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Note

Setting Sail with *The Charming Betsy*: Enforcing the International Court of Justice’s *Avena* Judgment in Federal Habeas Corpus Proceedings

Laura A. Young*

On March 31, 2004, the International Court of Justice (ICJ), the principal judicial organ of the United Nations, ordered U.S. courts to review and reconsider the convictions and death sentences of fifty-one Mexican nationals on death row in nine states.¹ The ICJ found that by failing to inform foreign defendants of their right to contact their consulate, the United States had breached its obligations under the Vienna Convention on Consular Relations (VCCR), a treaty by which the United States has been bound since 1969.² Over the past decade, state and federal courts, following the lead of the U.S. Supreme Court, have been reluctant to review the merits of VCCR

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2. *Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, (entered into force Mar. 19, 1967).* At the United Nations Conference on Consular Relations in 1963, the Vienna Convention was adopted to codify consular rights and obligations among nations around the globe. More than ninety-two national governments participated in the conference. LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 17 (1966). The VCCR was ratified by the U.S. Senate in 1969 and is a self-executing treaty, meaning that it does not require separate implementing legislation to become effective as domestic law. U.S. Dep’t of State, Consular Notification and Access, Part 5: Legal Material, at http://travel.state.gov/law/consular/consular_744.html#vienna (last visited Jan. 10, 2005) (“[o]bligations of consular notification and access are not codified in any federal statute. Implementing legislation is not necessary (and the VCCR...[is] thus ‘self-executing’) because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers”).

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claims or to fashion a remedy for acknowledged treaty violations. Instead, courts have often chosen to dismiss claims on procedural grounds, without a full hearing. The question now confronting courts across the country is whether the new ICJ directive in *Avena* will force change or lead to further entrenchment. The Supreme Court will take up this issue in March 2005 when it hears arguments in the case of José Medellín. Given the executive and judicial branches' past reluctance to defer to international law norms where the death penalty is concerned, the ICJ appears to have "set itself on a collision course with American courts." This Note argues for the use of the longstanding *Charming Betsy* canon of statutory construction to avert the potential collision between the ICJ and domestic doctrines, specifically the


Aside from extradition issues, the Council of Europe has threatened to revoke the United States' observer member status as a result of its refusal to enter into a dialogue on ending execution as a means of punishment. *Council Resolution 1253*, Abolition of The Death Penalty in Council of Europe Observer States, adopted June 25, 2001, at http://assembly.coe.int/Documents/AdoptedText/TAO1/ERES1253.htm (last visited Jan. 10, 2005). In June of 2001, the Council adopted a resolution based on a report from its Human Rights Panel noting that the United States and Japan are in violation of their obligations under a council resolution pertaining to observer member states. *Id.* The resolution stated that the use of execution as punishment is in violation of Article 3 of the European Convention on Human Rights and that "the death penalty has no legitimate place in the penal systems of modern civilised societies." *Id.*

Antiterrorism and Effective Death Penalty Act (AEDPA)\(^5\) and procedural default.\(^6\) Under *Charming Betsy*, federal statutes should be construed so as to avoid violations of international law.\(^7\) This Note also argues that if statutes, which represent the will of Congress, should be interpreted consistently with international law, then the judge-made doctrine of procedural default should be subject to a similar interpretation. Applying *Charming Betsy* would allow domestic courts to deal with the ICJ directive on their own terms\(^8\)—an important consideration given prevailing dualist notions of international law\(^9\)—and would assure foreign treaty partners that the United States recognizes its international obligations.\(^10\)

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7. In *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), the Court stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."


9. See infra Part II.

Part I of this Note describes the legal landscape related to VCCR violations and the death penalty, including both ICJ and Supreme Court rulings on the issue, and outlines the brewing conflict between the review and reconsideration ordered by the ICJ and domestic doctrines. Part II argues that U.S. courts are firmly dualist in their understanding of how international law interacts with domestic law—at least when it comes to the death penalty—and as a result, international tribunal directives must be enforced under the guise of domestic legal doctrine. Part III describes the Charming Betsy canon and discusses how it might be applied to the AEDPA so as to allow the ICJ’s requirement of review and reconsideration to be implemented in federal habeas corpus proceedings. Part IV briefly addresses the fact that Charming Betsy’s logic should also apply to prevent courts from denying review and reconsideration through use of procedural default rules.

I. MEXICO V. UNITED STATES: SEEKING A REMEDY FOR TREATY VIOLATIONS IN DEATH PENALTY CASES

Three nations have brought cases before the ICJ\textsuperscript{11} in an attempt to bring the United States into compliance with the VCCR and to demand a remedy for past violations—Paraguay in 1998,\textsuperscript{12} Germany in 2001,\textsuperscript{13} and most recently, Mexico in 2003.\textsuperscript{14} The key issue in each case has been interpretation of Article 36 of the VCCR, which reads in relevant part:

1. (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 de-

\textsuperscript{11} The ICJ has jurisdiction under an optional protocol to the VCCR, signed by both the United States and Mexico. See Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. 1, 21 U.S.T. 325, 596 U.N.T.S. 487, 488. The Optional Protocol states in relevant part that “disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.”


\textsuperscript{13} LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

\textsuperscript{14} Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31).
tained in any other manner. . . . The said authorities shall inform the
person concerned without delay of his rights under this sub-
paragraph;
2. The rights referred to in paragraph 1 of this Article shall be exer-
cised in conformity with the laws and regulations of the receiving
State, subject to the proviso, however, that the said laws and regula-
tions must enable full effect to be given to the purposes for which the
rights accorded under this Article are intended. 

In short, this language requires that when a foreign national is
detained by state or federal authorities in the United States,
those authorities must notify the detainee of the right to con-
tact his consulate and must notify the consulate that one of its
nationals has been detained.

