

The Death Penalty and U.S. Foreign Policy

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Declaration

I certify that except where due acknowledgment has been made, the work is that of the author alone; the work has not been submitted previously, in whole or in part, to qualify for any other academic award; the content of the thesis is the result of work which has been carried out since the official commencement date of the approved research program; and editorial work, paid or unpaid, carried out by a third party is acknowledged; and, ethics procedures and guidelines have been followed.

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The Death Penalty and U.S. Foreign Policy

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Table of Contents

1. Introduction
 - 1.1 Approach Overview
 - 1.2 Research Design Introduction
 - 1.3 Changing U.S. Death Penalty Policy
 - 1.4 Methods of Exerting Foreign Pressure
 - 1.5 Contribution to Discipline
2. Literature Review
 - 2.1 Literature Concerning Courts as Policymakers
 - 2.2 Literature Concerning Bureaus as Policymakers
 - 2.3 Literature on the U.S. Supreme Court as Policymaker
 - 2.4 Literature on the U.S. Death Penalty
 - 2.5 Contribution to the Literature
3. Methodology
 - 3.1 Define Research Question
 - 3.2 Case Selection and Analysis
 - 3.3 Data Collection and Analysis
 - 3.4 Model Weakness
 - 3.5 Synthesis
4. Death Penalty as Judicial Policy
 - 4.1 Can Judges Change Death Penalty Policy
 - 4.2 Models of Judicial Decision-making
 - 4.3 Factors Influencing Judicial Behavior
 - 4.4 Case Examination
 - 4.5 Analysis

5. Death Penalty as Popular Policy

5.1 Can U.S. Public Opinion Change Death Penalty Policy

5.2 Decline in Public Opinion

5.3 Evidence and Exoneration

5.4 Case Examination

5.5 Analysis

6. Death Penalty as Bureaucratic Policy

6.1 Can Bureaus Change Death Penalty Policy

6.2 External Factors That Impact Policy

6.3 Internal Factors That Impact Policy

6.4 Case Examination

6.5 Analysis

7. Foreign Consul Intervention

7.1 Can Foreign Consul Intervention Change Death Penalty Policy

7.2 Consequences of International Law Violations

7.3 Case Examination

7.4 Analysis

8. International Litigation

8.1 Can International Litigation Change Death Penalty Policy

8.2 International Court of Justice

8.3 International Customary Law

8.4 Case Examination

8.5 Analysis

9. Extradition

9.1 Can Extradition Policy Change Death Penalty Policy

9.2 Extradition of Foreign Nationals Charged With Death Penalty Offence

9.3 Consequences of Violation International Treaties

9.4 Case Examination

9.5 Analysis

10. Conclusion

CHAPTER 1

INTRODUCTION

Introduction

“From this day forward I will no longer tinker with the machinery of death... Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and legally obligated simply to concede that the death penalty experiment has failed.”

-United States Supreme Court Justice Blackmun
Callins v. Collins

Justice Blackmun’s oft-cited quote above, regarding the inherently arbitrary and capricious nature of death penalty implementation in the United States, is notable in Blackmun’s use of the word “experiment”.¹ Throughout the life of any democracy experiments in social policy are undertaken, some well-intentioned and others ill-conceived. However, all policy experiments are subject to the rigors of Constitutional conformity, and more generally must comport with the evolving standards of decency set forth by the Supreme Court, and premised upon that most hallowed document.² Under Article I section 8 of the Constitution it is incumbent upon Congress to “define and punish... offenses against the Law of Nations.” When offenses occur within the United States that offend the evolving standards of decency, violate international human rights laws, and isolate America from its staunchest allies, then policymakers must acknowledge that our experiment with the death penalty has indeed failed.

In recent years international pressure on the U.S., exerted by foreign nations with which America has enjoyed close long-term relationships, has mounted against America’s use of the

death penalty.³ This mounting opposition to the death penalty has strained diplomatic ties immeasurably. Issues of most trenchant importance involve the execution of minors and the mentally retarded in the U.S., a punishment recognized as a human rights violation in all developed countries save America.⁴ Additionally, organizations such as the United Nations and Amnesty International have issued scathing reports which have uncovered racial bias and fundamental procedural flaws in every phase of the judicial process in capital cases.⁵ These international pressures have been compounded by several prominent reports conducted by preeminent American scholars who strongly dispute the validity of prior research which suggests that the death penalty acts as a deterrent to violent crime and is more cost effective than other viable alternatives.⁶

Further anathema to death penalty proponents in the U.S. is the dwindling support nationally for capital punishment.⁷ Opposition to the death penalty in America can find its impetus among many justifications: the inequality of the process, the brutality of some forms of execution or the squalid conditions of death rows across the country, the economic inefficiency of execution, burgeoning international outrage, or religious beliefs that run counter to the death penalty. The alignment of opposition to the death penalty may be rooted in one of several major events in the U.S. that has ostensibly turned the tide of public opinion over the last twenty years. Sister Helen Prejean's best-selling novel (followed by a popular film version) *Dead Man Walking*, which dramatically illustrated the potential for redemption among convicted killers, sparked serious public debate over the morality of executions.⁸ Justice Blackmon's shifting position on the death penalty and the American Bar Association's issuance of a resolution calling for a moratorium on capital punishment clearly articulated the position of many respected legal scholars and

practitioners, whose personal experience informed their own professional assessment of the unfeasibility of capital punishment policies and their effect on society.⁹ The most tangible substantiation of death penalty policy failure can be seen in DNA evidence that has repeatedly exonerated innocent people condemned to death, and has further eroded public support for a practice that may have already resulted in the death of innocent citizens.¹⁰

1.1 Approach Overview

This dissertation will examine the ways in which U.S. domestic policy regarding the death penalty has been influenced by the exertion of concerted foreign political and economic pressure, imposed by powerful American allies on several strategic fronts. These foreign impacts can alter death penalty policies both de jure and de facto, creating shifts in recorded regulatory regimes as well as changing informal approaches to capital cases. The tactics foreign states could employ to bring pressure to bear on the U.S. would include the creative use of extradition policies, international litigation, foreign consul intervention during the trial phase of foreign nationals charged with death penalty offenses, and economic pressures such as disruption of trade negotiations. My dissertation will propose that through collective action foreign states can acquire the political capital necessary to encroach upon the sovereign boundaries of U.S. domestic policymaking, circumventing or diminishing the obstacles of federalism, and forcing one of the most powerful countries in the world to reconsider its policies on the death penalty.

This dissertation will further posit that the aforementioned international pressures can be applied most effectively on a specific governmental unit, namely the state of Texas. Texas, as the

most prolific executioner in the nation, sets the benchmark that other states look to for guidance when implementing their own death penalty policies. A repeal of the death penalty statutes in Texas would have a domino effect on other states, and could usher in a change in policy nationally. Texas, as a border state with Mexico, is highly dependent on its economic and diplomatic relations with its southern neighbor. Disruption of trade negotiations, the suspension of law enforcement cooperation in drug, immigration and national security investigations, could be combined with politically exerted pressure to shift the cost benefit analysis of capital punishment. This dissertation will examine the economic, trade and political dynamic that exists between Texas and Mexico, and posit ways in which this dynamic can be manipulated to force policy concessions.

1.2 Research Design Introduction

This dissertation will perform a case analysis approach in considering the aforementioned primary vehicles of state action, and assess their impact on U.S. domestic policy. Selecting a number of seminal and precedent-setting cases, a comparative analysis will illustrate the merits of my thesis, and ascertain the validity of my research question which is thus,

How has concerted foreign pressure on state and federal level courts, bureaucratic agencies and public opinion influenced U.S. domestic policies concerning the use of capital punishment?

The capital cases examined will be drawn primarily from the state of Texas which satisfy one or

more of the criteria set forth above (i.e. involve extradition, international litigation, consular intervention or the exertion of some form of economic pressure to impact the disposition of the case), but capital cases from other jurisdictions will be used as control cases when demonstrative of divergence among states. Due to the novelty of the issue (fortunately U.S. executions conducted in violation of international law lack sufficient frequency to be described as commonplace), the inadequacy of the data frustrates any attempt at a meaningful empirical assessment of the success of international pressures thus far. Absent a viable dataset which may capture any discernible trends, and case study approach is most appropriate.

1.3 Changing U.S. Death Penalty Policy

As most human rights concessions involving domestic policies are made predominantly by third world countries, and are explicitly tied to U.S. /E.U. foreign aid, countries wishing to extract political concessions from the U.S. (which receives no aid from countries abroad) have little hope of gaining reciprocity through that specific form of economic leverage. However, various methods when strategically arrayed can have an incalculable impact on U.S. domestic policy. At a time when America is desperately seeking to project the image of a beacon of democratic liberty to nations abroad, defending its record as an avowed executioner of juveniles and the mentally handicapped creates an embarrassment and hampers U.S. ability to conduct diplomatic relations effectively.¹¹ It further provides ample ammunition to other human rights violators who exploit the death penalty policies of the U.S. to stifle the opposition of their own detractors.¹² During international human rights summits time is frequently devoted to discussing death penalty issues, diminishing America's opportunities to negotiate resolutions to more salient

issues involving genocide, torture, and poverty.

