, for assuring the nation's compliance with its international obligations, regardless of how it implements those responsibilities domestically.[34] The

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[28] Brooke A. Masters, *Albright Urges Va. to Delay Execution*, WASH. POST, Apr. 14, 1998, at B1.
[29] *Id.*
[30] *Id.*
[31] Breard v. Greene, 118 S. Ct. 1352, 1356 (1998).
[32] *See id.*
[33] David Stout, *Clemency Denied, Paraguayan is Executed*, N.Y. TIMES, Apr. 15, 1998, at A1.
[34] Ronan Doherty, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281 (1996).

United States Constitution affirmatively grants foreign affairs powers to the federal government[35] through the following mechanisms: the regulation of commerce with foreign nations;[36] definition of uniform rules of naturalization;[37] regulation of the value of "foreign Coin;"[38] authority to raise and command armed services;[39] authority to declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;[40] capacity to enter treaties with foreign nations;[41] ability to receive[42] and appoint ambassadors;[43] and the ability to hear cases arising under "the Laws of the U.S. and Treaties", "Cases affecting Ambassadors", "all Cases of admiralty and maritime Jurisdiction", "Controversies to which the U.S. shall be a Party" and "Controversies between a State, or the Citizens thereof, and foreign States, citizens or subjects."[44] In addition to the affirmative grants of foreign affairs powers to the federal government, the United States Constitution affirmatively denies state control over foreign affairs issues. States may not: enter treaties, alliances, or confederations with other countries;[45] enter into any agreement or compact with a foreign power without consent of Congress;[46] grant letters of marque or reprisal;[47] lay imposts or duties on imports or exports without congressional consent;[48] or, engage in War, unless actually invaded.[49]

The Supreme Court has recognized the importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field.[50] In a famous opinion, Justice Sutherland argued that the states had never possessed any sovereignty in the international sense.[51] Justice Sutherland concluded that "even if the power to make treaties and maintain diplomatic relations with other sovereignties had never been mentioned in the Constitution, it would have vested in the federal government as necessary concomitants of nationality."[52]

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[35] *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 15 (1972).
[36] U.S. CONST. art. I, § 8, cl. 3.
[37] *Id.* at art. I, § 8, cl. 4.
[38] *Id.* at art. I, § 8, cl. 5.
[39] *Id.* at art. I, § 8, cls. 1, 12–15; *id.* at art. II, § 2, cl. 1.
[40] *Id.* at art. I, § 8, cl. 11.
[41] *Id.* at art. II, § 2, cl. 2.
[42] *Id.* at art. II, § 3.
[43] *Id.* at art. II, § 2, cl. 2.
[44] *Id.* at art. III, § 2, cl. 2.
[45] *Id.* at art. I, § 10, cl. 1.
[46] *Id.* at art. I, § 10, cl. 3.
[47] *Id.* at art. I, § 10, cl. 1.
[48] *Id.* at art. I, § 10, cl. 2.
[49] *Id.* at art. I, § 10, cl. 3.
[50] Hines v. Davidowitz, 312 U.S. 52, 62 n.9 (1941).
[51] *See* Doherty, *supra* note 34 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317–18 (1936)).
[52] *Curtiss-Wright*, 299 U.S. at 317–18.

If a specific power is not granted to the federal government in the Constitution, that power is left to the states.[53] Although the federal government's Constitutional authority over foreign affairs is certain, the reservation of State authority over matters not specifically enumerated as within the federal realm of authority, complicates this division of power. The organization of authority created by the United States Constitution has been described as creating a system of "dual sovereignty."[54] Those powers not Constitutionally assigned to the federal government enable "the individual states to retain and exercise powers that have significant collateral foreign affairs implications in a number of important contexts. . . . [In particular], the states' administration of the death penalty implicates and complicates the international interests of the United States and pits federal control over foreign affairs against the nation's commitment to federalism."[55]

As in the case of Mr. Breard, Virginia's execution of its laws frustrated the United States' fulfillment of its international legal obligations. The terms of the treaty and the United States Constitution itself compelled the United States to uphold the request of the ICJ to delay the execution of Mr. Breard. First, the Vienna Convention requires that foreign nationals under arrest and their respective consulates be allowed to communicate with one another.[56] Second, the foreign national can also require the host country to inform his foreign consulate of the arrest.[57] Third, the Vienna Convention requires a foreign national to be informed of his right to consulate, without delay.[58] Finally, consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, as well as send him communications, which are to be delivered without delay.[59] Since treaties are Constitutionally designated "the supreme Law of the Land,"[60] their terms should be upheld. The United States, by its own admission, violated the terms of this treaty in Mr. Breard's case.[61]