Each of the three nations that have brought claims before
the ICJ argued that the United States failed to notify their na-
tionals of their rights to consular communication, and thus
impeded the foreign government's ability to provide assistance
and, ultimately, to prevent their nationals from being sen-
tenced to death. While the United States in the past has of-
fered diplomatic apologies as a remedy after foreign nationals
were executed in violation of Article 36, the ICJ ruled in La-
Grand, a case brought by Germany, that an apology was insuf-
ficient. The question of what remedy is required after a VCCR
violation was contested again when Mexico brought its case to
the ICJ.

15. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21
16. The exact interpretation of the language of Article 36 has been the
subject of extensive litigation, and a description of the ICJ's rulings on the
meaning of disputed terms, such as "without delay," for example, is beyond the
scope of this Note.
17. Article 5 of the VCCR describes consular functions as "protecting in
the receiving State the interests of the sending State and of its nationals, both
individuals and bodies corporate," furthering relations, issuing travel docu-
ments, and providing general assistance of all kinds. Vienna Convention on
A list of U.S. embassies and consular posts can be found at http://travel.state
list of Mexican consulates in North America can be found at http://www.mex
online.com/consulate.htm (last visited July 1, 2004).
18. E.g., Memorial of Mexico ¶ 38 (June 20, 2003), Avena and Other Mexi-
(Mar. 31).
A. MEXICO’S ARGUMENTS BEFORE THE ICJ

In December 2003, representatives of the Mexican government told the ICJ that the United States was a chronic treaty violator and that it owed Mexico a remedy. The violations Mexico brought before the ICJ related to fifty-one Mexican nationals, all of whom had been arrested, tried, and convicted of capital crimes in the United States, but who had not been notified of their VCCR rights.21 Mexico argued first that consular notification is vital for Mexicans in the United States who often do not speak English and who are unfamiliar with the U.S. criminal justice system.22 When Mexican nationals are able to communicate with their consulate, consular officers can provide invaluable assistance in procuring or monitoring counsel, explaining the concept of plea bargaining, and gathering vital evidence and witnesses from Mexico to participate in the sentencing phases of death penalty trials.23 This failure to notify, Mexico argued, constitutes a violation of Article 36(1) of the VCCR.24

Mexico also argued that because the United States failed to notify defendants of their VCCR rights, the violation of those rights was never raised in judicial proceedings at the state level.25 As a result, under judicially created procedural default doctrines and the AEDPA,26 courts refuse to review the merits of VCCR claims in federal habeas corpus proceedings. Mexico argued that the application of those rules was in itself a separate violation of Article 36(2) of the VCCR, because the rules barred courts from attaching any legal significance to the treaty violation.27

Finally, as a remedy for these violations, Mexico demanded that the convictions and sentences of all fifty-one Mexican na-

22. Id. ¶¶ 49–71. This is particularly true for Mexican nationals because the government of Mexico has created an official program, the Mexican Capital Legal Defense Program, to provide assistance to its nationals who are charged with capital crimes. Id. ¶ 36.
23. Id. ¶¶ 72–88.
24. Id. ¶ 169.
25. Id. ¶¶ 226–29.
tionals be vacated, or at a minimum, that courts be prevented from applying procedural default rules so as to avoid hearing VCCR claims on appeal.  

B. THE UNITED STATES' RESPONSE TO MEXICO'S CLAIMS

The United States denied breaches of the VCCR in all of the cases. It argued that many of the individuals listed in Mexico's memorial actually were U.S. citizens or presented "strong indicia" of citizenship, and noted that many had confessed prior to being officially detained, thus never triggering VCCR protection.

The United States went on to argue that had any breaches of Article 36(1) in fact taken place, those cases were subject to "review and reconsideration" in conformity with domestic law and with the ICJ's prior decision in LaGrand. The LaGrand case was a suit by Germany over the same issue where the ICJ had ruled that the appropriate remedy for an Article 36 violation was "review and reconsideration" of the conviction and sentence. The United States was to implement the review and reconsideration via means of its own choosing. Referring to LaGrand, the United States argued that it already provided review and reconsideration through its domestic appeals process and that any defendant who could not raise the VCCR issue due to procedural restrictions would receive sufficient review and reconsideration through the executive clemency process.

C. THE ICJ FINDS THE UNITED STATES IN BREACH AND CLARIFIES APPROPRIATE REMEDIES

After hearing oral arguments in the case, the ICJ issued a ruling that attempted to find middle ground on this divisive is-

28. Id. ¶¶ 357–406. Mexico also argued that evidence or statements obtained prior to notification be excluded from any new trial and that the United States offer Mexico guarantees that treaty violations would not be repeated. Id. ¶¶ 374, 398.


30. Id. ¶ 1.2.

31. Id. ¶ 1.9.


33. Id. at 514.

Though contested, there was never any real question that the United States was in breach of its VCCR obligations. The ICJ found Article 36(1) violations in all fifty-one cases and again held that review and reconsideration was the appropriate remedy for failure to notify defendants of their rights under the VCCR. The ICJ clarified that the "review and reconsideration" it had envisioned in _LaGrand_ "should occur within the overall judicial proceedings relating to the individual defendant concerned" and that "the clemency process, as currently practiced within the United States criminal justice system . . . is . . . not sufficient in itself to serve as an appropriate means of 'review and reconsideration.'" In addition, the ICJ found Article 36(2) violations in three cases where defendants had exhausted state and federal appeals and had been procedurally barred at all stages from raising the VCCR issue.