The success of foreign government condemnation of U.S. domestic policies fomenting substantive change is not unprecedented. Segregationist policies in place after World War II were met with international disdain, and severely tarnished the image of the United States as a self-professed bastion of egalitarian values.¹³ The often times brutal and inhumane treatment of African-Americans was deplored by European countries, and used by the Soviet Union to mock what it saw as U.S. hypocrisy.¹⁴ African-Americans appealed to the United Nations General Assembly during segregation, protesting their treatment at the hands of the American government, seeking recourse and an international spotlight on the depredations of their race. These continual protestations were finally redressed by the courts, and the process of racial integration in the United States rapidly followed.¹⁵

Although many abhor the use of the death penalty under any circumstances, international human rights advocates frequently attribute their particular disdain of the U.S. death penalty policy to several primary objections to specific practices they deem troubling. The execution of juvenile offenders; the execution of the mentally ill or mentally retarded; the execution of foreign nationals not provided with all manner of legal accommodation; and the arbitrary implementation of the death penalty and evidence of racial, social and economic bias. The U.S. has come in line with the international community recently in outlawing the practice of executing juveniles and the mentally ill, a cause pursued aggressively in the past by international organizations such as Amnesty International. This dissertation contends that international influence can continue its successes in the future by deploying resources more strategically, and

targeting Texas specifically.

The execution of juveniles is almost universally rejected as an act of state endorsed barbarism, and is explicitly prohibited by the International Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child.¹⁶ The U.S. is signatory or has ratified both of those treaties but has taken exception to, or made reservations of, each provision which addresses the execution of juveniles.¹⁷ These continued exceptions have brought repeated protests and objections from some of our closest allies. In response to a UN threat to find U.S. reservations to a treaty invalid and a defeat of the purpose and spirit of the treaty on the whole, the United States Senate bared its teeth and threatened to discontinue its funding of the Human Rights Committee of the UN.¹⁸ When considering the potential loss to endangered juveniles outside the U.S. that the funding cuts would entail, the UN relented and allowed America to make exception to the treaty, and to continue executing juveniles in blatant violation of international law. This policy was effectively halted in 2005, when a 5-4 majority of the U.S. Supreme Court found that a “national consensus has developed against the execution of juveniles.”¹⁹ This dissertation explores how U.S. national consensus has been moved by coordinated public messaging campaigns by international actors, and the resulting policy changes.

The execution of mentally ill or mentally retarded offenders has been met with the same condemnation by the international community as that of juvenile offenders.²⁰ Lacking the intellectual capacity to comprehend the magnitude of their punishment, executing the mentally disabled is perceived as an act seemingly devoid of any retributive value, and undermines a

democratic states credibility as a protector of the rights of the weak and enfeebled.²¹ In addition to world leaders, such as the Pope (both current and previous) who have adamantly expressed their avowed disgust for the execution of the mentally handicapped, the UN Committee on Human Rights passed a resolution calling for the U.S. to stop its practice. Since 1976 thirty-four mentally retarded offenders have been put to death in America.²² In 2002, the practice of executing those with “intellectual disabilities” was deemed unconstitutional by the U.S. Supreme Court. However, this narrowly defined exception only applies to those with significant mental impairments that develop before the age of eighteen, and does not exclude any mental illnesses.²³ International advocates for death penalty abolition aver that this decision does not go far enough, and have used various methods examined in subsequent chapters to coerce policy concessions.

1.4 Methods of Exerting Foreign Pressure

The central thesis of this dissertation, that foreign entities (both official and private organizations) can influence U.S. domestic policies regarding the death penalty, focuses on both the diplomatic and economic pressures countries can apply to extract policy concessions, such as the informal policy among Texas prosecutors to withdraw the threat of seeking the death penalty in exchange for a suspect’s extradition from Mexico. The opportunity to leverage this pressure arises through three separate methods: (1) extradition policies, made through treaty negotiation and in real world extradition disputes, the resolution of which can create precedent or be used to exert pressure (e.g. forcing the jurisdiction seeking extradition to acquiesce to the withdrawal of the death penalty as punishment as a condition for surrendering the fugitive); (2) international litigation, most commonly before UN sanctioned courts (e.g. the International Court of Justice)

which the United States has acknowledged possesses authority over U.S. policy in a meaningful way; (3) consular intervention (or the filing of amicus briefs by other interested countries) at the trial phase of the judicial proceeding in which foreign states actively participate in the trial and contribute to the defense of their national. Each of these opportunities will be discussed below, with a brief outline of strategic methods that would be employed by foreign actors to influence U.S. policy.

The innovation of this approach is to focus on the diplomatic pressures foreign organizations could exert, and using a comparative analysis of several select cases which will illustrate how these pressures have been used in the past between to specific states: Mexico and the State of Texas.

Extradition

Extradition, or the process of one country rendering a fugitive apprehended within its borders to the country in which the fugitive is charged with a criminal offense, has become ever more complicated in recent years. The process of extradition is generally governed by international treaties that control the precise terms and conditions of fugitive surrender.²⁴ With growing international opposition to the death penalty among both sovereign nations and international organizations like the United Nations Human Rights Court, the U.S. finds itself situated in a very precarious position.²⁵ In certain instances foreign courts have refused to extradite the accused unless the U.S. prosecution acquiesces to the foreign states demand to remove the death penalty as a possible punishment. This essentially leaves the U.S. judicial system bound to the dictates of

a foreign state and frustrates the discretion of prosecutorial preference. The result is the de facto imposition of foreign states human rights jurisprudence on the U.S. judicial process.

A striking example of a foreign court exercising demands over U.S. prosecutions occurred in 1996 when the Italian Constitutional Court refused to extradite Pietro Vinezia, a fugitive facing the death penalty in the U.S., citing the right to life protections enumerated under the Italian Constitution.²⁶ The Italian Court found that its Constitutional mandates superseded any bilateral extradition treaty with the United States, and upheld the refusal to extradite. This dissertation will fully examine the policy ramifications both domestic and international, that follow from extradition conflicts such as these and how these confrontations can be used to effect policy changes within the U.S.

International Litigation

The phrase “international litigation” is a deliberately broad one, and is used to encompass a host of legal devices that have been employed to abolish the death penalty globally, including the findings of international organizations such as UN Human Rights Committee and the International Court of Justice. The creation of Human Rights Instruments such as the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty offer further testament to the resolve of signatory nations in promoting abolition and encouraging other states which have retained death penalty statutes to repeal them on human rights grounds. In addition, foreign national court decisions, invoking both

foreign jurisprudence and international consensus, have found the death penalty inconsistent with the laws protecting basic human rights or that fundamental freedoms concerning abusive punishments have been violated, and have subsequently abandoned the practice of capital punishment altogether.²⁷

This international amalgam of law and legal instrumentality has gradually coalesced into a source of customary international law, and has been acknowledged as binding on the United States, not only by U.S. courts, but is enshrined within its Constitution. In early U.S. Supreme Court decisions the Court held that the U.S. is bound by international law and must be “amenable to the law of nations”.²⁸ This dissertation will undertake an analysis of this line of legal precedent, examine how current courts reconcile contemporary death penalty policy with binding international customary law that prohibits capital punishment, and further explore how international actors can coordinate litigious efforts to heighten influence over U.S. domestic policies regarding the death penalty.

Foreign Consul Intervention

Foreign opposition to U.S. death penalty policy increases to a frenzied level when the prospect of the U.S. executing one of its own nationals becomes a very real possibility. Foreign nationals arrested for a crime, under the Vienna Convention on Consular Relations, must be informed of their right to confer with consular officials from their country of origin.²⁹ With little or no understanding of the language, law or customs of American society and its jurisprudence,

foreign nationals may not comprehend all the legal accommodation they may avail themselves of, as occurred in the Breard case.³⁰ This significant legal disadvantage could severely impair a future defense at trial. However, most law enforcement agencies are either unaware of its existence or deny its applicability altogether. This blatant disregard for the law and the flouting of international treaties leaves the suspect vulnerable to incriminating statements, false confessions, coerced statements and miscommunication through poor translation.

The execution of foreign nationals, under these patently illegal circumstances, has created international animosity toward the United States that has, and will continue to have, dire repercussions for Americans both here and abroad. States have refused extradition of violent criminals who have fled to their jurisdiction to effectively frustrate the U.S. judicial system (exploiting the hostility felt against the U.S.) and denying justice to the victims of violent crime.³¹ In the Medellin case and others the United States has also found itself party to litigation before international courts and tribunals for violating treaties and international law in carrying out executions of foreign nationals deprived of their procedural protections under the Vienna Convention.³²

A more grave consequence of American flouting of international conventions, treaties and court rulings are its impact on the authority of these international bodies, and the diminishing effect on their power and their ability to issue binding precedential edicts. This weakened authority may impair the U.S. in conducting its own international efforts to protect interest of national security, international trade and human rights.³³ Without universal recognition of the power of international organizations, the U.S. may find cooperation and reciprocity among other nations hampered. This dissertation will consider the impact foreign organizations have when

they become involved in the defense of a foreign nationals accused of capital offenses, and the implications of the United States refusal to abide by international law and treaty in denying those nationals rights guaranteed under international convention.

