EXECUTION OF FOREIGN NATIONALS IN THE UNITED STATES: PRESSURE FROM FOREIGN GOVERNMENTS AGAINST THE DEATH PENALTY

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I. INTRODUCTION

One of the sources of pressure against the use of capital punishment in the United States is foreign governments. Half the world's states do not use capital punishment. Importantly, that half includes all of Western Europe. The states of Western Europe, as a result of their economic situation and their economic cohesiveness, are better positioned than most other states in the world to put pressure on the United States on human rights matters.

In Western Europe, not only is capital punishment not practiced, but also the use of capital punishment is deemed a violation of human rights. A European treaty outlawing capital punishment as a human rights violation enjoys wide adherence. Western European states have often refused extradition to the United States where the United States has sought the surrender of a person to be tried for a capital offense. Popular sentiment is so strong against capital punishment in many Western

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European states that European citizen groups and government officials have lobbied against the imposition of death sentences in particular cases. Italy has played a leading role in this regard.

II. WESTERN HEMISPHERE PRESSURE ON CAPITAL PUNISHMENT

In recent years, pressure against the use of capital punishment in the United States has come from Western Hemisphere states as well, typically in cases in which nationals of a Western Hemisphere state have been sentenced to death in the United States. The number of foreign-state nationals sentenced to death in the United States is not insignificant. Presently, between sixty and seventy are housed in death row sections of the prisons of various states, awaiting execution. Most are from this hemisphere, a fact that is likely attributable to the large numbers of immigrants to the United States from the hemisphere.

Capital punishment is little used in the Western Hemisphere. After western Europe, the western hemisphere is the next region of the world most strongly opposed to capital punishment. The United States is a major exception in this regard.

The pressure by Western Hemisphere states has been exerted not on the grounds of the impropriety or illegality of capital punishment. It has been exerted on a basis that may surprise many in the United States, namely, the unfairness of the criminal trials and sentencing of these foreign-state nationals.

Prejudice against these foreign-state nationals has been suggested as a factor in some of the cases. The principal point of challenge, however, has been the alleged violation of a treaty provision. Under the Vienna Convention on Consular Relations, to which 156 states are parties, authorities who arrest a national of a high contracting party are required to inform that person of a right provided in the Convention to contact the person's consulate for assistance. The obligation is contained in Article 36, paragraph 1, of the Vienna Convention on Consular Relations, which reads:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:
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> (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;
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> (c) consular officials 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.[1]

The critical aspect of Article 36, paragraph 1, is the final sentence of subparagraph (b), namely, the obligation to inform a foreign national of the right of consular access. The Western Hemisphere States whose nationals have been sentenced to death in the United States have charged, both in protest notes and in documents filed in court, that their nationals were not afforded this information at the time of arrest, or, indeed, at any time during the trial or sentencing. The governments of these states were thus deprived of the opportunity to assist their co-nationals in defending the charge that led to conviction and a sentence of death. Of all the foreign-state nationals currently awaiting execution in the United States, few if any were provided the information required to be given by the Vienna Convention on Consular Relations.

The result, argue these governments, is unfair trials. The function of consular assistance is to allow a foreign national to present a proper defense. The institution is based, in part, on the premise that a foreigner is typically less able than a national to present a defense, because of less familiarity with the culture and legal system. It is based as well, in part,

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1. Vienna Convention on Consular Relations, April 24, 1963, T.I.A.S. 6820, 21 U.S.T. 77.

on a concern that the person may be the object of discrimination as a foreigner.

The United States does not question the importance of consular protection in criminal cases. According to the Legal Adviser to the Department of State, "[t]he United States attaches great importance to ensuring respect for the consular notification obligation under the Vienna Convention. In addition to being legally required, United States compliance helps ensure our ability to protect United States citizens when similarly detained abroad."[2] The Justice Department has made a similar affirmation of the effect and importance of the notification obligation: "the United States firmly believes in and supports consistent adherence to the consular notification provisions in Article 36 of the Vienna Convention on Consular Relations. . . . These provisions are very important to the United States because they give significant protection to United States nationals when they reside or travel abroad."[3]