With the ICJ's ruling, a flurry of activity began in domestic courts. Of the cases where the ICJ has found treaty violations, one of the most urgent is that of José Ernesto Medellín Rojas. Medellín, along with five other youths from Houston, was convicted in 1994 for the gang rape and murder of two teenage girls. The Fifth Circuit recently denied his request for a certificate of appealability on the issue of whether state authorities' failure to notify him of his right to consular contact prejudiced his case and the U.S. Supreme Court has granted certiorari. For Medellín and other Mexican nationals in federal court, the next step is asking for the review and reconsideration required by _Avena_. Aside from implicating a vastly complicated array of statutes and case law relating to the death penalty, the cases of Mexican nationals named in the _Avena_ judgment implicate the often tortured and constantly evolving interplay between international law and the U.S. legal system.

36. _Id._ ¶¶ 106, 121.
37. _Id._ ¶ 141.
38. _Id._ ¶ 143.
42. As one scholar puts it, "international law and U.S. Constitutional law seem to exhibit a kind of passive hostility toward one another." Edward T.
II. ENFORCING DECISIONS OF INTERNATIONAL TRIBUNALS IN DOMESTIC COURTS: DUALIST AND MONIST PERSPECTIVES

Litigation over the VCCR, like legal battles over detainees in Guantanamo, and the outcry over White House memoranda authorizing potentially illegal interrogation practices, has laid bare the vast gulf between competing theories about how international law and domestic law should interact in the context of a particular nation-state. International law is a broad term that encompasses, among other things, norms of state practice, broadly focused multilateral human rights agreements, narrowly focused bilateral treaties, as well as decisions of an increasingly wide array of international tribunals. In asking for enforcement of the Avena judgment, the question is one of interpreting and enforcing the decision of an international tribunal that itself interprets a multilateral, yet relatively narrowly focused treaty designed to codify norms of state consular practices developed over centuries.

Two main theories related to the enforcement of international law in domestic courts, the monist and dualist perspectives, have long been a subject of debate among scholars. Monist theory draws on natural law rationales and proposes that international and domestic law are interlocked in a single system, leading to the notion that international legal norms dominate domestic law when there is conflict. Alternatively, most domestic legal institutions draw on dualist theory when evaluating their own relationship to international law. Dualist theory sees domestic and international law as distinct, with mu-
municipal law generally supreme in the face of conflict. Scholars note that courts in the United States, not to mention the executive branch, are dualist in their conception of international law, especially with regard to the death penalty.

A discussion of the first case to raise the VCCR issue in the context of the death penalty helps to illustrate this point. Angel Breard, a Paraguayan national, was convicted of attempted rape and murder in Virginia in 1993. His sentence was confirmed by the state supreme court in 1994. Although state authorities were aware of his status as a foreign national, Breard was never informed of his right to contact the Paraguayan consulate. As a result, Breard did not raise the issue of his VCCR rights until his 1996 federal habeas corpus appeal. The Fourth Circuit held that Breard's VCCR claim was procedurally defaulted because he had not appropriately raised it at the state level. By the time the U.S. Supreme Court reviewed Breard's habeas petition, Paraguay had brought suit in the ICJ and that court had issued provisional measures demanding that the United States "take the measures necessary to ensure that Mr. Breard is not executed pending the disposition of [his] case." The Supreme Court affirmed the lower federal courts in a per curiam decision that was issued on Breard's execution date. Breard was executed despite the ICJ provisional measures and Paraguay subsequently dropped its suit.

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48. See id. at 63–64; O'CONNELL, supra note 46, at 42.
49. See, e.g., Bradley, supra note 45, at 531 (stating that "[m]ost commentators agree that, at least during the latter half of this century, dualism has been the prevailing view"); Harold Hongju Koh, Paying Decent Respect to International Tribunal Rulings, 96 AM. SOC'Y INT'L L. PROC. 45, 46 (2002) (noting that "[w]e have never had in the United States a monistic system in which international tribunals sit in some form of binding vertical appellate review of domestic adjudication"). But see JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 99–118 (2d ed. 2003) (describing a more monist jurisprudence as evidenced in recommended changes to the Restatement (Third) of Foreign Relations Law § 115).
52. Id.
55. Breard, 523 U.S. at 376.
While Paraguay's suit before the ICJ did not produce a final ruling from that court, Breard's case did produce bad precedent for defendants in domestic courts. The Supreme Court's opinion in Breard denied relief on two grounds: procedural rules of a forum nation-state govern implementation of treaties in that nation-state, and the last-in-time rule controls, if a statute and a treaty are in conflict. The ruling was dualist in that it showed a preference for domestic doctrine, even judge-made procedural doctrine, over treaty obligations that had been freely and voluntarily assumed by the United States under the Vienna Convention. Breard continues to prevent defendants from obtaining review and reconsideration of VCCR claims. For example, in the case of Medellin, the Fifth Circuit stated, "only the Supreme Court may overrule a Supreme Court decision. The Supreme Court has not overruled Breard. We are bound to follow the precedent until taught otherwise by the Supreme Court."

Analyzing Breard as an affirmation of dualist thinking trickling down through the judiciary helps in understanding the utter failure of federal courts to provide relief to a single defendant on the basis of VCCR violations. Under a dualist con-

57. Breard, 523 U.S. at 375. It is important to note, however, that a similarly long-standing principle of international law holds that states may not invoke their domestic legislation or procedures as an excuse for failing to comply with international obligations. MALANCIUK, supra note 46, at 64; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. b (1986) (specifying that a "state cannot adduce its constitution or its laws as a defense for failure to carry out its international obligation").