Economic Pressure

Governments who commit acts recognized as human rights abuses by civilized nations and international rights organizations are almost invariably controlled by despotic regimes whose tenuous hold on power is predicated upon repressive governance and ruthless subjugation of its people. The regimes who engage in human rights violations, because of their inherent instability, are often located in impoverished countries which rely on massive amounts of foreign aid from countries like the United States. Imposing economic sanctions on the regimes has proven successful in gaining concessions on domestic policies which constitute human rights abuses.

The use of economic sanctions to hold governments accountable for their actions is an effective tool against cash starved nations suffering in abject poverty, but not as powerful when the country is one of the wealthiest in the world, in the example of the United States. As a globally acknowledged human rights abuser, the U.S. operates with seeming impunity when it violates international law and treaty by executing juveniles, the mentally retarded and foreign nationals. Although trade embargos and UN sanctions may seem entirely unrealistic, there are certain strategies nations and international organizations can adopt to pressure the U.S. to change domestic policies.

The disruption of trade negotiations by raising human rights concerns regarding the death penalty during the talks can have both an economic impact and influence public opinion. For example, when a Mexican national was executed in the U.S. amid international outrage, President Vincente Fox publicly rebuffed President Bush's invitation to visit his Texas ranch for trade talks creating a diplomatic rift and impeding international economic relations among the two countries.³⁴ This dissertation will examine the ways in which economic pressure can be used to create an incentive for policy change and draw more public awareness to the issue as a human rights abuse.

1.5 Contribution to Discipline

Prior research concerning the impact of international pressure on American death penalty cases is incredibly sparse, and deserves a fresh approach that offers new insight into an seemingly intractable debate. Only several books exist (most of foreign publication, listed in my bibliography) that discuss foreign intervention during capital punishment proceedings, and most extant literature appears in the form of journal articles. This dearth of coverage may be attributed to several causes; the offenders sentenced to death are typically persons deemed unworthy of sympathy, and their plight garners little publicity or compassion; the growing disregard for international opinion among Americans has diminished concern over foreign outrage; the relative infrequency of executions blatantly in violation of international law prevents sustained attention directed at death penalty policy, defeating any serious attempt to mount national opposition. The generally perceived lack of importance regarding executions conducted in the

U.S. in violation of international law must certainly factor into a publishers decision to decline to publish work that professes its importance.

The work that does exist has confined its examination to historical trends and abstract theorization regarding potential sources of diplomatic embarrassment and the putative compromise of U.S. democratic integrity by pursuing the death penalty. This dissertation will make a unique contribution to several related disciplines by positing that nations must move beyond seeking diplomatic rapprochement with the U.S. federal government exclusively and develop foreign policies which target specific states in which to exert pressure. Because past misdirection of foreign organizations focused primarily at the national level (which is the level of government responsible for conducting international relations), states have easily deflected criticism away from their own death penalty policies. The obstacle of federalism can be overcome by concerted efforts to pressure states individually through trade and diplomacy. The state this dissertation will focus on is Texas (which executes more international offenders than any other state). Texas, as a Mexican border state, frequently exchanges trade delegations and enters independently into trade agreements with Latin American countries.

In the last half century U.S. policies regarding capital punishment have increasingly deviated from that of other developed civilized nations. U.S. policies that endorse the execution of juveniles, the mentally handicapped and disadvantaged foreign nationals have been recognized by both allied nations and international organizations as human rights abuses and violations of international law. If the United States is to maintain its reputation as defender of democratic ideals on the global vanguard of promoting civil liberties and social justice, U.S. policies on the

death penalty must be changed. This dissertation is unprecedented in research literature in that it examines the myriad ways that death penalty policy can be influenced by external forces.

International pressures directed at specific governmental entities can have a profound effect on both governmental operational efficiency and public sentiment, and effectively render capital punishment cost-prohibitive from a public policy standpoint. By coordinating repeated and intense opposition to the implementation of death penalty policies, using the methods outlined above, the death penalty can be made into an exceedingly costly enterprise and made less attractive as a policy option. Foreign state actions that successfully elevate the cost of U.S. executions are myriad, and could include the following : engaging the United States in protracted extradition processes initiated by governments who have captured fugitives of American justice who face the death penalty; interminably long litigation before international courts and tribunals regarding human rights violations; extensive foreign state involvement in both the trial and appellate phase of nationals charged with capital crimes; foreign trade delegations interjecting death penalty issues during trade negotiations at the state and federal level, disrupting trade across borders. This dissertation will add a new dimension to the existing discourse on the death penalty by undertaking a novel approach; using a comparative case study analysis, using seminal cases mainly in Texas that involve the implementation of one or more of the above elements, to illustrate how these specific methods can and have been used to shape U.S. domestic policies regarding capital punishment.

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- ²³ Atkins v. Virginia, 536 U.S. 304 (2002).
- ²⁴ E.g. United States-Mexico Treaty on Extradition, 31 UST 5059, (1978).
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- ²⁸ Blackmun, Harry, "The Law of Nations", *Yale Law Journal*, 104 (1994):34.
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³³ Kadish, Mark, "Article 36 of the Vienna Convention on Consular Relations: a Search for the Right to Consul", *Michigan Journal of International Law*, 18 (1997):565.

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CHAPTER 2

LITERATURE REVIEW

2.1 Overview

This literature review will provide a sweeping introduction to scholarly work that spans across several disciplines, and will synthesize the literature relevant to each chapter. Therefore, the first half of the review will present scholarship drawn primarily from political science and public policy journals regarding the U.S. organs of state responsible for shaping and implementing death penalty policy, namely the courts and various government bureaus. This literature will emphasize the government's role as policymaker, and discuss constraints and liberties each entity labours under when attempting to institute new policy proclamations. The second half of this review will devote itself to an examination of literature which analyses issues that fall under the rubric of legal scholarship, and examines the influential mechanics that this dissertation avers can impact policymaker decisions on death penalty policy, namely extradition treaties, consular involvement and international litigation and public opinion. This literature will highlight not only articles which illuminate the diaphanous fabric of international law, but will explore the caselaw upon which this literature rests.

2.2 Literature Concerning Courts as Policymakers

Literature on Trial Court Judges as Policymakers

Although many different actors participate in the judicial process, it is the judges who are vested with the authority to act as the ultimate arbiters of justice. Even though each judge

operates at the pinnacle of her jurisdictional sphere, her ascension to that position may have taken several possible pathways. In the United States judges gain judicial positions by either appointment or through popular election, with both methods of attaining judgeship entailing certain unique responsibilities and obligations that may influence their ability to make judicial decisions. This essay will consider the practical and political implications surrounding both methods of judicial selection by conducting a thorough examination of the theoretical contributions scholars have made to this line of inquiry, and discuss the importance of judicial selection in contemporary jurisprudence.

Scholars have long maintained that the selection and retention of judges reflects contrasting ideas regarding the role of the courts in society. If courts are to function independently, the functionalist model of judicial selection requires courts to operate outside the influence of the electorate, in addition to the legislative and executive branches, in order to effectively serve as a check on institutional power and to preserve the rule of law. However, Dubois embraces the concept of an inherently political judiciary, finding that direct accountability through partisan elections will ensure opposition and criticism of those already in power.¹ According to Webster, the judicial selection debate reflects the tension between the dual role a judge assumes as both the lawmaker and the arbiter of justice, and illustrates the dichotomy between the political and social roles judges alternately assume.² Webster counters the functionalist model by asserting that judicial independence must be tempered by a system that ensures accountability, and states that courts must heed the majority's social, political and economic views when adjudicating the law, and that judicial accountability is consistent with the principles of democracy which value the importance of the popular vote.³ It seems clear that the method of judicial selection is instrumental in determining whether judges are able to retain the

independence that enables them to faithfully execute their responsibilities to the bench objectively, but also determines whether they remain accountable to the public to which they serve.

Certain scholars who have studied judicial selection have focused on cyclical pressures elected judges labor under, and have noted shifting patterns of judicial decision-making that correspond to electoral schedules. Melinda Gann Hall proposes an econometric model predicated upon a cost benefit approach to judicial decision-making. When examining state high courts, Hall observed that electoral incentives entice judges to conform to the popular majority, and rendering decisions that are more politically expedient, avoiding controversial decisions, and acting to preserve their longevity on the court. Hall further notes that this trend of the minority conforming to the majority is especially pronounced during the election season. Hall and Brace address the difference in decision-making disparities between elected and appointed judges in examining death penalty decisions. The authors found that appointed judges are more likely to overturn death penalty convictions than elected judges, especially if the elected judge has brief tenure on the court. The authors aver that the appointed judges are less beholden to their constituencies, and act according to their own preferences. Hall's work bolsters the earlier assertions by Dubois that judges are political actors who, absent pressure by outside forces, will make decisions based upon personal preference.