Furthermore, executive and judicial mechanisms were available which would have allowed the United States to uphold its international obligations without compromising its commitment to federalism. The United States could have taken greater strides to comply with the Order of

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[53] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").
[54] Printz v. United States, 117 S. Ct. 2365, 2376 (1997).
[55] Doherty, *supra* note 34, at 1281.
[56] Vienna Convention, *supra* note 6, art. 36, 21 U.S.T at 101.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] U.S. CONST. art. VI.
[61] James P. Rubin, Text of Statement Released in Asuncion, Paraguay on Behalf of the United States of America, http://secretary.state.gov/www/briefings/statements/1998/ps981104.html (visited Dec. 2, 1998); Richardson, *supra* note 8.

the ICJ and delay the execution of Breard until such time as a decision could be made on the merits regarding the United States' violation of the Vienna Convention.

Although treaties are the supreme Law of the Land, the United States federalist system, as a system of *dual* sovereignty, merits a discussion of whether the federal government possesses the power to force states to carry out treaty obligations. The general rule when an international treaty and state law conflict is that the international treaty overrides. This rule of law is based on the Supremacy Clause of the United States Constitution.[62] However, in the 1950's, concerns arose that this treaty-making power would allow members of the executive to circumvent the constitutional limits on the federal government. Although the Senate Judiciary committee's Bricker Amendment to the Constitution repeatedly failed,[63] the Supreme Court's decision in *Reid v. Covert*[64] settled the issue. *Reid* involved a military dependent tried before a military tribunal rather than a civilian court, for an alleged murder in Great Britain. The relevant treaty in *Reid* permitted U.S. military courts to exercise exclusive jurisdiction over U.S. servicemen and their dependents in cases involving criminal offenses committed in Great Britain.[65] In ruling that the provision arranging for military trials of U.S. dependents could not escape the requirements of the Constitution, the Court explained that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[66] So long as treaties comply with the U.S. Constitution, they are valid.

The validity of the Vienna Convention was not in dispute in the case of Breard. However, it is demonstrative of the distinction between the federal government's power to develop international law and its ability to require local governments to administer it. Breard was arrested, detained and prosecuted by Virginia officials. Virginia officials failed to notify the Consular Office in Paraguay of Breard's arrest for two years. Virginia officials failed to notify Breard of his right to contact his Consular Office. Therefore, the discussion hinges not on whether a state of the United States violated a provision of the Vienna Convention, but rather, what the United States, as the signatory party, could do about it.

A. The United States' scope of power to compel states to comply with international treaties.

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[62] U.S. CONST. art. VI.
[63] GERALD GUNTHER, CONSTITUTIONAL LAW 206 (12th ed. 1991).
[64] Reid v. Covert, 354 U.S. 1 (1957).
[65] *Id.*
[66] *Id.* at 15.

States are not mere political subdivisions of the United States.[67] Yet despite the "residuary and inviolable sovereignty"[68] of the States, the structure of the Constitution forbids the federal government from compelling the States to enact or administer federal law.[69] In *Printz v. United States*, the Supreme Court described the Brady Act, which required that state law enforcement officers perform background checks, as forced participation in the administration of a federal program.[70] Under a *Printz* analysis, legislation passed by the federal government compelling the states to enact or administer federal law, is unconstitutional. However, the *Printz* argument, in an international context, has yet to be addressed by the Supreme Court.