58. Breard, 523 U.S. at 376.


60. Medellin v. Dretke, 371 F.3d 270, 280 (5th Cir. 2004).

61. See, e.g., U.S. ex rel. Madej v. Schomig, 223 F. Supp. 2d 968, 980 n.13 (N.D. Ill. 2002) (granting relief on Sixth Amendment grounds but noting that "it is unlikely that this, or any other Court could premise relief on [a Vienna Convention violation]"); see also Amanda E. Burks, Consular Assistance for Foreign Defendants: Avoiding Default and Fortifying a Defense, 14 CAP. DEF. J. 29, 40 (2001). It is encouraging, however, that since Avena, one state court has granted review and reconsideration based on a VCCR violation. The first defendant to bring the Avena judgment back to the United States was Osbaldo Torres, whose execution was to take place just a few weeks after the ICJ's judgment was issued. Torres v. Oklahoma, No. D-1996-350 (Okla. Crim. App. Mar. 1, 2004) (order setting execution date). Torres had exhausted his state and federal appeals and brought a new petition in state court asking the court to order an evidentiary hearing on his Article 36 claim. Torres v. Mullin, 317
ception, decisions of international tribunals such as the ICJ have little force in domestic legal decision making until they have been incorporated into domestic law through statutory directives or Supreme Court precedent. As a result, federal courts continue to follow Breard in declining to review the merits of VCCR claims brought by foreign nationals.

With its Avena ruling, the ICJ specified that by "review and reconsideration," it meant a judicial hearing in which a court would consider whether the treaty violation—the failure by arresting authorities to notify either the foreign national or the consulate—prejudiced the defendant's case such that a new

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F.3d 1145, cert. denied, 124 S. Ct. 562 (2003) (mem.). Torres argued that the Oklahoma courts were bound by the judgment of the ICJ under the Supremacy Clause of the U.S. Constitution. 124 S. Ct. 562, 563. The Oklahoma Court of Criminal Appeals ultimately agreed and granted Torres a hearing, allowing for the review and reconsideration required by LaGrand and Avena. Torres v. State, No. PCD-04-442, slip op. at 1 (Okla. Crim. App. May 13, 2004). In a special concurrence, Judge Chapel summarized the logic of the Supremacy Clause argument:

At its simplest, this is a matter of contract. A treaty is a contract between sovereigns. The notion that contracts must be enforceable against those who enter into them is fundamental to the Rule of Law. This case is resolved by this very basic idea. The United States voluntarily and legally entered into a treaty, a contract with over 100 other countries. The United States is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy Clause to give effect to that treaty.

As this Court is bound by the treaty itself, we are bound to give full faith and credit to the Avena decision. I am not suggesting that the International Court of Justice has jurisdiction over this Court—far from it. However, in these unusual circumstances the issue of whether this Court must abide by that court's opinion in Torres's case is not ours to determine. The United States Senate and the President have made that decision for us.

Id. at 5 (Chapel, J., concurring). The Governor of Oklahoma subsequently commuted Torres' sentence to life imprisonment. See Adam Liptak, Execution of Mexican Is Halted, N.Y. TIMES, May 14, 2004, at A23. While the Supremacy Clause argument has intricacies of its own, the focus of this Note is on the larger group of defendants who had not exhausted their appeals when Avena was issued and who are moving through the habeas corpus process. These defendants are not likely to win a Supremacy Clause argument because treaties do not automatically trump federal statutes, as they do state law, under the Constitution. See, e.g., United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988) (noting that "[u]nder our constitutional system, statutes and treaties are both the supreme law of the land, and the Constitution sets forth no order of precedence to differentiate between them.")

62. See HINGORANI, supra note 45, at 30; O'CONNELL, supra note 46, at 42.

trial or sentencing is required. In short, compliance with Avena requires an evidentiary hearing—exactly what the Supreme Court refused to give Angel Breard when he raised the violation of the VCCR in his 1998 case.

A brief explanation of the process by which capital cases make their way through the courts is helpful at this point, to introduce the doctrines considered in this Note. Capital defendants in the United States go through a three-stage appeals process after a finding of guilt and a death sentence in the state trial court: direct appeal, state postconviction review, and federal habeas corpus review. Depending on a defendant’s progression through this process, the obstacles to his request for review and reconsideration will be different. Defendants bringing claims in state postconviction proceedings may have the simplest path to enforcement under the Supremacy Clause of the Constitution. Defendants bringing claims in federal habeas corpus proceedings, however, face a considerably more convoluted route, because of the tangled web of statutory and judicially created restrictions on the writ of habeas corpus.

Within the federal habeas corpus process, capital defendants may be in variously beneficial or disastrous positions, based on the relative knowledge and procedural expertise of their previous attorney, or, in most cases, attorneys. As in Breard, two main restraints will almost certainly rear their heads in the cases of defendants asking for review and reconsideration under Avena: judge-made procedural bars, and the AEDPA restrictions on evidentiary hearings.

Procedural default is a judicially created doctrine that allows federal courts to refuse to review potentially meritorious claims if those claims were not raised in state court in accordance with state procedural rules. Procedural default in effect prevents appellants from even getting into the courthouse. One can imagine the problem this can cause for foreign national defendants who are not notified of their rights under the VCCR.

64. See supra note 37 and accompanying text.
65. See generally COYNE & ENTZEROOTH, supra note 3.
66. See supra note 61 for a discussion of the Torres case.
68. See Wainright v. Sykes, 433 U.S. 72 (1977). For the procedural bar rule to apply, a petitioner must violate an applicable state procedural rule, the state court must rely on this adequate and independent state ground to deny relief, and the state must timely raise procedural bar as a defense to the petitioner's claim for relief. See HERTZ & LIEBMAN, supra note 67, § 26.1.
Those defendants never raise their rights in state court because they know nothing of them. They are then barred from raising a claim based on that right in federal court because they failed to comply with state procedures that required them to raise a denial of a federal right at trial.

If a defendant can overcome procedural default, he must demand an evidentiary hearing to prove the facts that could not be introduced in state postconviction proceedings because of the procedural default rule. It is here that the AEDPA statutory restrictions may operate to prevent the review and reconsideration required by *Avena*.