Judicial appointments to the United States Federal Courts have momentous import, and according to Slotnick, a president can influence the course of national affairs through his appointments for a quarter century after he leaves office. Concerning the appointment of U.S. Supreme Court Justices, Segal identifies a number of primary considerations a president would evaluate before finally selecting a nominee.⁴ Those considerations would include, but would not

be limited to, partisanship and ideology, the political environment, prior experience, region of the candidate, the race, religion or sex of the candidate and whether the candidate is a friend or patron of the president or his political party.⁵ Goldman, in constructing his model for conceptualizing the strategies employed by presidents to appoint federal district court judges, advances a theory which is premised upon distinct agendas under which presidents operate; namely policy, partisan, or personal agendas.⁶ When viewed from the framework of Goldman's rigidly compartmentalized model, the process of federal court nominations is revealed to be utilitarian in nature. Goldman's work suggests that judges are appointed as policy proxies to advance the agenda of the executive, and emphasizes the nature of judicial appointments as a political currency to be spent by the president.⁷

Appointing multiple justices to the Supreme Court that share the President's political, cultural, economic and judicial philosophies (i.e. "packing the court") has been successful in that courts have tended to historically follow the dictates of the ruling coalition according to Robert Dahl.⁸ Dahl asserts that rulings of the Supreme Court are never long out of line with the policy views of the ruling coalition and are generally consistent with the demands of the controlling government.⁹ In this sense, court packing has been successful in converting the Court into an essential proxy institution for the ruling coalition, reducing its capacity to act as a counter-majoritarian force.

This assertion is further bolstered by the empirical research of Lawrence Baum, who maintains that as membership on the Court itself changes, collective voting patterns shift (Baum examined these behavioral trends from 1946-1985 in civil liberties cases).¹⁰ Baum's work regarding Supreme Court decision-making comports with Susan Haire's study of the 9th Circuit Court of Appeals, in which she found that the ideological composition of the bench upon which

the justice is appointed can have a discernible impact on the decision-making process.¹¹ Haire found that Reagan-era appointees to the 9th Circuit staffed largely with liberal holdovers from the Carter Administration, became more moderate, conforming to the views of the majority.¹² The notion that Supreme Court membership change will impact its policy production casts the Court as a dynamic political institution subject to the will of the ruling coalition. However, Mishler finds that the Court is also responsive to influence outside the government and posits that public opinion may sway the Court into modifying policy choices.¹³ Mischler qualifies this by noting that there is a five-year lag in responsiveness.¹⁴ This lapse may suggest that the Court follows the elected not the electorate, refuting the assertion that the Court pays attention directly to public opinion.¹⁵ Cognizance of this trend of collective conformance could conceivably impact judicial selection by inducing selectors (either executive or electoral) to choose judges who are less moderate in an attempt to achieve parity on the court (e.g. moderate executive appointing an extremely conservative jurist to a liberal bench to dilute overly liberal ideology).

On balance, the impact of judicial selection is far reaching in its policy implications, and the method by which jurists are selected is critically important in striking a balance between maintaining an impartial judiciary that can fulfill its oath of office effectively, and still remain connected to the societal imperatives that justice must ultimately serve. Scholars in the area of judicial selection have contributed to our understanding of the process by conducting a methodical examination of the processes involved in picking judges, the various motivations of the participants, and a careful consideration of the outcomes different methods produce. Scholarly consensus would indicate that the accountability of elected judges is preferable over appointed judges who may act independently, but beyond the scope of societal norms.

Literature on the United States Supreme Court as Policymaker

An early influential article which addresses the fundamental question of Supreme Court legitimacy as a policy making organ of government is Robert Dahl's *Decision Making in a Democracy: The Supreme Court as Policy-Maker*.¹⁶ In his article, Dahl proffers the view that the Supreme Court is at its core a political entity. Dahl considers the Supreme Court political because it is mainly concerned with making policy choices, a process which is inherently political. Dahl poses questions about the Supreme Court that would be applicable to the evaluation of most political bodies of government, such as "who gets what and... what groups are benefited or handicapped..."¹⁷

Dahl asserts that the most important aspect of the Courts power is its ability to confer legitimacy on the coalition's interpretation of the Constitution. However, Graber insists that justices "declare state and federal practices unconstitutional only when the national coalition is unable or unwilling to settle some public dispute... (and) prominent elected officials consciously invite the judiciary to resolve those political controversies that they cannot or would not address."¹⁸ For Graber the real controversy exists between a "clashing majority", not between the judiciary and another branch of government.¹⁹ Some theorists, such as Horowitz, see the expanding judicial responsibilities of the Court (especially over the last several decades) as contributing to the burgeoning of policy decisions foisted upon the judiciary, and impacting its status as policymaker.²⁰ The role of the U.S. judiciary has been enlarged to encompass heretofore unadjudicated issues such as welfare administration, prison administration and education policy, to name a few. This newly acquired caseload has greatly diminished the ability of the Court to affect new public policy, in Horowitz's estimation.²¹ However, Cavanaugh and Sarat proffer a

compelling rejoinder to Horowitz's argument, and strongly dispute the assertion that "the courts are doing too much and doing it badly." The authors argue that the courts have ably demonstrated an ability to adapt to new institutional dynamics, citing the examples of the Court's disposition of debtor-tenant defaults, related party disputes and extended impact cases.²² But Rabkin sees this "compulsion" to enter the political fray and resolve disputes among governmental agencies (Education Office of Civil Rights, to use the example the author invokes) as misguided by the Court, and furthermore that the Court lacks the equipment to manage these controversies.²³ However, Rabkin doubts the Supreme Court can muster the self restraint necessary to impose constitutional limitations on its judicial authority.

Gerald Rosenberg follows Robert Dahl's original premise that Courts are incredibly constrained in their ability to create new national social policy, and argues that the Supreme Court cannot act autonomously and labors under far too many constraints imposed by other members of the governing coalition to either implement or impede policy change independently.²⁴ Broadly, Rosenberg enumerates three conditions, all of which must be satisfied for the Court to create social reform: (1) Other political players must offer incentives/costs to compel compliance with the Court's ruling, (2) The market participates in Court ruling implementation and (3) The Court can provide protection to those who act.²⁵ In the decisions Rosenberg invokes as case evidence, he astutely points to the social pressures from the civil rights movement that culminated in Brown v Board of Education²⁶ and the social upheaval which already existed during Roe v Wade²⁷ as the conditions upon which those decisions were made. These cases, according to Rosenberg, as they stand alone were not responsible for changes in policy. Rosenberg also refutes the importance of certain equal protection cases which created gender classifications subject to increased court scrutiny arguing these protections have done

little to advance the roles of women in contemporary society.

A criticism of Rosenberg's approach would be the exceedingly narrow focus on the Supreme Court, neglecting implementation at the lower district court levels, which may also contribute to strawman complications. An extension of this criticism of Rosenberg's tightly constrained focus on the Supreme Court is forwarded by Schultz and Gottlieb, who challenge his equally confining definition of the role of courts in modern society, questioning how the courts should be viewed as social policy instruments, and asking how society should goal these institutions.²⁸ Schultz asserts that Rosenberg, aside from his obvious evidentiary shortcomings (e.g. different standards of proof for different institutions), fails in not incorporating a more structural and institutional approach that accounts for other exogenous factors occurring within a larger political context.²⁹ Schultz also advises looking to the lower courts to better understand the causal links between judicial efficacy and social reform.³⁰

Canon takes Rosenberg to task for partly the same reason Schultz finds fault, an unduly restrictive conception of Supreme Court success.³¹ Canon criticizes Rosenberg for his narrowly defined idea of Court implementation, and claims that Rosenberg neglects to accommodate implementation that is incremental, graduated or even partial. Canon contends that not all policy success need be measured in full implementation to be considered a success in terms of impact, and that Rosenberg's overly restrictive notion of implementation fails to capture the deep impact its rulings can have.³²

Although no particular paradigm offered by any of the authors appears more compelling than any other, Rosenberg's original idea that the Court is constrained by other factors, and cannot act autonomously, was later given more texture and a greater depth of meaning by subsequent authors who through criticism managed to build upon Rosenberg's novel premise.

Dahl and Rosenberg's work can be viewed as contributing a large impact on Supreme Court scholarship by creating a piece of work which fomented an important discussion and debate about the very nature of Court power and its institutional limitations.