The federal government's authority to require local government officials to carry out the terms of the Vienna Convention depends on the resolution of the following issues: (1) whether the Vienna Convention creates personal rights of a constitutional nature; and (2) if the Vienna Convention does not create personal rights of a constitutional nature, whether the federal government may rely on its constitutional powers to make foreign policy. If the Vienna Convention creates personal rights of a constitutional nature, the federal government might be able to place an affirmative obligation on the states to notify aliens of their rights under the treaty. The authority of the federal government to compel such notification by the states arises from the Due Process Clause of the Fourteenth Amendment,[71] which was the justification for *Miranda*.[72]

1. The Vienna Convention is a source of individual rights.

The District Court for the Eastern District of Virginia, in the *Republic of Paraguay v. Allen*,[73] expressed in dicta that the Vienna Convention does not create private rights of action. As distinguished from Breard's case, the plaintiff in *Allen* was not an individual, but the Republic of Paraguay with enforcement rights as a signing party to the Vienna Convention. Furthermore, "the district court in *Allen* did not cite any authority or engage in any analysis to support its conclusion that the Vienna Convention does not create privately enforceable rights."[74] Due to

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[67] New York v. United States, 505 U.S. 144, 188 (1992).
[68] *Id.* (quoting The Federalist No. 39).
[69] *New York*, 505 U.S. at 188.
[70] *Printz*, 117 S. Ct. at 2376.
[71] U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); *see* Duncan v. Louisiana, 391 U.S. 145 (1968) (holding that constitutional rights are applicable and enforceable against the states when the rights implicate fundamental principles of liberty and justice).
[72] Miranda v. Arizona, 384 U.S. 436 (1966).
[73] *Allen*, 949 F. Supp. at 1274.
[74] James A. Deeken, Note, *A New Miranda for Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the Wake of* Printz v. United States, 31 VAND. J. TRANSNAT'L L. 997, 1019 (1998).

application of the procedural default rule, the Supreme Court in *Breard v. Greene* did not reach the question of whether Mr. Breard had personal rights under the Vienna Convention.[75] However, the holding of the Supreme Court that "by not asserting his Vienna Convention claim in state court, habeas petitioner procedurally defaulted on this claim,"[76] strongly implies that Mr. Breard had individual rights under the treaty which he unfortunately, waived.

In the carefully crafted press release from the U.S. Department of State, James Rubin stated that the "failure to notify Mr. Breard was unquestionably a violation of an obligation owed to the Government of Paraguay."[77] Although this statement seems only to express an obligation to the Republic of Paraguay, James Rubin also states that the United States intends to ". . . ensure that the consular rights of foreign nationals in the United States are respected, and that Paraguayan and other foreign nationals in the United States are properly notified of their right to request consular assistance if they are arrested or detained."[78] It is an untenable conclusion that this treaty which provides a foreign national with the right to request consular assistance in the case of arrest, does not provide such foreign national a set of individual rights on that basis.

To determine whether a treaty may be privately enforced, the intent of the singing parties as evidenced by the language of the treaties should be analyzed.[79] Although the Preamble to the Vienna Convention recognizes that "the purpose of such privileges and immunities is not to benefit individuals,"[80] such right could not inhere in the Nation without inhering in the individual. Furthermore, the text of the treaty states that "the authorities of the receiving State shall inform the [arrested or imprisoned person]. . . of his rights without delay."[81] The text of the Vienna Convention, as well as the purpose behind it, provide a source of individual rights for foreign nationals.[82]

Addressing a situation comparable to that of Breard, in ruling on a case in which an arrested alien was not advised of his ability to contact his foreign consulate, the Fifth Circuit referred to the alien's ability to contact

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[75] *Greene*, 118 S. Ct. at 1352.
[76] *Id.* at 1355.
[77] Rubin, *supra* note 61.
[78] *Id.*
[79] Deeken, *supra* note 74; *see* Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 937 (1988); *see also* Republic of Paraguay v. Allen, 929 F. Supp. 1269, 1274.
[80] Vienna Convention, *supra* note 6, pmbl.
[81] *Id.* at art. 36, § 1(b).
[82] The Clinton Administration in the Breard case took the view that the treaty did not create personal rights and was a matter for country-to-country diplomacy. Linda Greenhouse, *Court Weighs Execution of Foreigner*, N.Y. TIMES, Apr. 14, 1998, at A14.

his consulate as "his rights under the Convention."[83] However, due to the fact that the alien's claims in *Faulder* were dismissible on other grounds, the court did not examine whether the rights were privately enforceable.[84] The holding of the United States Supreme Court, the language of the Vienna Convention and the statements made by the spokesperson for the Secretary of State all indicate that Mr. Breard had individual rights under the Vienna Convention.