On several occasions in recent decades, the Department of State has sent a circular letter to local law enforcement agencies around the United States, advising them of the obligation to inform foreign nationals of their right to contact a consul, and providing a list of the locations and telephone numbers of embassies and consulates.[4]

The Legal Adviser states that many detained foreign nationals are given the required information by law enforcement authorities:

> We have had many positive experiences with local, state, and federal law enforcement authorities in cases raising the Article 36 notification and access obligations. We regularly hear from state and local law enforcement agencies in widely separate parts of the United States that wish to confirm information contained in our April 1993 Notice for Law Enforcement Officials on the Detention of Foreign Nationals or to seek clarification of these instructions. We also hear routinely from foreign government representatives about issues relating to foreign nationals

2. Letter to Robert F. Brooks, Esq., from Michael J. Matheson, Acting Legal Adviser, (Aug. 20, 1997) (copy on file with author).

3. Brief for Allen at 1, Paraguay v. Allen (No. 96-2770)(4th Cir. 1997).

4. U.S. DEPARTMENT OF STATE, NOTICE: IF YOU HAVE DETAINED A FOREIGN NATIONAL, READ THIS NOTICE, (Sept. 1, 1991) (copy on file with author).

> whose detentions have been notified to these representatives through the Article 36 notification process.[5]

Nonetheless, in the current capital cases involving foreign nationals, there is, as mentioned, little indication that the required information was given. In none of the capital cases has the Department of State, or a prosecuting attorney, asserted, in response to an Article 36 claim, that the required notification was given.

III. Reasons Courts Have Refused to Enforce the Right of Consular Access

Since the Article 36 obligation reads in clear terms, one might expect the courts to provide redress when the obligation is violated. To date, however, courts in the United States have given a cool reception to foreign nationals who have raised the lack of compliance to challenge a conviction. In only one reported case, a non-capital case, has a court granted relief.[6]

The courts have found various ways to reject an Article 36 claim. One state court judge presented with a post-conviction petition based on an allegation of non-compliance with Article 36 said that Article 36 did not require any notification. The judge said:

> This court knows of no law, treaty, or judicial precedent, which imposes on law enforcement officials an affirmative duty to inform an alien detainee of a right to contact consul, nor does this court recognize such an obligation. While custodial personnel may not obstruct or deny an alien detainee's right to contact his nation's consul, they have no affirmative duty to inform him of that right.[7]

The court made this ruling after being presented the text of Article 36. The judge did not provide any elaboration that would indicate how he arrived at his erroneous reading of Article 36. His reading is in obvious contradiction to the text, which, as the Department of State acknowledges, requires notification of the right to contact a consul.

For the most part, however, the courts have recognized that Article 36 requires notification and that a foreign national to whom no notification was given may raise the matter. However, the courts, confronted by

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5. Letter to Robert F. Brooks, Esq., from Michael J. Matheson, Acting Legal Adviser, Aug. 20, 1997 (copy on file with author).

6. United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980).

7. Ohio v. Loza, No. CA96-ID-214, 1997 WL 634348 (Ohio Ct. App. Oct. 13, 1997).

foreign nationals raising Article 36 claims, have invoked one or another procedural hurdle that has resulted in a denial of relief.

A. Limitation on Appeal to the United States Court of Appeals

In a 1997 case, the Supreme Court of the United States denied certiorari review after the court of appeals refused to review a district court order denying a habeas corpus petition filed by a foreign national sentenced to die by a state court. A Mexican national had been convicted of murder in Virginia and sentenced to death there. Virginia authorities had not informed him of his right to contact a Mexican consul. He sought habeas corpus review in the United States district court on grounds of Virginia's failure to comply with the obligation to inform him of the right of consular access, challenging the conviction on that basis.