Segal and Spaeth have formulated a model of judicial policymaking, the attitudinal model, which postulates that all justices make decisions based solely upon their own ideological preferences and are not confined by previous decisions or indeed by the rule of law.³³ The main proponents of the attitudinal model argue that they have found no empirical evidence which would indicate that justices are compelled to adhere to the principles of stare decisis (the rule of precedent) and that justices tend to vote along strict lines of preference.³⁴ This view has been tempered by other judicial scholars, Knight and Epstein, in which they argue that judicial precedent acts as a normative constraint on judicial decision making and that justices have a preferred rule they would like to establish but modify their position to reconcile their preference with existing precedent.³⁵

The strategic model of court decision-making holds that the Supreme Court is a collegial institution and that justices act collectively and strategically to advance their own preferences. This model proposes that justices negotiate compromise that is amenable to both reconciling policy concerns for individual members and also serves to enhance the efficiency of the Court as an institution. This collegial process effectively resolves disputes before the Court more effectively, allowing the Court to render dispositive action without the undue waste of time involved in impasse. Shapiro argues that collaboration and bargaining occur only under limited circumstances, but that "courts are actually in a better position to recognize the real public interest among the various special interests masquerading as public interests, than are legislatures or executives..." and that "indeed in a contemporary government it is the judges mind that most

closely mirrors the demos, as the rest of government is more and more fragmented into the various specializations needed to cope with an increasingly complex environment.”³⁶

Another model used to assess the ability of the court to create policy is the historical institutionalist model. This model asserts that decisions must be placed in an interpretative and historical context and that Court decisions be constrained within a political, systemic framework. Adding and expounding upon the historical institutional model, Kritzer conceptualized jurisprudential regimes.³⁷ These regimes are comprised of discreet, historically steeped bodies of law, rules and regulations that are molded into precedential structures which guide and influence Court decisions. This neo-institutionalist approach opines that regimes are social constructs that can be ignored but essentially form a framework which the justices uses to overcome the appearance of acting strictly in accordance with personal preference.

While it is difficult to determine with absolute certainty whether the justices of the Supreme Court always votes along political or ideological preferences (due to the general reticence of the Court to confess partisanship or admit political influence or even discuss their own deliberative processes) it is possible to determine which highly charged cases became controversial and created the appearance of political motive. According to Gillman, controversial decisions are those “where judges (a) make decisions consistent with their political affiliations and (b) receive no support from judges with different party loyalties and that (c) seem inconsistent with the judge’s usual pattern of decision making or with generally accepted understandings of the existing law.”³⁸ A decision having met all these criteria, a rebuttable assumption arises which indicates partisan considerations may have influenced the decision made by a justice.

Almost invariably, the scholarly literature and the empirical studies produced by both the legal and political academic communities are in agreement regarding the Supreme Court’s ability

to act as a countermajoritarian institution; its power to act as a policymaker is greatly constrained by the other branches of government and susceptible to being influenced by public opinion. Although the limitations imposed upon the Court by other members of the ruling coalition vary widely in accordance with the many factors discussed in the body of the essay above, it is exceedingly rare that the Court is endowed with the ability to make any decision unfettered by any one influential factor, and completely left unencumbered by exogenous forces to craft policy independently. However, acting prudently and in cognizance of the disparate forces working earnestly to influence the Court, it can nonetheless become empowered to act decisively given the proper circumstances, and can create policy with broad political and legal ramifications.

2.3 Literature Concerning Bureaus as Policymakers

The literature that discusses government bureaucratic behaviours, and which attempts to analyse the manner in which agencies respond to pressures regarding policy change is vast. This review will confine the scope of its inquiry to the seminal literary works that examine how bureaus are organized, operate and respond to external influence.

Chester Barnard defines an organization as a “system of consciously coordinated activities or forces of two or more persons”.³⁹ James Q. Wilson further posits that of primary importance is how that coordination is achieved. It stands to reason that the means used to attain this coordination are linked to their ends (or their tasks are related to their goals). And because the means and ends of each bureau are different, one must assess the tasks and goals of each bureau in question to determine the most effective method of organizational coordination. It seems abundantly evident that in refusing to recognize bureau differences, even those which are

nuanced or idiosyncratic, one is thwarted in applying a uniform approach to understanding bureau organization. For a bureau to successfully execute its governmental mandate and achieve its goals, it must learn to maneuver through dangerous political waters outside its own territory. As Selznik pointed out, bureaus survive by monitoring their environments, avoiding conflicts, and adapting to their (occasionally hostile) surroundings.⁴⁰ Lipsky when considering member behavior finds that, “when taken in concert, their individual actions add up to agency behavior”.⁴¹ Lowi has frequently lamented the power given to bureaucrats to determine policy, and has suggested that Congress can curtail the excessive use of bureaucratic power by simply making applicable statutes more specific.⁴² Congress has often been criticized for using its oversight of bureaus to micromanage agency operation, and impairing its ability to function smoothly. In many ways the relationship between Congress and the bureaus resembles a principal-agent arrangement, and many agencies have repeatedly demonstrated a loyal sense of responsiveness to Congressional preferences that conforms to electoral principles of representation. Scholz used a time series analysis to establish that from 1974-1992 the variation in tax law enforcement by the IRS could be attributed to the preference of elected officials.⁴³ Agencies have also shown a willingness to adhere to the political preferences of the court. Howard empirically demonstrated that the IRS would shift its auditing policies to suit the ideological preferences of the reviewing appellate court bench, finding that when conservative judges occupy the bench, the IRS audits poor taxpayers more frequently, and when a liberal judge presides over the audit wealthier citizens are targeted.⁴⁴

Downs asserts that the urge to maintain status quo is strong, and fitting into a new informal structure in the bureau acts as a disincentive to cultural change.⁴⁵ Warwick argues that economic and political imperatives make bureaus resistant to change, and that change impeding factors

such as an entrenched administrative orthodoxy make culture change improbable, but avers that individual members may opt to “wait out” change until executives leave. To the extent that the bureau’s culture is determined by its resources and the problems it confronts, Kingdon finds that problems contain a perceptual, interpretive element and that values influence bureau-member decisions.⁴⁶ The inherent conflicts that arise from disparate value systems within an agency can create a relational power discord, according to Baratz, which disrupts the prioritization of bureau imperatives.⁴⁷

Kaufman has found that these efforts to cultivate voluntary conformity to change will enhance collective esprit de corps.⁴⁸ Further, Khademian has discovered that devolving responsibility for the implementation of these changes, and allowing street level bureaucrats to “exercise independent judgment”, also improves efficiency.⁴⁹

2.4 Literature Concerning the Death Penalty

Presently, the United States holds the dubious distinction of being one of the most prolific first world democracies which continues its use of capital punishment, and according to Prinzo “the only western democratic state to employ the death penalty for ordinary crimes during times of peace.”⁵⁰ Throughout the last 100 years the sovereign nations of Europe embarked upon a wide divergence from the U.S. in its respective death penalty policies, with many countries favoring abolition to continued execution, according to Hood.⁵¹ The U.S. appeared to have marked a turning point in its criminal justice history when the Supreme Court, in *Furman v. Georgia*,⁵² found the death penalty was being arbitrarily implemented, and so constituted a violation of the 8th Amendment prohibition against cruel and unusual punishment. The holding by the Supreme Court in *Furman* instantaneously nullified 40 death penalty statutes nationwide, and

consequently caused the rapid mobilization of capital punishment proponents in state legislatures into action to enact death penalty processes that would conform to the court's ruling. Four short years later, in *Gregg v. Georgia*,⁵³ the court found that the new death penalty statutes in Georgia, Texas and Florida were now in full comportment to the Constitution. In *Gregg*, the Court noted that new procedural reforms created a two-phased process for guilt and sentencing, automatic reviews of sentencing and proportionality, and purported to eliminate arbitrary death sentencing. The Court's decision in *Gregg* resulted in death sentences flowing again apace and unabated, with over 1000 people executed subsequent to the 1976 ruling.⁵⁴

However, the international community has failed to recognize the Court's contention that the new procedural safeguards instituted under *Gregg* result in fundamentally fair trials, or humane punishment for those persons ensnared in a system widely considered discriminatory based on race, economic status or jurisdiction, maintains Hood.⁵⁵ International organizations and courts have taken notice, and according to Schabas, although no international law currently exists that explicitly prohibits U.S. capital punishment, many legal standards may currently circumscribe its implementation, and may soon form the basis for customary norms that will persuade a court or legislature to abandon the practice, or create *de facto* abolition.⁵⁶ The United Nations has enacted a resolution to heighten procedural safeguards to decrease arbitrary processes, and the International Court of Justice (ICJ) has ruled multiple times that the U.S. is in violation of the Vienna Convention for improperly executing persons. The court's ruling in *Lawrence v Texas*⁵⁷ indicates that foreign jurisprudence is readily considered, and when Justice Kennedy referenced International Convention on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) in his opinion he lent an increased gravitas and precedential value to international law. According to Koh the integration of sound foreign legal principles, as the

Lawrence references by Justice Kennedy exemplify, creates a transnational legal process that ultimately incorporates human rights values into domestic laws.⁵⁸ Martinez espouses the view that through democratic nation-state interaction sovereign countries can create zones of comity and cooperation that would lend itself to capital punishment abolition.⁵⁹ She further posits that instead of violating federalist principles and encroaching upon U.S. judicial sovereignty, the international cooperation would be beneficial in that it provides consultation between countries, and further between states with their respective counties, so that counties that may ultimately be affected by treaty negotiation have an opportunity to participate.⁶⁰

Extradition Literature

Under the United States Code, 18 U.S.C. 3181, extradition is defined as

Surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory and within the territorial jurisdiction of the other which, being competent to try and punish him, demands his surrender.