Breard, for example, did not raise his Vienna Convention claim until he reached the federal habeas corpus appeals process. As a result, the Supreme Court held that Breard was subject to both procedural default and to a provision of the AEDPA that prohibits defendants from raising claims in federal court when they have failed to develop the factual basis of the claims in state court. The relevant statutory language from the AEDPA reads:

(a) [The courts] shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States. . . .

(e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

Although defendants in Breard's position should become less and less common as information about the Vienna Convention becomes more widely available, there will remain some defendants who are never notified of their rights to consular noti-

69. *Breard*, 523 U.S. at 373.
70. *Id.* at 376.
fication, and whose attorneys fail to raise the issue because of lack of knowledge. These individuals will find themselves in federal court attempting to enforce the ICJ’s demand for review and reconsideration, but their claim will be barred by both the procedural default rule and the AEDPA restrictions on evidentiary hearings.72

Without full briefing or oral argument on the subject, the Court in Breard assumed a direct conflict between U.S. obligations under the VCCR and the domestic doctrines.73 This perceived conflict immediately raised the Court’s dualist hackles, and led to the invocation of the last-in-time rule to trump treaty obligations.74

III. DEMANDING REVIEW AND RECONSIDERATION THROUGH THE CHARMING BETSY CANON

The last-in-time rule applies when there is direct conflict between a statute and a treaty, or between two statutes.75 If a

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72. For example, José Medellin raised his Vienna Convention claim in state habeas corpus proceedings, but no hearing was ever held on the matter. See Medellin v. Dretke, 371 F.3d 270, 279–80 (5th Cir. 2004). Though the facts were never “developed” in state court, it is possible that a court would find that the AEDPA’s restriction on evidentiary hearings does not apply in Medellin’s case. He did in fact raise the claim in state court, but the procedural bar doctrine prevented him from developing the facts. The standard for application of AEDPA § 2254(e) was established by the Supreme Court in 2000. Williams v. Taylor, 529 U.S. 420, 431–32 (2000). In Williams, the petitioner raised a new claim of juror and prosecutorial misconduct, but the factual basis of the claim was not reasonably available to defense counsel at the time of trial. In such cases, the failure is not the petitioner’s fault, so courts do not apply the § 2254(e) bar on evidentiary hearings. The Supreme Court has not definitively ruled on whether procedurally defaulted claims, even when initially raised in state habeas proceedings, are “failures” under § 2254(e). Even if § 2254(e) is held not to apply in Medellin’s case, the procedural default doctrine undoubtedly does apply. See Dretke, 371 F.3d at 279–80.

73. Breard, 523 U.S. at 376 (viewing the AEDPA and the VCCR as “inconsistent”).

74. “When a statute that is subsequent in time is inconsistent with a treaty, the statute to the extent of the conflict renders the treaty null.” Id. (quoting Reid v. Covert, 354 U.S. 1, 18 (1957)).

75. In Whitney v. Robertson, the Supreme Court held that treaties and statutes are on the same footing:

[Both are declared by [the constitution] to be the supreme law of the land. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing.

124 U.S. 190, 194 (1888). The Whitney Court also makes clear that the legisla-
court can be convinced, however, that the conflict consists simply of differing interpretations of a statute, as opposed to a direct conflict based on a single interpretation, another canon of construction comes into play.

A. THE CHARMING BETSY CANON OF STATUTORY CONSTRUCTION

When Breard was decided, international law scholars disputing the ruling suggested that the Supreme Court should have applied the Charming Betsy canon. The Charming Betsy canon takes its name from a schooner that was the subject of a seizure dispute. The United States Navy had seized The Charming Betsy under the auspices of the Nonintercourse Act of 1800, which prohibited “any person or persons, resident within the United States or under their protection” from trading with French nationals. The owner of The Charming Betsy sued, claiming that he was a Danish citizen, though he had been born in the United States. The Court held that the Nonintercourse Act did not apply to The Charming Betsy’s owner, because to construe the statute to have such far-reaching effect would violate the law of nations. Specifically, the Court stated, “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”

While the canon may have had its genesis in a fledgling nation’s desire to avoid disputes with more powerful foreign nations, the Charming Betsy doctrine has recently been de-
scribed as one of several models on a continuum of approaches that domestic courts can use to grant deference to international law decisions.82

Under this approach, there are no binding instructions in a statute or treaty as to what effect to give to the international tribunal decision. Nor is the court even requested to directly recognize and enforce the decision. Rather, the decision is considered as part of the process of interpreting and construing a domestic statute.83

Under this view, the Charming Betsy canon becomes particularly relevant for the enforcement of the Avena judgment in the context of the AEDPA.

B. CHARMING BETSY AND THE SEPARATION OF POWERS

Scholars argue that today, the Charming Betsy canon is essentially a tool to avoid separation of powers problems, in instances where judicial interpretation of statutes could place the United States in violation of international law.84 While other international legal scholars have disputed this narrow interpretation of the canon,85 this view of the Charming Betsy doctrine seems reasonable, in light of the dualist leanings of today's Supreme Court.

Whereas the conduct of the nation's foreign affairs is committed by the Constitution to the executive and legislative branches, not the judiciary,86 separation of powers problems can emerge when courts attempt to determine how statutes and other doctrines impact the United States' international obligations. In other words, Congress is free to breach treaty obligations but judges are not.

