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Zschernig v. Miller and the Breard Matter

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formed an independent judicial evaluation of the relevant considerations.[41] This should have been done here.

On the only previous instance when a controversy was simultaneously pending before the Supreme Court of the United States and the ICJ, the Supreme Court granted certiorari and the ICJ thereafter dismissed the international proceeding.[42] Paraguay's case equally deserved plenary treatment, at which the Supreme Court should, in its own words, have given "respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret" the same.[43]

CONCLUSION

The U.S. Government's basic litigating position—that no court should entertain a foreign state's claim for redress of a treaty violation—is disappointing.[44] When Paraguay's efforts to obtain relief from the U.S. judiciary encountered opposition from the executive branch on the ground (inter alia) that the proper avenues for relief were diplomatic channels or international litigation, Paraguay's initiation of the ICJ proceeding on the eve of Breard's execution deserved a response from the United States that would have enabled these serious issues to receive a full airing (where the U.S. position might well have ultimately prevailed).[45] When the two judicial tracks were simultaneously in operation, instead of arguing that the claim was in principle nonjusticiable in either forum, the United States could have encouraged the two courts to accord due respect to each other's treatment of matters falling within their respective spheres of competence. If the U.S. Government had suggested this approach, the dual litigation might have proceeded toward a resolution that would have left both sides, and both courts—as well as the world community—satisfied that the rule of law had been honored.

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ZSCHERNIG V. MILLER AND THE *BREARD* MATTER

In 1968 the United States Supreme Court decided *Zschernig v. Miller*,[1] a foreign relations case that has been characterized as unique.[2] An Oregon probate statute provided for escheat of a decedent's property in preference to a nonresident alien's claim to

[41] *Cf. Barclays Bank*, 512 U.S. at 328–32 (upholding a state tax alleged to burden foreign commerce, after performing independent examination of significance of Executive's statements bearing on foreign policy considerations).

[42] Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958); Interhandel (Switz. v. U.S.), 1957 ICJ REP. 105 (Order of Oct. 24); and Preliminary Objections, 1959 ICJ REP. 6 (Mar. 21).

[43] 118 S.Ct. at 1354.

[44] For criticism of the Government's typical reliance on nonjusticiability arguments in foreign affairs cases, see THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS (1992); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION, ch. 6 (1990).

[45] As the ICJ viewed the matter, the issue of whether a criminal conviction could be set aside as a remedy for breach of the Vienna Convention "can only be determined at the stage of the merits." ICJ Order, *supra* note 12, para. 33. U.S. lawyers might well expect that such an issue should be decided at the outset: in federal courts, it could be resolved on a motion to dismiss for failure to state a claim on which relief may be granted. FED. R. CIV. P. 12(b)(6).

* Of the Board of Editors. I am grateful to Lara Ballard (Columbia Law School, J.D. 1998, and a member of my class on the Constitution and Foreign Affairs in spring 1998) for her research paper on the Vienna Convention on Consular Relations and its potential applications in domestic courts.

[1] 389 U.S. 429 (1968).

[2] *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AJIL 821, 825 (1989).

inherit it unless the alien's country (1) allowed United States citizens to inherit under similar circumstances, (2) allowed U.S. citizens to receive payment here of funds inherited there, and (3) gave foreign heirs the right to receive the proceeds of Oregon estates without confiscation. Residents of then East Germany, who were the heirs of an Oregon decedent, challenged the constitutionality of the statute. The Supreme Court struck down the statute, finding that Oregon probate and appellate judges were basing their decisions on "foreign policy attitudes, the freezing or thawing of the 'cold war.' "[3] Justice Douglas, writing for the majority, went on:

> It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. . . . The present Oregon law is not as gross an intrusion in the federal domain as [state restrictions on travel to or from East Germany] might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.[4]

The Oregon statute in *Zschernig* did not conflict with any federal statute. Moreover, the Department of Justice in an amicus brief in *Zschernig* had said that the U.S. Government did not contend that the application of the statute in the circumstances of that case unduly interfered with the United States' conduct of foreign relations. Yet the Supreme Court held that the statute, as applied by the Oregon courts, unconstitutionally interfered with the federal foreign relations power.