The United States and Mexico have been signatories to the Multilateral Convention on Extradition, and a separate bilateral extradition treaty between the two nations that has been in force since 1978.⁶¹ According to Thatcher, extradition treaties and statutes are subjective and open to interpretation based upon individual court methods, which can lead to confusion and delay. McHam further opines that cultural differences between Mexico and the U.S. further contribute to delay and often the outright refusal to produce anyone the U.S. demands be surrendered. This pattern of behavior is often seen in U.S. death penalty cases, as Mexico

abolished capital punishment in 1937, and as a matter of informal policy will refuse to extradite unless given assurance that the death penalty will be removed as a possible punishment.

According to Schabas, this has led to a de facto abolition of the death penalty in which U.S. prosecutors have been forced to exchange a reduction in punishment in return for the transfer of the suspect.

Foreign Consul Literature

The Vienna Convention on Consular Relations (VCCR) accords all foreign nationals accused of a crime the right to have a consular representative notified, and allowed an opportunity to be provided their assistance in regards to legal counsel and financial aid. In two seminal cases, *Breard v Greene* and *Stewart v Lagrand*, the defendant's home countries sought to delay their execution by bringing suit before the ICJ arguing that their client's consular rights were violated. In both cases the ICJ ruled that the Vienna Convention was violated and ordered a stay of execution be granted. The Supreme Court declined to honor the ICJ ruling, and both were later put to death. Sheik, however, finds that the rapidly evolving jurisprudence that addresses U.S. disregard for international treaty obligations as providing a promising legal environment ripe for fast paced change. He allows that the U.S. Supreme Court recalcitrance in honoring a string of ICJ rulings alleging blatant U.S. violations under the VCCR is nevertheless balanced by the lower courts gradually shifting into alignment with ICJ edicts. Djajic further postulates that municipal courts in the US are beginning to create interjudicial relationships which will result in the increasing enforceability of ICJ legal principles. Flieschman recognizes Mexican effects to forcefully intervene both judicially and diplomatically on behalf of its nationals facing

prosecution in America and its success in raising awareness of U.S. violations. Valencia notes that Texas has not responded well to the new developments in consular violation rulings by the ICJ, noting that the Texas Attorney General has stated categorically that he will ask for no new trails or stays of execution. He did say, bowing somewhat to ICJ pressure that he will begin to consult with the U.S. State Department for guidance in future consular cases.

International Litigation Literature

In the U.S. many persons facing the death penalty, both citizens and foreign nationals, have appealed to international courts and commissions for reprieve arguing that the U.S. death penalty is a human rights violation under a number of treaties, conventions and international legal norms. Wilson notes that the Organization of American States, in which the U.S. holds membership, many persons under penalty of death have availed themselves of the International American Commission of Human Rights, invoking Article 1 of the American Declaration of the Rights and Duties of Man that every human has a right to life. The U.S. government has so far rejected the Declaration as a binding force, and Rothenberg vociferously argues that international bodies such as the OAS and ICJ threaten the sovereignty of the U.S. justice system in three ways; creating claims that international law prohibits the death penalty, the insinuation of foreign law into domestic jurisprudence, and the encroachment upon U.S. sovereignty to administer its own justice system. But Clarke would disagree, stating that America is out of touch with a burgeoning global consensus that capital punishment is no longer accepted by modern civilized societies. Indeed, McDonnell holds that U.S. overreaction to 9/11 attacks has amplified the U.S. response to crime and has further eroded U.S. respect for rule of law, undermining American international

moral standing. Truskett argues that the wide chasm that separates U.S. death penalty policy with the abolitionist oriented nations of the world can be bridged by encouraging a contextualized discourse among nations that allows for multiple interpretations of death penalty policy analysis which will in turn create a transnational legal system appropriate for a global society that wishes to protect human rights. Fitzpatrick identifies cases such as *Thompson v Oklahoma*, that indicate U.S. courts are increasingly receptive to embracing international norms relating to the death penalty, which relying on international law ruled that execution of persons under 16 violated the 8th Amendment of the U.S. Constitution. Wilson points to recent revisions of the ABA Guidelines of Death Penalty Defense Counsel that encourage lawyers defending capital punishment defendants to raise issues regarding international law at trial, primarily those relating to consular issues under the Vienna Convention, to assert the increasingly pervasive nature of international law in domestic court practice. On balance, the literature suggests a growing shift in U.S. domestic courts which indicates an increased receptivity to the consideration of international law and norms in death penalty decisions.

Public Opinion Literature

Because this portion of the review concerns itself with a relatively recent developing trend, the extant literature reflects this dearth of coverage and analysis. A seminal work, however, can be found in Dwyer, Neufeld and Schenk, *Actual Innocence*. Most of the other literature (excluding death penalty treatises relied upon to build historical context and an overview of capital punishment in the United States) which discusses the advent of DNA exonerations and public opinion are contained in journal articles and periodicals, the most influential of which will

be discussed in this review.

Dwyer and Neufeld frame the debate of death penalty reliability by first considering the effect of improper judicial administration in capital cases. The evidence that the authors submit demonstrates that the courts continuous failure to correct serious trial errors is both incidental and systemic. The authors point to cumbersome laws and procedures that impede the full scrutiny of evidence, discriminate against the wrongly accused, and actively subvert the process to avoid overturning convictions. Dwyer and Neufeld offer compelling anecdotal evidence from cases in which they have personally participated that suggests that innocent men have already been executed in America.

In Ron Tabak's *Finality Without Fairness*, Tabak argues that changes in public perception of the death penalty have occurred, and after the Supreme Court reinstated the death penalty in 1976, it was no longer a mandatory punishment for murder, capital punishment became a political issue and courts began to doubt the effectiveness of the death penalty as a deterrent to violent crime. In line with this changing discourse among the judiciary and the public at large, Tabak asserts that prosecutors were less pressured and felt free to opt out of the death penalty without appearing soft on crime.

In John Wefing's *Wishful Thinking*, Wefing posits that DNA will, once techniques become perfected, ensure that only the guilty are executed, reinforcing their guilt and further strengthen death penalty policies, not lead to their abolition. Wefing refers to the consistently overwhelming approval rates for the death penalty, and sees slight shifts in popularity as a response to the fledgling technologies initial discovery of post conviction errors, and simply correcting past mistakes. Wefing also points out those judicial and procedural deficiencies have been, throughout the history of death penalty in the U.S., addressed by legislative bodies to make

capital punishment consistent with both judicial edicts and responsive to public opinion.

2.5 Contribution to the Literature

Many studies across academic disciplines as diverse as criminology, political science and law, have undertaken both qualitative and quantitative assessments of U.S. death penalty policy. However, none has posited a case study analysis of a multifaceted approach to shaping death penalty policy through international forces, using capital cases that have been prosecuted between the United States and Mexico as a basis for a case study model. This singular academic contribution should serve as a primer to foreign actors who seek to explore ways in which death penalty policies can be positively impacted.

This dissertation will employ a case study analysis that combines both qualitative and quantitative assessments of death penalty impacts through specific seminal case outcomes and empirical measurements of success in pressure applications between the U.S. and Mexico. This bifurcated approach to death penalty policy analysis is unprecedented in U.S. literature and will advance a new theoretical framework that examines multiple causes and effects from a case study perspective. In conclusion, this dissertation will expose and analyze the institutional mechanics of death penalty policy in the United States, and then construct hypothetical levers upon which foreign actors can theoretically exert pressure to obtain a desired outcome, using a case study analysis to demonstrate the viability of the theoretical model. Ultimately this dissertation will hopefully provide more than a novel contribution the extant literature, but moreover a working model that foments action and encourages new discourse among both academics and practitioners. It is hoped that this dissertation may contribute to compelling

foreign forces to align resources and actors to effect change and work to abolish a policy that has taken innocent lives, exacerbated class and race divisions, and diminished the standing of America internationally as a bastion of human rights and rule of law.

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CHAPTER 3

METHODS

3.1 Defining the Research Question

3.11 What is the Research Question

This dissertation seeks to examine the behaviour of many different policymakers actions in the process of shaping and implementing capital punishment policies by asking the same fundamental question; “Can American policymakers behaviour be influenced by a foreign source?” The research objects of this study’s inquiry vary, from judges and prosecutors to the United States Supreme Court. The policymakers behaviour constitutes the dependant variable under observation in the study, while various mechanisms such as extradition policy and international litigation are treated as independent variables acting to manipulate policy outcomes. The research questions, which have been deliberately framed to capture the most central instruments of death penalty policymaking, can be directly stated thus,

Can international forces impact Supreme Court Policy regarding the Death Penalty?