2. The individual rights afforded by the Vienna Convention are of constitutional significance.

The failure of the police to inform a foreign national of his "rights" under the Vienna Convention should rise to the level of rights constitutionally guaranteed. Opponents of this proposition would refer to the Second Circuit's decision in *Waldron v. INS*.[85] The Second Circuit in *Waldron* held that the failure of the Immigration and Naturalization Service (INS) to inform the defendant of the Vienna Convention did not constitute a violation of fundamental liberties with constitutional origins.[86] Although the failure to inform an arrested alien of his ability to contact his consulate may not, in the case of a finding of deportability,[87] undermine the alien's fundamental liberties, this failure to inform Mr. Breard's consulate violated his fundamental liberties. Most significantly, Mr. Breard was arrested for capital murder. A conviction for capital murder, could and did, eventually deprive Mr. Breard of his fundamental right to life. The alien in *Waldron* did not have a fundamental right to contact his consulate or to reside in the United States; however, a result of the failure to notify Mr. Breard's consulate of his arrest was his plea of guilty for capital murder.

Despite the concern that ". . . the Vienna Convention may create rights for aliens above and beyond the constitutional safeguards afforded to citizens,"[88] this is a measure the United States must take in death penalty cases. Not only is the death penalty an inherently unique form of punishment, but as of 1996, 108 countries had banned the death penalty altogether (including all European states and eight South American states, one of which is Paraguay).[89] In addition to the language barrier which often impedes an alien's ability to understand the legal implications of his actions, without the aid of his consular, it is not likely that a foreign national accused of capital murder will be able to understand the grave consequences of his decisions following arrest. The irreversibility of the

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[83] Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir.), *cert. denied* 117 S. Ct. 467 (1996).
[84] *Id.*
[85] Waldron v. INS, 17 F.3d 511 (2d Cir. 1993).
[86] *Id.* at 518.
[87] *Id.*
[88] Deeken, *supra* note 74, at 1025.
[89] *See* WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 296 (2d ed. 1997).

death penalty and the distinctive circumstances surrounding an alien's arrest for murder, demand that notification of the alien's consulate rise to the level of constitutional rights in that narrow situation. Mr. Breard's due process rights were violated at every step of the legal process during the two years following his arrest up to the time the Republic of Paraguay was notified. The Republic of Paraguay has stated that they would have advised Mr. Breard to pled guilty in exchange for a life sentence.[90] Had Mr. Breard's individual rights under the Vienna Convention been upheld, it appears likely that he would have pled guilty in order to preserve his life. This violation of the Vienna Convention was a violation of his fundamental rights of constitutional proportions.

The Vienna Convention is a source of individual rights of constitutional significance, which were undisputably violated by Virginia officials. Irrespective of what the federal government could have done to force the states to comply with the Vienna Convention prior to Mr. Breard's sentencing, the United States voluntarily submitted to the ICJ on the Request for Provisional Measures.[91] Although addressing the ". . . gravity and importance of the decision,"[92] the United States nevertheless failed to comply with the Order of the ICJ. Based on the nature of the rights which were violated, and the fact that these rights were bestowed by the supreme Law of the Land, the federal government should have, at the minimum, complied with the Order of the ICJ and delayed the execution of Mr. Breard. The United States used the federalist system as an excuse, justifying the failure of its measures to ensure that Mr. Breard was not executed pending the final decision of the ICJ. Yet, to quote Justice O'Connor, "the other essential element of our federalist tradition is mutual trust and respect. . . . Just as state courts are expected to follow the dictates of the Constitution and federal statutes, domestic courts should faithfully recognize the obligations imposed by international law."[93] Mutual trust and respect dictated that the United States should have truly exhausted all possibilities in their effort to comply with the ICJ Order. However, the United States chose not to exercise those options which would have allowed it to honor its international obligations.

IV. UN-SEIZED OPPORTUNITIES, ON THE PART OF THE UNITED STATES, TO COMPLY WITH THE ICJ ORDER.

A. The federal habeas corpus review as an exercise of federal authority over state actions.

[90] Richardson, *supra* note 8, at 122.
[91] Application of the Vienna Convention on Consular Relations (Para. V. U.S.), http://www.icj-cij.org/idocket/ipaus/ipauser980407/ipauscr980407.html (visited Nov. 23, 1998).
[92] *Id.*
[93] Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35, 41 (1996).