The full scope of the *Zschernig* holding is unclear.[5] The Supreme Court has never squarely relied on it in the thirty years it has been on the books. It may simply be a Cold War relic.[6] It dealt with a probate statute that was typical of state Cold War statutes, and the Supreme Court went out of its way to note that Oregon judges were not the only state court judges who exhibited Cold War prejudices in their application of these statutes.[7] The Court stressed the aggregate effect of state judges' Cold War pronouncements in these cases, suggesting that an isolated instance or two would not have called for the same result. Although the *Breard* matter is not the only instance in which state officials have ignored or been unaware of the obligations of the Consular Relations Convention,[8] it does appear to be the only one in which the Governor of a state has rejected an appeal by the Department of State to stay an execution on foreign policy grounds. In addition, important to the decision in *Zschernig* was the fact that both the Oregon statute and the state judges' application of it were based on foreign policy attitudes. There is no indication that the Governor of Virginia in the *Breard* matter was motivated by hostility toward Paraguay or toward the system of protections supplied by the Consular Convention, though he did display some disdain for the International Court of Justice and rebuffed the Secretary of State when she pointed out the adverse foreign policy implications of going ahead with the execution.

[3] *Zschernig*, 389 U.S. at 437.

[4] *Id.* at 440–41.

[5] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 163–65 (2d ed. 1996); Bilder, *supra* note 2, at 825–26.

[6] HENKIN, *supra* note 5, at 165, asks whether it might be such a relic.

[7] *Zschernig*, 389 U.S. at 437 n.8.

[8] As of May 1998, there were apparently about 70 foreign nationals being held in U.S. prisons despite allegations that their rights under the Consular Convention had been violated. NAT'L L.J., May 4, 1998, at A12. *See also* S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719 (1995).

The factors just mentioned may limit *Zschernig* as a precedent. It has also been suggested that *Zschernig* might proscribe "only state or local statutes or other measures or activities that involve detailed inquiry into the nature or operation of a foreign government and, in particular, judicial inquiries and decisions criticizing and 'sitting in judgment' on foreign governments."[9] This interpretation limits *Zschernig* to its facts, and would render it inapplicable to the *Breard* situation. This reading could also explain why *Zschernig* has not been thought useful to strike down such state practices as imposition of the death penalty on juvenile offenders. *Zschernig* has not been invoked for this purpose despite the foreign relations complications stemming both from nearly universal acceptance abroad of the prohibition in the Covenant on Civil and Political Rights regarding persons under eighteen years of age,[10] and from objections by a UN special rapporteur, nongovernmental organizations and others to the statutes permitting execution of juveniles in some states.[11]

On the other hand, a reporters' note to the *Restatement (Third) of the Foreign Relations Law of the United States* relies on *Zschernig* for a broad proposition: states are "barred from 'intruding' on the exclusive national authority in foreign affairs."[12] And on the few occasions when the Supreme Court has characterized its own holding in *Zschernig*, it has done so broadly. In the *Verlinden* case, involving sovereign immunity, the unanimous Court cited *Zschernig* (inter alia) for the proposition that "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident."[13] In the *Citibank* case, Justice Rehnquist, announcing the decision of the Court but writing only for himself and two other Justices, characterized *Zschernig* as having struck down an Oregon statute "that was held to be 'an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.' "[14]

In the *Breard* matter the U.S. Secretary of State told the Governor of Virginia, in effect, that to execute Angel Francisco Breard without any further proceedings would raise unique and difficult foreign policy issues, and would interfere with her conduct of foreign relations by appearing to ignore the processes of the ICJ, limiting the State Department's ability to protect Americans living or traveling abroad.[15] The fact that she did so by way of a "request" rather than an "order" probably was dictated by political caution,[16] but in any event is irrelevant to the basic point: the official in charge of the day-to-day conduct of U.S. foreign policy expressed a serious foreign relations concern that could have been alleviated, as she pointed out, by a mere stay of execution until such time as the legal issues—including the federalism issues addressed by Professors Bradley and Goldsmith in this *Agora*[17]—could be adequately considered.