Can international forces impact Trial Court Judges policies regarding the Death Penalty?

Can international forces impact Public Opinion regarding the Death Penalty?

Can international forces impact Bureaucratic Policy regarding the Death Penalty?

Can international forces imposed by Foreign Consul impact policies regarding the Death Penalty?

Can international forces imposed by Extradition Treaties impact policies regarding the Death Penalty?

Can international forces imposed by International Litigation impact policies regarding the Death Penalty?

Each of the objects studied in their respective chapters, as well as each of the mechanisms, are inextricably intertwined in the political and judicial system which enacts, adjudicates, and ultimately implements death penalty policy. As complex organizations, these dependant variables are infinitely complicated and their behavioural patterns subject to multiple independent variable impacts. This case study will focus on individual cases that allow for an in depth examination of events and draw inferential causal connections using a number of innovative techniques. The mechanisms of policy change, or the independent variables, will additionally be explored using a case study analysis and intervening causal factors will be carefully examined by using within case analysis to plot interrelationships among event observations.

My central hypothesis for each object and variable is that U.S. policymakers can be influenced by the actions of foreign actors. The validity of this hypothesis will be rigorously tested by both within-case analysis which examines different elements of the case for intervening causes, and will be supplemented by a comparative cross-case analysis when appropriate.

3.12 How the Model Will be Tested

My hypotheses will be tested using a case study approach, that utilizes a process tracing technique to assess causation, by which the validity of the results are determined by using an elite interview process which refines the accuracy of inferential conclusions. The case study method of analysis consists of an exhaustive examination of a particular case or event which tests explanations which may be extrapolated out to create larger generalizations about systemic behaviour.¹ Each case under evaluation will be thoroughly and extensively dissected, and the

singular event occurrences derived from this process will be used to create observations that will be assimilated into a testable model. Process tracing, a method that is used to trace the linkages between causes and outcomes in individual cases will be employed to examine observations made in a case study analysis, and will aid in refining causal inference.² The process tracing tests are an invaluable instrument in bolstering explanatory hypotheses in qualitative research, and assess causal process observations (CPO's, which are essentially diagnostic pieces of evidence used in the study) by subjecting these observations to vigorous analytical testing within-case to establish causal relationships between observations.³

The validity of the inferential assertions drawn from the process tracing tests will be further tested by an elite interview process, a form of non probability sampling that uses the interviewee data taken from elite actors within the system who have participated in the death penalty process, and are essential sources that can provide detailed insights with unparalleled acumen regarding the validity of the hypothesis, and can confirm or reject these hypotheses based upon firsthand knowledge. Elite interviews is an innovative tool, not widely used that allows the researcher to corroborate data culled from other sources, establish policymakers attitudes and make deeper inferences about broader population decision-making , and validate theoretical assumptions incorporated into the research model.⁴ The elite interviewing compiled for this dissertation consists of accounts taken from both Texas judges and attorneys who have handled capital cases that involved foreign actors from Mexico. The data taken from the elite interviews will serve as complement and validation, or rejection and rejoinder to my individual hypotheses, a novel approach to death penalty analysis.

No model of hypothesis testing has been devised in the social sciences, either quantitative or qualitative, which can claim to produce irrefutably conclusive results upon its application. With

the advent of statistical software which made compiling and analysing raw empirical data much easier, quantitative analysis in the social sciences has become de rigueur, and case study analysis has been largely relegated to minority status in most journals and is seen as a less rigorous contribution to academic disciplines such as political science, economics and sociology, with case study articles in social science journals plummeting from 70% in the 1960's to 10% by the 1970's.⁵ However, case study analysis, according to George, is making resurgence in research popularity due to some improvements in codifying techniques to ensure uniformity and allow for more reproducible results, an acknowledgment of case study limitations, and new innovative methodologies that strengthen case studies by integrating certain empirical evidence to bolster and reaffirm the assertions made and the causal connections established, as well as the model assumptions, such as trace processing and elite interviews.⁶ Many research questions that deserve fuller and more robust treatment, but lack sufficient data to construct a viable dataset for empirical analysis (such as this study) have effectively applied a case study approach to examine issues of vital import to social sciences. To assert that this dissertation will provide categorical answers to its research questions would be an inflation of the ability of the case study model and a tacit denial of its limitations. Instead, this dissertation seeks to establish causal relationships within several important individual cases and to use different methodologies to formulate generalizations that can be applied to larger systems of domestic policymaker actions, and illustrate patterns that are recognizable outside the case study environment.

3.2 Case Selection and Analysis

The cases selected for each chapter have been done so deliberately to achieve a number of aims, namely to ensure that the data provided for each case study conforms to rigorous validity requirements to guarantee model construct validity, internal and external model validity (internal

validity referring to causation between observations, and external validity referring to the models ability to generalize to a larger population set), and model reliability. Case selection criteria will be limited in order to control and confine the model and to promote consistency and accuracy in analysis so that results can be more widely generalized. Case selection limitations will include geographic limits (i.e. Texas and Mexico) subject matter limits (capital punishments) and to ensure model construct validity cases are selected and analysed using assessment devices such as trace processing and elite interviews, as these methods are most suitable to the analysis and ensure internal validity of the research model. The study uses a number of data culled from diverse sources such as judicial opinion, interviews, archival documents, press reports and public records that aggregate multiple forms of diagnostic evidence to establish a causal chain in the policy process. Techniques such as cross-case or comparative-case analysis and within-case analysis will provide strong external validity for the studies research model by establishing correlative parallels between similar cases.

The foregoing technique of case study and its concomitant process of data collection and assimilation will be applied to cases in which my hypothesis will be tested to examine how policymakers respond to forms of pressure. Each case, and the corresponding rationale for its inclusion in the study, is outlined below.

Judges

The case I have selected to examine whether trial court judges in Texas can act as policymakers in presiding over capital punishment cases is Texas v John Green.⁷ Green was charged in the killing of a Vietnamese immigrant in Texas that occurred during a home robbery. Judge Kevin Fine, a Texas District Court Judge, during a pre-trial hearing granted a motion finding the death

penalty in Texas unconstitutional on the grounds that it violated the 8th Amendment prohibition on cruel and unusual punishment. This case was selected for examination because it is highly unusual for a lower court in Texas to blatantly flout established precedent created by Texas appellate courts, which have consistently found the death penalty to be in full comportment to the Constitution. This case will serve as a novel approach to how a judge responds to precedent, and attempts to create a holding that essentially generates new policy.

Public Opinion

The case I have selected to examine whether public opinion can impact death penalty policy is Texas v Gary Graham, who was convicted of murdering a man during a grocery store robbery while on a crime spree in Houston Texas in 1981. The identification of Graham by a witness was challenged as not credible or trustworthy and ultimately attracted the attention of Amnesty International (represented by Bianca Jagger, a outspoken human rights advocate), who vigorously advocated for Graham's retrial by calling attention to his case in local media, holding numerous press conferences in order to sway public opinion and put pressure on local and state politicians. I have selected this case because it demonstrates a direct correlation between international organizations public efforts and the media, which can be viewed through the lens of shifting public opinion regarding Graham's perceived guilt.

Bureaus

The case selected for case study analysis concerning the question of whether bureau behaviour can be impacted by foreign intervention is the case of Texas v Javier Medina.⁸ Medina was convicted of killing an undercover narcotics officer during an arrest for drug trafficking. Medina was denied his rights to consular notification under the Vienna Convention and subsequently

sentenced to death. This case incited considerable outrage in Mexico, which rallied the vehement support of eleven South and Central American nations to protest through diplomatic channels, namely through the U.S. Department of State. The U.S. State Department (a federal bureau) advocated on Medina's behalf to the Texas Board of Pardons and Parole (a state bureau) suggesting that the Board recommend clemency to the Governor (at that time George W. Bush). This case was selected because it illustrates bureaucratic policy involvement by two separate bureaus, which ultimately come into conflict.

Foreign Consul

The case selected for analysis of foreign consul intervention in the pre-trial and trial phase of Mexican nationals charged with capital offences is *Texas v Ricardo Guerra*.⁹ In July of 1982 Guerra was charged with murder by Texas law enforcement agents for the slaying of a fellow police officer in Houston, Texas. Guerra was never advised of his rights to consular contact under the Vienna Convention, and the police engaged in flagrant violations of criminal procedure. The Mexican Consulate learned of Guerra's detention in Texas and challenged his conviction on the grounds that his interrogation and witness intimidation was violative of procedural rules. Mexico's involvement ultimately led to a full exoneration. This case is selected as illustrative of the impact of timely consular involvement to preserve the rights of foreign nationals from Mexico.