The Court has long understood this relationship, holding repeatedly that Congress has the authority to breach treaty obligations through express action, just as any party to a contract can breach their obligations and suffer the consequences.87 This

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82. Alford, supra note 8, at 731.
83. Id.
84. Id. at 733–34.
86. See, e.g., U.S. CONST. art. I, § 8 (listing Congress's power to regulate commerce with foreign nations, to punish offenses against the law of nations, and to declare war); U.S. CONST. art. II, § 2 (giving the President and the Senate the power to make treaties).
87. Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that with regard to treaties, "Congress may modify [treaty] provisions, so far as [those
The principle has been most evident in the Court's federal Indian law jurisprudence, but also applies in other contexts. For example, in *Trans World Airlines v. Franklin Mint*, the parties argued whether the repeal of a statute rendered a portion of the Warsaw Convention—an international air carriage treaty that the United States had ratified—unenforceable in the United States. The Court held that there is a "firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action." This holding rested on the decision in *Cook v. United States*, involving a ship owner who contested a fee as a violation of a treaty between the United States and Britain. The Court held that, while Congress has the power to abrogate treaties, "[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed."

This judicial concern over clear expression of congressional intent derives from a concern that without such expression the Court overreaches in interpreting statutes so as to violate treaty obligations. Treaty abrogation is the domain of Congress, and, arguably, the executive. As noted by one proponent of the separation of powers analysis of *Charming Betsy*:

-*[the canon] is a means by which the courts can seek guidance from the political branches concerning whether and, if so, how they intend to violate the international legal obligations of the United States. Second, the canon reduces the number of occasions in which the...*
courts, in their interpretation of federal enactments, place the United States in violation of international law contrary to the wishes of the political branches.\textsuperscript{95} Debate remains as to the contexts in which \textit{Charming Betsy} applies, particularly with regard to the level of ambiguity necessary to invoke application of the rule.\textsuperscript{96} Nevertheless, given its dualist leanings,\textsuperscript{97} it is a safe assumption that the current Supreme Court will construe the canon relatively narrowly, if indeed it can be convinced to apply it in dealing with the \textit{Avena} judgment. The narrowest interpretation, embodied by the quote above, assumes that the \textit{Charming Betsy} canon applies only when courts must interpret an ambiguous statute to avoid separation of powers problems.

C. PRIOR APPLICATION OF \textit{CHARMING BETSY} IN \textit{UNITED STATES V. PALESTINE LIBERATION ORGANIZATION}

The Southern District of New York applied the \textit{Charming Betsy} canon to deal with a similarly controversial conflict between a treaty and a subsequently enacted federal statute.\textsuperscript{98} In the 1980s, the Department of Justice (DOJ) brought suit in federal court seeking an injunction to close down the Observer Mission of the Palestine Liberation Organization (PLO) at the United Nations Headquarters.\textsuperscript{99} The DOJ claimed that the Anti-Terrorism Act of 1987\textsuperscript{100} abrogated the United States’ international obligation to allow the PLO to operate an office at the United Nations Headquarters.\textsuperscript{101} The court noted that the DOJ’s interpretation of the statute would require the court to order a clear abrogation of the international obligations of the United States.\textsuperscript{102} Refusing to follow the Government’s interpre-

\textsuperscript{95} Bradley, supra note 59, at 525–26.

\textsuperscript{96} Id. at 491 (stating that while the level of ambiguity required in a statute before the canon can apply is unclear, the overall focus of the canon on avoiding violations of international law is nevertheless clear).

\textsuperscript{97} See supra notes 49–58 and accompanying text.


\textsuperscript{99} Id. at 1460.

\textsuperscript{100} The Anti-Terrorism Act of 1987 prohibits the establishment or operation of PLO offices within the United States. Pub. L. No. 100-204, Title X, § 1003(3), 101 Stat. 1331.

\textsuperscript{101} Palestine Liberation Org., 695 F. Supp. at 1460.

tation, the court held that "the text of the [Anti-Terrorism Act] and its legislative history, fails to disclose any clear legislative intent that Congress was directing the Attorney General, the State Department, or this Court to act in contravention of the Headquarters Agreement." The court went on to note that while Congress has the power to abrogate treaties, courts will not interpret statutes to do so unless there is an "unequivocal" expression of congressional intent to abrogate. The court specifically referred to Charming Betsy to support its holding that the newly enacted Anti-Terrorism Act did not apply to the PLO office at the United Nations Headquarters.

As the Supreme Court had done in Murray v. Schooner Charming Betsy, more than one hundred years earlier, the court in Palestine Liberation Organization conducted a traditional statutory interpretation exercise in its application of Charming Betsy. The court identified specific text that could be differentially interpreted, and noted that the relevant statutory section did not make any reference to abrogation of international obligations. The court then examined the entire legislative enactment, parts of which clearly did address treaty obligations, in contrast to the omission in the section dealing with maintenance of offices. The court then reviewed the legislative history of the statute, finding no clear expression of intent to abrogate. Finally, the court noted that the judiciary has been known to go to great "lengths... in construing domestic statutes so as to avoid conflict with international agreements." A similar analysis can be conducted in the AEDPA-VCCR context.

for United Nations' invitees, such as the PLO, to operate an office at the Headquarters. Id. at 20; see also Palestine Liberation Org., 695 F. Supp. at 1458–59.

104. Id.
105. Id. (noting that the Charming Betsy canon "is a rule of statutory construction sustained by an unbroken line of authority for over a century and a half").
106. 6 U.S. (2 Cranch) 64, 66 (1804).
108. Id.
109. Id. at 1469–70.
110. Id. at 1468.
D. APPLYING CHARMING BETSY TO ALLOW REVIEW AND RECONSIDERATION UNDER THE AEDPA

If the AEDPA is an ambiguous statute that is open to interpretation, then the Charming Betsy canon can be used to avoid invocation of the last-in-time rule. If petitioners raising VCCR claims for the first time in federal habeas proceedings wish to avoid the result in Breard, they might begin by convincing the Supreme Court that there is no conflict between the treaty and the statute. Giving the Supreme Court a permissible route to hear defendants' cases without simply deferring outright to the international tribunal would seem to be the most effective strategy for enforcement. The first hurdle for VCCR litigants then, is to show that the AEDPA provisions are ambiguous.