[9] See Bilder, *supra* note 2, at 825 n.27, and authorities there cited.

[10] International Covenant on Civil and Political Rights, Dec. 19, 1966, Art. 6(5), 999 UNTS 171.

[11] *See* Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 572–75 (1997) (not discussing *Zschernig*, but pointing out the disinclination of federal political branches to correct state human rights practices). *See also* Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1998/68/Add.3, para. 145.

[12] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §402 reporters' note 5 (1987); *see also id.*, §1 reporters' note 5; HENKIN, *supra* note 5, at 511 n.20.

[13] Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983).

[14] First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 n.1 (1972) (opinion of Justice Rehnquist).

[15] *See* N.Y. TIMES, Apr. 14, 1998, at A14; *id.*, Apr. 15, 1998, at A18.

[16] See Professor Vázquez's contribution to this *Agora*, Carlos Manuel Vázquez, Breard *and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, *supra* p. 683.

[17] *See* Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, *supra* p. 675.

Whatever token deference the Governor of Virginia gave to the foreign relations concerns, it is clear that he had no use for the International Court of Justice. He said that to grant a stay would "have the practical effect of transferring responsibility from the courts of the Commonwealth and the United States to the international court."[18] Moreover, he was convinced "that the International Court of Justice has no authority to interfere with our criminal justice system."[19] Outweighing any need to defer to the State Department or to the ICJ, in his view, was the people's need "to know they will be safe in their homes."[20] He overlooked the fact that no one had asked him to put Breard back on the streets.

If *Zschernig* is to be read broadly to prohibit states from "intruding" on the exclusive national authority in foreign affairs, it would seem to apply to the *Breard* situation. The tone and content of Governor Gilmore's comments, like the tone and content of probate judges' denunciations of communism and Communist officials during the Cold War, displayed a lack of sensitivity—even disdain—toward foreign relations concerns. One could argue that *Zschernig* applies a fortiori, since the state official (in fact, the highest state official) in this matter not only denigrated the role of the International Court of Justice—a court whose Statute is a treaty binding upon the United States—but also ignored or subordinated foreign policy concerns expressly pointed out to him by the Secretary of State. In *Zschernig*, there was no applicable treaty and no such stated foreign policy position (in fact, there was the executive branch's statement expressing a lack of foreign policy implications), yet the state intrusion was struck down as unconstitutional.

Moreover, if the key to *Zschernig* is the verbal insensitivity of state officials toward foreign governments or their representatives, it is only a short step to extend that concern to a situation in which the insensitivity is toward an international institution—the International Court of Justice—which the United States has pledged to support even in moments of deepest dissatisfaction with the Court's decisions,[21] and which the Secretary of State said in this very case deserved respect so that Americans traveling or living abroad may be confident of the State Department's protection.

Nevertheless, the argument may still be made that this is an isolated case involving an ICJ order and a State Department request following a violation of an accused's rights under the Consular Convention, and that *Zschernig* simply does not apply to isolated cases. If that is the correct approach, we must await further opportunities for state governors to consider the effect of ICJ provisional measures or of foreign relations advice from the State Department or of violations of the Consular Convention, before we can confidently conclude that a serious constitutional problem is presented. In any event, given the current composition and lack of international law awareness of the United States Supreme Court,[22] we are unlikely any time soon to have an authoritative Supreme Court interpretation of *Zschernig*. As Professor Bilder pointed out almost a decade ago, state and local governments must therefore take responsibility for ensuring that they act

[18] *See* RICHMOND TIMES-DISPATCH, Apr. 16, 1998, at B5.