A claim based on a treaty may serve as a ground for the issuance of a writ of habeas corpus. A federal statute provides that a writ of habeas corpus may issue if a person is in custody "in violation of the constitution or laws or treaties of the United States."[8] The District Court denied relief, however, after which he filed an appeal in the United States Court of Appeals. The Court of Appeals refused to hear the appeal, in light of a 1996 statute providing that if a district court denies the habeas corpus petition of a person sentenced in state court, there should be no appeal of that denial, unless the petitioner can make a substantial showing of a violation of a constitutional right.[9] The Court of Appeals said that the Mexican national was alleging a violation of a treaty right, not a constitutional right.[10]

In seeking review by the Supreme Court of the United States, the petitioner, supported by the government of Mexico as *amicus curiae*, argued, unsuccessfully, that the Court of Appeals had misconstrued the 1996 Act, because there was no indication in the legislative history of an intent to preclude appeals based on treaty claims, which up until then had been permitted. In addition, they argued, also unsuccessfully, that where the effect of a statute on a treaty obligation is unclear, courts must construe the statute in a way that does not result in a violation by the United States of its treaty obligation.[11]

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8. 28 U.S.C.S. §§ 2241(c)(3), 2254(a) (1997).

9. Antiterrorism and Effective Death Penalty Act of 1996, (*codified as* 28 U.S.C. § 2253(c)(2)) (1997).

10. Murphy v. Netherland, Warden, 116 F.3d 97 (4th Cir. 1997) *cert. denied*, 1997 U.S. LEXIS 4423.

11. Brief for Netherland, Murphy v. Netherland, Warden, 116 F.3d 97 (4th Cir. 1997).

B. Default on Procedural Grounds

Another basis on which courts have rejected a Vienna Convention claim is that the matter was not raised early enough in the proceedings. In most of the litigated cases, the foreign national has raised the Vienna Convention claim only in post-appeal review. In an Ohio case, the foreign national raised the claim in post-conviction proceedings, under a statute that allows review of a criminal conviction on constitutional grounds.[12] The Ohio court denied review on the grounds that the Vienna Convention claim was not a constitutional claim.[13]

Federal courts too have denied Vienna Convention claims on the ground that the claim was raised too late. These cases have involved persons convicted and sentenced to death in state court. Even though federal statute provides for habeas corpus review whenever a person is in custody "in violation of the constitution or laws or treaties of the United States,"[14] the courts have invoked a rule that a person convicted in state court must present all possible arguments to the courts of the state before seeking federal review. If an issue that could have been presented in state court was not presented, the federal courts say that the issue was *procedurally defaulted*.[15]

Foreign nationals challenging a conviction and death sentence on Vienna Convention grounds have questioned this result, arguing that the procedural default rule is based on considerations of federal-state relations. The rule is designed to accord deference to the state courts.[16] The foreign nationals have argued that this consideration is inapposite when a treaty right has been violated. When that has occurred, any opportunity presented to a court to correct the violation should be taken, because the result otherwise will be that the United States defaults on a treaty obligation.

C. A Prejudice Requirement

Most courts that have not refused to consider Vienna Convention claims on procedural grounds have rejected them on the basis of a requirement of showing prejudice. They have said that a foreign national

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12. OHIO REV. CODE ANN. § 2953.21(A)(1) (1997).

13. Ohio v. Loza, No. CA96-10-214, 1997 WL 634348 (Ohio Ct. App. Oct. 13, 1997).

14. 28 U.S.C.S. §§ 2241(c)(3), 2254(a) (1997).

15. Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997).

16. Fay v. Noia, 372 U.S. 391, 432 (1963); Engle v. Isaac, 456 U.S. 107, 127 (1982); Murray v. Carrier, 477 U.S. 478, 487 (1986); Coleman v. Thompson, 501 U.S. 722, 730 (1991).

asserting a Vienna Convention claim must demonstrate that he or she was prejudiced by the inability to have a consul's assistance.[17]

The courts have created a prejudice requirement, without a clearly stated rationale, but apparently by analogy to other defensive assertions regarding which a showing of prejudice is required. The difficulty with this approach, as applied to the Vienna Convention on Consular Relations, is that it is only the rare case in which a foreign national can demonstrate to any degree of certainty that participation by a consul would have led to an acquittal, or to a lesser sentence. A consul's functions are varied, and one cannot know after the fact what a consul might have done that would have affected the outcome. A prejudice requirement makes it highly unlikely that a court will rule in favor of a Vienna Convention claim.

Under the Vienna Convention, the contracting states have implicitly said that a person is prejudiced if required to defend a criminal charge without consular assistance. Absent an assumption that a foreigner is disadvantaged in the criminal process, there would be no need for consular assistance.