Any statutory interpretation exercise begins with the text.\textsuperscript{111} Examining the plain text of AEDPA section 2254, the first argument for ambiguity is that the section makes no mention of treaties whatsoever. In addition, the Supreme Court itself recognized the section's ambiguity in Williams \textit{v.} Taylor.\textsuperscript{112} The Court noted that the term "failed" in the statute is open to varying interpretations.\textsuperscript{113} As the Court stated, "'fail' connotes some omission, fault, or negligence on the part of the person who has failed to do something."\textsuperscript{114} This seems a clear opening for the Court to classify various omissions by petitioners differentially, either as failures or not. In Breard, the Court implied that the state's initial treaty violation had, over time, become the defendant's failure, but the opinion in Breard is hardly a definitive interpretation of the AEDPA. The Breard decision was issued without full argument or briefing, and was prior to LaGrand and Avena.\textsuperscript{115} One can argue that another possible interpretation of the statute does exist; that is all that Charming Betsy requires.\textsuperscript{116}

\textsuperscript{111} As in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.' Am. Tobacco Co. \textit{v.} Patterson, 456 U.S. 63, 68 (1982) (citing Reiter \textit{v.} Sonotone Corp., 442 U.S. 330, 337 (1979)).

\textsuperscript{112} 529 U.S. 420, 431-39 (2000); \textit{see also supra} note 72 for additional discussion of the \textit{Williams} case.

\textsuperscript{113} \textit{Williams}, 529 U.S. at 431.

\textsuperscript{114} \textit{Id.}


\textsuperscript{116} \textit{See supra} notes 76-80 and accompanying text.
Second, litigants will need to show that interpretation of the AEDPA in a way that denies VCCR defendants evidentiary hearings raises a separation of powers problem. This task is simplified by the ICJ’s recent ruling in *Avena*. Under this ruling, the continued application of procedural default rules to preclude evidentiary hearings on VCCR claims is a violation of Article 36(2).\(^{117}\) If the Supreme Court persists in construing the AEDPA as it did in *Breard*, it will be placing the United States in clear violation of its treaty obligations, as determined by the ICJ. By construing a statute in a manner that conflicts directly with international law, the Court will be usurping Congress’s prerogative to abrogate treaties.\(^{118}\) The Supreme Court itself has recognized that the ICJ is “an international court with jurisdiction to interpret such [treaties].”\(^{119}\) The ICJ ruling is, therefore, a pronouncement that the Supreme Court will have to deal with, as part of the body of international law.

Abrogation of treaty obligations is a legislative, and arguably executive, function. It seems absurd, for example, that the courts should have the power to expose U.S. nationals detained abroad to possible retaliatory violations of their consular rights, where neither Congress nor the executive branch have acted to abrogate the VCCR.\(^{120}\) It is for this reason that the *Charming Betsy* canon was developed in the first instance.\(^{121}\) *Charming Betsy* prevents the courts from subjecting the nation to international political consequences resulting from treaty abrogation.

\(^{117}\) *See supra* notes 35–39 and accompanying text.

\(^{118}\) *See supra* notes 87–93 and accompanying text.

\(^{119}\) *Breard*, 523 U.S. at 375. Jurisdiction over disputes relating to interpretation of the Vienna Convention was granted to the ICJ under the Optional Protocol to the Vienna Convention concerning the Compulsory Settlement of Disputes. *See* LEE, *supra* note 2 at 198–204. The United States in fact proposed the Optional Protocol. *Id.* In October 1969, the Senate unanimously approved the Vienna Convention along with the Optional Protocol granting jurisdiction over disputes to the ICJ. *See* 115 CONG. REC. 30,997 (1969). Thus, the United States has expressly agreed that any other nation that is party to the Optional Protocol can submit disputes about the Vienna Convention to the ICJ for binding resolution.

\(^{120}\) *See* Paust, *supra* note 76, at 697 (writing that the *Breard* opinion “should be revisited” because “[i]f followed even partly abroad, the opinion could have serious consequences for U.S. nationals detained in foreign countries”); *see also*, Editorial, *Foreigners on Death Row*, N.Y. TIMES, Apr. 19, 2004, at A24 (suggesting that the President should halt executions of any of the Mexican nationals named in the ICJ case so as not to imperil Americans overseas).

\(^{121}\) *See supra* note 81 and accompanying text.
E. Congress Did Not Intend for the AEDPA to Abrogate Treaty Obligations

One could argue that even if the AEDPA is open to alternative interpretations, Congress has clearly expressed its intent to preclude judicial "review and reconsideration" of any facts not developed at the state level. The habeas statute does, after all, mention claims based on treaties.\textsuperscript{122} This mention of treaties, however, is far from a clear statement that Congress intended to abrogate the duties of the United States under the Vienna Convention, or any other treaty for that matter. This language has been in the habeas statute since the Supreme Court's jurisdiction was expanded to specifically include the writ in 1867,\textsuperscript{123} and alone cannot serve as a basis for the contention that Congress meant to abrogate subsequently enacted treaties such as the Vienna Convention. In addition, the legislative history of the AEDPA does not indicate that Congress had treaty abrogation in mind at all, when writing revisions to the habeas statute. Although there is much discussion of potential treaty obligations and violations in the legislative history referring to the antiterrorism portions of the AEDPA, there is no mention whatsoever of treaties in the portion of the legislative history specifically devoted to the Effective Death Penalty Act. For example, in drafting the alien removal procedures under the AEDPA, Congress specifically addressed potential impairments to treaty obligations.\textsuperscript{124} The conference committee report for the AEDPA expresses Congress's intent not to abrogate treaties through removal of any alien.\textsuperscript{125} The same report makes no mention of treaties in relation to the Effective Death Penalty portions of the bill.\textsuperscript{126} Similarly, a key House Report from the previous year, which introduced the Effective Death Penalty Act as a separate bill, made no mention of treaty obligations.