[19] *Id.* The ICJ expressly recognized in its Provisional Measures Order that its function was not to act as a court of criminal appeal. Case concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures (Order of Apr. 9, 1998).

[20] N.Y. TIMES, Apr. 15, 1998, at A18.

[21] When the United States revoked its declaration accepting the Court's jurisdiction under Article 36(2) of the ICJ Statute in 1985, it nevertheless reaffirmed its "traditional commitment to international law and to the International Court of Justice in performing its proper functions." Department [of State] Statement (Oct. 7, 1985), DEP'T ST. BULL., Jan. 1986, at 67, *reprinted in* 24 ILM 1743, 1744–45 (1985). *See also* statement of State Department Legal Adviser Abraham D. Sofaer (Dec. 4, 1985), DEP'T ST. BULL., Jan. 1986, at 67, 71.

[22] See United States v. Alvarez-Machain, 504 U.S. 655 (1992), as well as Breard v. Greene, 118 S.Ct. 1352 (1998).

within appropriate constitutional bounds when foreign relations issues are at hand.[23] The Governor of Virginia failed to shoulder that responsibility in the *Breard* matter.

FREDERIC L. KIRGIS*

COURT TO COURT

Leave aside the question whether the indication of provisional measures by the International Court of Justice in the *Breard* case was binding on the United States as a matter of international or domestic law. Scholars will continue to differ on this question; government decision makers will reach their own conclusions. Leave aside that the state of Virginia violated a solemn treaty obligation, a treaty that the Supreme Court is obliged to uphold as the supreme law of the land. Without denigrating the power of these arguments, a less contentious case can be made for the granting of a stay—a case based less on compulsion than on civility.

Consider the impact of the ICJ's decision as persuasive authority, or, more precisely, a request from one court to another. The indication of provisional measures can be understood to include a request from a principal judicial authority on international law to the supreme judicial authority on U.S. law to take any measures within its power to enjoin an immediate and irrevocable harm until both courts had adequate time to consider the applicable questions of law.

The Supreme Court should have honored this request as a matter of judicial comity, offering the ICJ the same respect that U.S. courts are increasingly according their counterparts around the world. Comity, of course, is a concept with almost as many meanings as sovereignty. However, U.S. courts have been developing, or perhaps simply rediscovering, the more distinctive concept of judicial comity.

Justice Antonin Scalia distinguished between "the comity of courts" and legislative comity in his dissent in the *Hartford Fire* decision, describing judicial comity as the decision by a court in one country to decline jurisdiction "over matters more appropriately adjudged elsewhere."[1] As authority for this distinction, Justice Scalia turned back to Joseph Story's *Commentaries on the Conflict of Laws,* published in 1834. Story, in turn, distinguished between "the comity of the courts," and "the comity of the nation," emphasizing that courts did not defer to foreign law as a matter of judicial courtesy, but rather on the basis of an interpretive principle requiring courts to read legislative silence regarding the effect of foreign law as the tacit adoption of such law unless repugnant to fundamental public policy.[2]

But what, then, is the comity of courts? If it is not the determination whether and under which circumstances to apply foreign law, what is left to decide? Even more fundamental questions, at least to any practicing lawyer, concern where the case shall be heard in the first instance, under what procedures, with what opportunities for discovery—in short, the entire procedural context in which the substantive legal issues are embedded.

Judicial comity is thus the lubricant of transjudicial relations. The question facing judges around the world, in the words of Judge, now Justice, Stephen Breyer, is how to

[23] *See* Bilder, *supra* note 2, at 831; *see also* Spiro, *supra* note 11, at 578.

* Of the Board of Editors.

[1] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993). By contrast, legislative or "prescriptive comity" is "the respect sovereign nations afford each other by limiting the reach of their laws." *Id.*

[2] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §38 (Arno Press 1972) (1834).