In one case, a United States district judge reversed a conviction because of a Vienna Convention violation without requiring the convicted foreign national to demonstrate prejudice. The court of appeals reversed, however, stating that prejudice must be demonstrated by the foreign national.[18] In the Court of Appeals, one judge dissented, arguing that while prejudice was relevant, the burden should be on the government to show that no prejudice occurred. The dissenting judge based his view on the importance of meeting treaty obligations. He wrote:

> This nation must manifest integrity in our treaties with foreign countries. To honor the provisions of . . . the Vienna Convention on Consular Relations . . . mandates a sense of justice and decency. To do anything less is a severe erosive compromise of our very essence equal if not greater than a Constitutional violation.[19]

17. United States v. Calderon-Medina, 591 F.2d 529, 532 (9th Cir. 1979); Murphy v. Netherland, Warden, 116 F.3d 97, *cert. denied* 1997 U.S. LEXIS 4423; Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996).

18. United States v. Calderon-Medina, 591 F.2d 529, 532 (9th Cir. 1979).

19. United States v. Calderon-Medina, 591 F.2d 529, 532 (9th Cir. 1979) (Takasugi, J., dissenting).

IV. POSSIBLE INTERNATIONAL ACTION

To date, litigation in United States courts has not resulted in any success in challenging capital convictions on the basis of the Vienna Convention on Consular Relations. Approaches in the international arena may result. Petitions have been filed with the Inter-American Commission of Human Rights.[20] The matter has been taken up at the diplomatic level. Mexico, in addition to filing protest notes with the United States in several of the cases involving its nationals, has raised the issue at the United Nations.

To date, the United States Department of State has rebuffed the approaches of the Western Hemisphere governments who have approached it. As far as can be known, it has taken no steps to encourage state courts or state governors to comply with the Vienna Convention. Given the obligation of the United States to comply with the Vienna Convention, this lack of action puts the United States in violation of its Vienna Convention obligations. Since the obligation to comply with the Vienna Convention rests on the United States, one might expect more aggressive action from the State Department than an occasional circular letter. Importantly, the State Department acknowledges that rights under the Vienna Convention have been infringed in the cases that have been brought to its attention.

The Justice Department has argued, so far successfully, that a foreign state may not sue to force a United States to comply with Article 36, on the rationale that the matter must be handled at the state-to-state level. Thus, the Justice Department asserts: "Assertions by foreign states of treaty violations are properly resolved through diplomatic representations between the foreign state and the Executive Branch of our federal government, or through actions before appropriate international bodies, not through suits brought by foreign states in domestic courts."[21]

However, as indicated, every foreign state to date that has made diplomatic representations to the Department of State regarding Article 36 has been politely shown the Foggy Bottom exit door. Litigation in the International Court of Justice may ultimately result. The Vienna Convention on Consular Relations does not include a provision for compulsory reference of disputes to the International Court of Justice, but a separate protocol to the Vienna Convention does so. The United States is a party to the optional protocol, as are a number of Latin American states.

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20. S. Adele Shank & John Quigley, *Foreigners on Texas' Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719, 722-27 (1995).

21. Brief for Allen at 2, Paraguay v. Allen (No. 96-2770) (4th Cir. 1997).

V. CONCLUSION

International pressure is being brought to bear on the United States on the capital punishment issue. The United States increasingly is isolated as a major state that continues to use capital punishment. Given this international isolation on the issue, the execution of foreign nationals becomes a lightning rod for mobilization of foreign sentiment and an occasion for action by foreign governments.

Domestic pressure as well is being brought to bear on the United States regarding capital punishment. The American Bar Association has called for a suspension of executions in light of widely perceived inequities in application of the death penalty.[22] Pressure by foreign governments regarding capital punishment is being brought to bear at the same time as domestic pressure is increasing. Pressure from abroad may ultimately play a decisive role in the fate of capital punishment in the United States.

22. Darryl van Duch, *ABA Asks Death Penalty Halt, Skirts Bond Reform*, NAT'L L.J., Feb. 17, 1991, at A7 (calling for moratorium on executions until it can be demonstrated that the process leading to execution is being handled fairly).