\begin{footnotes}
\item[122] See supra note 71 for the text of 28 U.S.C. § 2254(a) (2000) (allowing the courts to "entertain an application for writ of habeas corpus in behalf of a person in custody on the grounds that he is in custody in violation of the Constitution or law or treaties of the United States").
\item[125] Id. (stating that "the removal of an alien shall be to any country which the alien shall designate if such designation does not, in the opinion of the Attorney General, in consultation with the Secretary of State, impair the obligation of the United States under any treaty").
\item[126] See id. at 101–07.
\end{footnotes}
gations, or of abrogation anywhere. At a minimum, Congress's silence on the issue of treaties creates ambiguity, because courts will not construe a statute to abrogate international law, in the absence of a clear statement of legislative intent. Congress's silence in this area hardly qualifies as a clear statement. It is simply impossible to glean any congressional intent to abrogate treaty obligations from the statutory language of the AEDPA. As a result, the Charming Betsy canon should be applied in place of the last-in-time canon of statutory interpretation.

IV. APPLYING THE LOGIC OF CHARMING BETSY TO ADDRESS PROCEDURAL DEFAULT RESTRICTIONS ON "REVIEW AND RECONSIDERATION"

As discussed earlier, habeas corpus petitioners may confront two obstacles to the review and reconsideration mandated in Avena—the AEDPA restriction on evidentiary hearings and procedural default. While the two doctrines are linked, and the Court has adopted the same cause and prejudice standard for a defendant to overcome each, they should be addressed separately. The Charming Betsy canon most clearly applies in the statutory context, but its shadow should fall equally across the judge-made doctrine of procedural default.

In describing the procedural default doctrine in Breard, the Supreme Court stated "[i]t is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas." Indeed the Court was correct in its assertion that it was applying a rule, not a constitutional provision or even a statute, to refuse to give Breard admission to the federal habeas process. The doctrine of procedural default is judge-made, not congressionally mandated, and has been far from consistent over time.

127. See id.; see also H.R. REP. 104-23, at 9 (1995) (describing the bill as "designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings").
128. See supra notes 87–94 and accompanying text.
129. Williams v. Taylor, 529 U.S. 420, 433 (2000) (stating that the "[c]ourt borrowed the cause and prejudice standard applied to procedurally defaulted claims, deciding that there was no reason 'to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim'" (citation omitted).
Initially, the procedural default doctrine applied only if the petitioner had "deliberately bypassed" state courts before bringing claims to federal court. Over the decades, however, the doctrine has become increasingly restrictive, barring federal courts from even entertaining claims, never mind holding evidentiary hearings, where defendants and their attorneys have deliberately or inadvertently failed to follow state procedural rules.

Petitioners who have been subject to a Vienna Convention violation can argue that the procedural default rules should not apply, based on the ICJ's own statement on the matter:

the procedural default rule has not been revised nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the [VCCR] in the initial trial.

Defendants can overcome procedural default by showing cause and prejudice, and can certainly argue that state failures to provide consular notification constitute cause. In Murray v. Carrier, the analogue to its AEDPA ruling in Williams, the Supreme Court noted that procedural default would not apply where some "objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." The holding in Murray supports the notion that where state actors interfere with defense counsel's ability to comply with state procedural rules by not advising defendants of their VCCR rights, the defendant cannot be held to have defaulted.

Petitioners may also want to use the separation of powers logic behind Charming Betsy, even though the canon usually applies only to interpretation of statutes. In Charming Betsy, the Court developed, and has reasserted for the last century, a doctrine preventing the judiciary from impinging on the other branches' exclusive right to abrogate treaties. If interpretation

134. Id.; see also Memorial of the Federal Republic of Germany ¶ 4.34 (Sept. 16, 1999), LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 465 (June 27) (describing the combination of procedural bar rules and the AEDPA as making "it even more difficult to challenge a state conviction. A habeas petitioner alleging to be held in violation of treaty law will not even be granted an evidentiary hearing to establish prejudice.")
of a statute in a manner than violates treaty obligations is a severe violation of the separation of powers severe enough to warrant its own canon of construction, the use of judicially created procedural doctrines to accomplish the same result surely is more severe. Petitioners using this logic, however, will be pitting the separation of powers doctrine against procedural default's grounding in federalism. International law, as codified in the Vienna Convention on the Law of Treaties and the Restatement (Third) of Foreign Relations Law, is clear that federalism is no excuse for breach of treaty commitments.136 Charming Betsy offers courts a means by which to cloak deference to international law in domestic separation of powers doctrine. Whether the Supreme Court would choose such a trope remains to be seen.

CONCLUSION

With its judgment in Avena, the ICJ has set sail on a collision course with the American courts. By finding that state failures to notify defendants of their Article 36 rights constitutes a breach of the Vienna Convention on Consular Relations, and by finding further that failure by courts to review and reconsider those individual cases based on procedural default the AEDPA constitutes a separate and ongoing violation, the ICJ has presented the Supreme Court with a clear choice. The Court can either flout international law, intentionally placing the United States in clear breach of that law, or the Court can patch together some method of judicial review and reconsideration of pending capital cases. The Court likely will be confronted with the issue soon, in the case of José Medellín. While the Court may indeed be willing to flout international law when it comes to the death penalty, it would at the same time flout separation of powers doctrine, which reserves to the political branches the power to abrogate treaties. The Court has confronted this problem in the past and developed a canon of construction that tips the balance to preserving separation of powers, as well as preserving relations with other nations. While the ICJ's and the Supreme Court's doctrinal ships indeed seem headed for disaster, an ancient schooner by the name of The Charming Betsy may sail into the fray and bring a change of course.

136. See Swaine, supra note 42, at 450.