Federal control over the state's administration of criminal law is limited. However, one method of federal control, in the death penalty context, is the federal habeas corpus review of state law convictions and sentences. The federal government has the formal opportunity to review the state law sentences. Regardless of the frequency with which federal courts alter the outcome of a case in deference to international law, federal courts have the power and opportunity to do so through the review of habeas corpus petitions.[94] This option was available to the federal courts in the appeals instituted by Breard and Paraguay. In fact, "the Supreme Court has reversed state-level practices in cases in which they have had 'more than an incidental effect' on foreign relations, a threshold Breard plainly met."[95] However, both the Fourth Circuit and the United States Supreme Court denied the habeas petitions instituted on behalf of Breard, in spite of the United States' concession that treaty notification requirements had not been met. Through the judiciary's actions in the Breard case, "the federal government proved utterly unwilling to discipline Virginia in the wake of the violation and in the face of the ICJ Order. The lesson of the Breard episode for state authorities: Don't be too anxious about respecting international law."[96]

B. Diplomatic pressure as a source of federal authority over state actions.

In addition to the judiciary's formal review, the executive branch, through the Department of Justice and State Department had the opportunity to present views on the Virginia sentence. The Supreme Court made a rare request[97] that the Department of Justice submit a brief explaining their position on the ICJ Order indicating that the United States should take ". . . all measures at its disposal" to delay the execution of Breard.[98] The brief submitted by the Solicitor-General to the Supreme Court argued that the ICJ Order did not justify halting Breard's execution while it trumpeted the fact that pocket-sized reference cards were issued to law enforcement officers as demonstrative of their efforts to prevent future violations. Presenting a view opposite that of the Department of Justice, Secretary of State Madeleine Albright sent a letter to the Governor of Virginia requesting a stay of execution until such time as the ICJ could render a decision, for diplomatic reasons. The public positions of the Department of Justice and the Secretary of State were incompatible. If the Solicitor General had urged the Supreme Court ". . . to accept the case for appeal and set the argument for some time in the fall after the ICJ argument, on the grounds that it was not in the national interest of the U.S. judiciary to be seen in open conflict on this question with a valid Order of

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[94] *See id.* at 42.

[95] Peter J. Spiro, *States That Flout World Opinion May Incur Loss*, NAT'L L.J., May 4, 1998, at A23.

[96] *Id.*

[97] Richardson, *supra* note 8, at 125 (stating that a request by the Supreme Court for the views of the Justice Department is unusual in death penalty cases).

[98] ICJ Order, *supra* note 26.

the ICJ, the voices would have been joined in support of the Secretary of State's correct warning about the welfare of U.S. citizens abroad."[99] However, the federal government's failure to urge delay with a unified voice on this issue with significant international implications, demonstrates an un-seized opportunity to comply with the ICJ Order.[100]

C. Application of the Supreme Court's timetable as an additional measure which would have resulted in compliance with the ICJ Order.

Justices Stevens, Breyer and Ginsburg dissented on the grounds that Virginia's execution schedule leaves less time for the Court to consider the petitions than the Court's rules provide for in ordinary cases.[101] Justice Stevens stated that the Court has ". . . been deprived of the normal time for considered deliberation by the Commonwealth's decision to set the date of petitioner's execution for today. There is no compelling reason for refusing to follow the procedures that we have adopted for the orderly disposition of noncapital cases. Indeed, the international aspects of this case provide an additional reason for adhering to our established Rules and procedures."[102] Justices Breyer and Ginsburg echoed Justice Stevens' sentiments in favor of a stay of execution so as to avoid speedy deliberation of such a grave matter. Application of the timetable of the United States Supreme Court would have been an additional measure the federal government could have taken to delay the execution of Bread and thereby comply with the Order of the ICJ.

Simply stated, the capacity to review habeas petitions, and in Breard's case, the denial of the habeas petitions subsequent to the issuance of the ICJ Order of Provisional Measures, places the violation of the ICJ Order within the realm of federal control. The United States cannot shirk responsibility for violations of the Vienna Convention by citing the complex delegation of authority under the Federal system; "[A]s long as a branch of the federal government has the formal opportunity to review state law sentences for potential violations, the state remains subordinate to the federal foreign affairs power, and it cannot implicate the nation's international legal responsibility without federal permission."[103] Just as domestic tort law encourages parents to discipline their children, so too

[99] Richardson, *supra* note 8, at 129.

