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The Breard Case and the Virtues of Forbearance

By John G. Douglass

AT A TIME when the scheduled execution of Angel Francisco Breard made Virginia the focus of a groundbreaking controversy over the reach of international law into the domestic criminal process of the United States, law students and faculty at the University of Richmond had the unique opportunity to consider the case along with Philippe Sands, then a Visiting Allen Chair Professor at the University. Professor Sands is remarkable not only because of his impressive reputation as a scholar in international law, but also because of his experience as a practitioner before the International Court of Justice which was, at that very moment, wrestling with the Breard case.¹

Like Professor Sands, I was troubled at Virginia's execution of Breard in the face of the ICJ's Order for Provisional measures. At least symbolically, the episode undermines future efforts by the United States to convince other nations to take international law seriously. If the United States will not — or cannot, under our federal system — defer a state's irreversible action in a matter of life or death for a period of months at the request of an international tribunal interpreting a treaty to which the United States is a party, then we will be hard pressed to ask other nations to pay any heed to ICJ directives of lesser moment.

But I do not share in many of Professor Sands' broader concerns about the Supreme Court's ruling. Professor Sands argues that, under the Court's ruling, nations "are free to determine how to implement [substantive protections of international law]" and that such pro-

tections "can be gutted altogether by limiting the [procedural] circumstances in which [an] individual can invoke the right."

I believe the Court's ruling is considerably narrower. The Court claimed no power to impose special procedural limits on the implementation of international treaty rights. Instead, the Court ruled that such treaty rights are of equal dignity to rights guaranteed under our Constitution or by federal statute. They may be invoked, procedurally, in the same manner and subject to the same limitations under which a defendant might invoke, for example, claims under the Fourth or Fifth Amendments.

Such a concept carries its own, rather sensible, limits. Nations should be no more restrictive — procedurally — in enforcing treaty rights than they are in enforcing the rights of their own citizens under domestic law. To do less would, as Professor Sands points out, "gut" the force of international law.

But to expect more, it seems to me, is a political impossibility. It seems highly unlikely that Paraguay or any other signatory to the Vienna Convention believed that it had ceded authority to an international tribunal on otherwise routine matters of criminal procedure. It is possible, of course, that nations collectively might agree to create "international rules of criminal procedure." But it does not appear to me that the Vienna Convention established any such rules.

Instead, it requires only that "full effect ... be given to the purposes for which the [treaty] rights ... are intended." The courts of Virginia and the United States did exactly that. Unfortunately for Breard, he attempted to invoke those rights, belatedly, in a case

where the "full effect" of such rights was essentially nil. A conversation with consular officials would have made no difference.

"On the merits," then, I find little reason to fault the Court's decision. What is most troubling to me, however, is that the international conflict engendered by the Breard episode was so avoidable. As three Supreme Court justices pointed out, the Court had discretion to stay Breard's execution irrespective of the ICJ order, simply to allow the normal time for considering the pending petitions for certiorari.

Gov. Jim Gilmore possessed the power to forbear from execution, even if only for a few months, simply as a matter of deference to the ICJ or to the secretary of state and the president. He could easily have done so while still maintaining that he had power to do otherwise. Even a brief delay might have given the ICJ time to consider the merits and do what international tribunals ought to do: fashion an opinion designed to promote treaty compliance without intruding too deeply into the domestic legal process.²

Instead, as Professor Sands rightly concludes, Virginia's rush to irreversible action has thrown down a gauntlet which the ICJ is unlikely to ignore. Paraguay's case is still pending against the United States and Virginia's haste has diminished the prospect of a "diplomatic" resolution. If, as Professor Sands suggests, the ICJ ultimately rules that "international law prevails over domestic law," and that the Vienna Convention creates "enforceable individual

rights to which real remedies attach," then we may be headed for an unfortunate showdown with an unpredictable ending.

Perhaps the ICJ will prove to be a paper tiger. Though it seems unlikely in the current political climate, perhaps Congress might view our international obligations seriously enough to implement the treaty with legislation that might expand the power of federal courts to review state action in cases of alleged treaty violations.

Neither result would benefit Virginians, who would like to preserve local control over the administration of criminal justice, but must compete in a global economy which will become increasingly dependent upon the enforceability of international law. That dilemma may well arise during future international "trade missions" when Virginia's governor sits across the table from his counterpart in, just for example, Paraguay.

Sometimes power is preserved most effectively through forbearance. John Marshall proved that maxim almost 200 years ago when, by declining to exercise powers Congress had attempted to give the Court, he preserved for the long run the Court's fundamental powers of judicial review.³ Gov. Gilmore would have done well to heed that advice. It remains to be seen whether the ICJ will follow Marshall's example.

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Endnotes

¹ Breard never claimed that he was affirmatively denied access to the Paraguayan consul. He complained only that arresting authorities violated the Vienna Convention by failing to inform him of his right to contact the consulate. Apparently, neither Breard — who had been living in the United States for about six years before he raped and murdered one of his Arlington County neighbors — nor his trial counsel gave any thought to contacting the consulate before his conviction or during the process of direct appeal to the Supreme Court of Virginia. The matter was first raised when he filed a petition for habeas corpus in federal court. See *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996), *aff'd sub nom Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998). The Federal District Court rejected the claim, finding that it was procedurally defaulted when Breard failed to raise it in state court and, further, that Breard failed to show any cause or prejudice for the default.

² For example, the ICJ might rule, and still could rule, (1) that signatory nations may follow their own rules of criminal procedure as long as they "give full effect" to the "purpose" of the Convention, and (2) that the treaty violation in Breard's case had no effect on his conviction or sentence, so that the purposes of the convention were not frustrated in his case.

³ *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803).