[100] The Department of Justice could have maintained the same legal position, yet suggest that the Supreme Court order a stay for diplomatic reasons so that the United States would appear cooperative in the early stages of the case before the ICJ. Due to Paraguay's November 2, 1998 request that the case be removed from the Court's List, whether this position would have aided the United States in the case then pending before the ICJ will remain unknown.

[101] *See* Breard v. Greene, 118 S. Ct. 1352, 1357.

[102] *Id.*

[103] Doherty, *supra* note 34, at 1324–55.

the doctrine of state responsibility encourages nation-states to bring their political subdivisions into line with international law.[104]

V. CONCLUSION

The atrocity of his crimes notwithstanding, Mr. Breard had individual rights under the Vienna Convention which were violated by the state of Virginia. Although the Clinton administration asserted that the Vienna Convention only provided rights to Paraguay and not Mr. Breard, the question was not yet resolved. The ICJ indicated, in its Order of Provisional Measures, that the United States should take "all measures at its disposal"[105] to ensure that Mr. Breard was not executed until the court could decide whether he had individual rights under the Vienna Convention.

The issue of whether Mr. Breard actually had rights under the Vienna Convention remains unresolved. While the language of the treaty, dicta in *Breard v. Greene*,[106] and a press release from the State Department[107] all indicate that he had such rights,[108] Mr. Breard was executed before the ICJ was able to resolve the matter. Furthermore, the Republic of Paraguay withdrew its case from the Court's List in November, before the ICJ could decide the matter, for reasons which have not been officially stated.[109] The federal government did not comply with the ICJ Order to take "all measures at its disposal"[110] to ensure that Mr. Breard was not executed pending the final decision of the ICJ.

The federal government did not exercise its formal authority, as limited to the habeas corpus review of state sentences and application of extradition treaties, to comply with the Order of the ICJ. While the federalist structure allows the federal government to retain formal authority, this type of control over cases involving the imposition of the death penalty on foreign nationals, presents the undesirable situation where a state becomes an actor on the international stage. The resulting disputes between state and federal governments over delicate diplomatic issues appear to "contradict the framer's presumption that the federal

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[104] Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567 (1997).
[105] ICJ Order, *supra* note 26.
[106] *See Greene*, 118 S. Ct. at 1355.
[107] Rubin, *supra* note 61.
[108] *See* Part III of this text for full discussion.
[109] Carlos Montero, *U.S.-Paraguay: Piracy Trade Sanctions Threat Could Be Lifted Soon*, Inter Press Service, Nov. 12, 1998, at 1, *available at* 1998 WL 19901499 ("Sources with the Paraguayan government suggest a tradeoff may have occurred in talks with the U.S. that ended yesterday and that Paraguay's withdrawal of its action brought before the ICJ last month in The Hague for the Apr. 14 execution of convicted rapist and murderer Paraguayan citizen Angel Breard").
[110] ICJ Order, *supra* note 26.

government would serve as the nation's sole representative on the world stage and that the states would be forbidden from plunging the nation into international disputes."[111]

While the federal habeas corpus statutes provide the federal government with a safety valve mechanism through which it can prevent violation of international obligations, the state appears to be emerging as an individual actor on the international scene. Inherent in the United States' federalist system is the principle that the federal government alone is responsible for the foreign affairs of the Nation. However, to the extent that the federal government shifts responsibility for violations of international law to the states, making states participants in the international community, such sub-national actors will be less able to deny international responsibility. As the emerging significance of the state in the realm of international law will continue to challenge the authority of the federal government, it is imperative that the federal government continue to assert its command of foreign affairs through internal diplomacy.

The federal government was in a position to urge a delay of Breard's execution, by asserting diplomatic interests, to the United States Supreme Court and the State of Virginia. Instead of articulating a singular position, the federal government set forth two contradictory views. Additionally, the Supreme Court could have simply applied its own rules to delay the execution of Mr. Breard. None of these additional measures were taken on behalf of the federal government. The United States hid behind the cloak of federalism as it trounced the authority of and the respect due the decisions of the International Court of Justice. The United States' failure to comply with the ICJ Order was a violation of its international obligations.

[111] *Greene*, 118 S. Ct. at 1325–26.