Extradition

The case selected to consider the question of whether foreign extradition policies can impact U.S. death penalty cases is *Texas v Ernesto Reyes*.¹⁰ In September of 2007 Texas police identified Reyes as the prime suspect in the killing of a nineteen year old college student in

Carrollton, Texas, and led to a national search for Reyes' whereabouts. In October of that year, Reyes was taken into custody in Mexico by a jointly coordinated effort by Mexican and Texas law enforcement agents, and his extradition process was begun. In negotiations with prosecutors, Mexico insisted that Reyes would only be extradited if capital punishment was removed as a possible sentence. The Texas prosecution relented, and it was agreed between the parties that the death penalty be disallowed, and subsequently Reyes was surrendered to Texas authorities and transported to the United States. This case has been selected not because of its novelty, but because it illustrates a commonly accepted practice among both Mexican and American actors.

International Litigation

The case selected for addressing the question of whether international litigation can result in shifting death penalty policy is Texas v Juan Garza.¹¹ Garza was the son of Mexican immigrants, an owner of a thriving construction company in Brownsville Texas, and a highly successful smuggler of marijuana. In 1990 Garza suspected that several associates were police informants and ordered them executed by his subordinates. In 1992 Garza was arrested and charged with three counts of murder, drug distribution and money laundering and subsequently sentenced to death. Post conviction appeals by Garza included petitioning the Inter American Commission on Human Rights, arguing that his death penalty sentence was in violation of Articles of the American Declaration related to Rights to Life, Due Process and Fair Trial. The Commission agreed, and ordered a stay of his execution. President Bill Clinton responded by granting a six month reprieve. This case is particularly illuminating in that it involves many different government actors ranging from trial and appellate courts, international judicial bodies, and the President. Submitting this case to an in depth case study analysis would display the

multifaceted environment death penalty policy evolves within, and highlight the linkages between different strata of government.

3.3 Data Collection and Analysis

3.31 Sources of Data

The different sources of data fall under several distinct classifications, and each is used to serve a specific purpose.¹² Certain data categories, such as archival documents (either court oriented documents such as briefs and motions, or law enforcement documents such as arrest reports or interviews with arrestee's, or bureaucratic documents such as State Department cables or official letters sent to agencies or foreign governments) will be used to create a deep historical context to the event, and capture the complexion of circumstances from multiple perspectives. Other forms of data sources such as formal judicial opinions (from both a domestic forum and international courts) will render legal policy decisions and outcomes that will generally constitute end-stage dependent variables, used as plot positions that other independent variable observations will be linked to as data points along a chain of event causation. These causal linkages will be further reinforced by additional data in the form of press reports and external interviews with participants in the process, lending further historical structure and strengthening the model's overall internal validity. To add an increased level of complex analysis, elite interview data will be collected and applied to the model to reaffirm the causal relationship between sequential events that ultimately influence the positions of the dependant variables, and eliminate the sufficiency and necessity of potential intervening independent variables. Finally, as pertains primarily to the chapter on public opinion, simple statistical data, such as death penalty favourability rates will be used to indicate shifts in popular opinion and perceptions of guilt.

3.32 Collection of Data

Data collection for this study has been thorough with data needing to be carefully culled, compiled and assembled according to its chronological position in the event timeline to ensure its proper impact was accurately weighed and assessed relative to other events in the causal chain. Some historical data such as witness or suspect interviews with the press were collected largely from online sources. Other historical documents such as police reports, legal briefs and rulings on motions before the court were more difficult to uncover and were obtained through repeated requests by email of officials, attorneys, law enforcement officers or judicial clerks. The data compiled is unfortunately not completely exhaustive in its account, in that certain persons for purposes of confidentiality would adamantly oppose requests for disclosure of documents. This was especially true concerning some cases which are still pending judicial review and evidence has not been made public, or is legally protected work product or covered under attorney client privilege. (e.g. interviews between attorney and client that are held private or prosecution trial preparation notes, either of which could be incredibly edifying as to lending insight into the process of policy negotiation or formation, but may also compromise case outcomes if divulged).

Data collected from elite interviews was taken from research conducted and questions asked directly of policymakers and participants in the event by the author, and are subject to the same limitations of access discussed above. Statistical data regarding the death penalty polls and perceptions of guilt are drawn from such sources as the Gallup Poll, the U.S. Department of Justice, and the Texas Bureau of Crime.

3.33 Model Analysis

The case study model analysis will occur in contextual and analytical stages, which will be reiterated in each chapter and will assume the following structure:

Stage 1 Policy Context

Stage 2 Individual Case Historical Context

Stage 3 Trace Process Analysis and Creation of Inferential Assertions

Stage 4 Elite Interview Applications

Stage 5 Cross Case Comparative Analyses

Stage 1

This stage will provide an in depth policy analysis for the particular chapter's dependant variable. This will create a broad policy-oriented intellectual environment in which to place the individual case into proper policy perspective. It will include discussions of all relevant policy positions and considerations that create a context within which each actor in the case study event will operate, and will create a rich subtext to lend greater meaning to the actor's behaviour.

Stage 2

The individual case historical stage will weave together the historical events using a vast array of documentation to create a complex tapestry of circumstantial diagnostic evidence to create multiple causal linkages. This stage will naturally segue from the policy context, providing a real world exemplar with which to apply policy vantage points from different policy makers (e.g. courts, law enforcement, bureau members, government actors, etc.).

Stage 3

The trace process analysis stage will apply an analytical framework to the historical case study events, using a within-case analysis to expose causal relationships between intra-case events, examining intervening processes to determine causal connections and to ultimately test hypothetical relationships. The primary model test for causation will be Colliers Doubly Decisive test which will examine both necessity and sufficiency for the existence of a causal relationship by identifying key observations within the event, creating inferential assumptions regarding their connection, then testing the hypothesis by eliminating other potential intervening variables that could impact the variable under observation.

Stage 4

The elite interview stage will consist of applying the data compiled from elite testimony regarding their perception of the events and the policy. This stage will either affirm or reject the model analysis and consequently strengthen or refute the validity of the inference. By imposing the insights of actors who have direct knowledge of the events and a level of expertise concerning the historical policy considerations brought to bear on the case under examination, as well as the policy implications created by the case outcome, the inclusion of elite interviews further enhances the credibility of the case study analysis.

Stage 5

The cross case examination stage will involve a further layer of complex analysis by conducting a comparative study of companion cases to assess patterned similarities among cases with the same independent variables, and looking at how those variables react under the same pressure in a virtually identical policy and contextual environment.

Each stage is designed to be progressively more intensive in analysis, and provide a tiered system of increased validity.

3.34 Limitations of the Data

There are certain limitations regarding case study data, and the ramifications of the observational deficiencies are predicated upon its usage and the inferences drawn from the respective source.

Historical data, which in this case includes legal briefs, press interviews of witnesses and participants to the event, police reports, court documents, can be flawed in that the recordings are invariably documented by persons whose accounts and statements may be colored by prejudice or skewed by personal perspectives. Controlling for this type of data limitation is impossible, but can also be a beneficial aspect to the study in that varying perspectives when combined will balance the account and add a substantive element to the collective narrative, providing more compelling detail to the analysis.

Limitations in data regarding the legal opinions also suffer the same inherent bias. The false premise that the law is applied by judges impartially and without the intrusion of personal preference does not account for the pervasive nature of the human impulse to encroach upon all human judgments, even those purported to be entirely dispassionate and uncompromised by arbitrary and capricious impulse. However, as with historical data which is impossible to wholly eliminate the existence of any bias, preferential behaviours of actors should be embraced as indicators of possible independent or intervening variables, not discounted as outliers or simple model flaws which that are impossible to extricate. These behaviours will be identified as observations, treated as diagnostic evidence, and analysed as possible links in the event's causal chain.

Elite interview data presents the same challenges in terms of bias but offers the same rewards in terms of contextual data and will be treated accordingly. Statistical data, used sparingly in this study, has the traditional quantitative issues of sampling error, question bias and the possibility of statistical manipulation. Studies used will be discerned based upon the validity of the methodological approach, and only those studies deemed sufficiently rigorous will be relied upon.

3.4 Model Weaknesses

3.41 Case Study Weaknesses

Many perceived case study weaknesses are made in comparison to more commonly used empirically oriented quantitative studies that have large robust datasets that give a researcher the ability to mine for obscure causal relationships among thousands of observations, thereby increasing the statistical variance and theoretically creating models which are more generalizable to larger population sets.¹³ However, case study analysis focuses instead on identifying sequential relationships within an event using within-case and cross-case analysis to extract observations and construct causal linkages to determine the impact on dependant variables and test certain hypothesis, and eschews using data across different cases to draw correlations between events. In sum, it is simply a different lens through which data can be viewed. It does, however, have certain weaknesses as do all analytical methodologies. Namely, the issue of appropriate case selection that minimizes case bias, the case studies inability as a qualitative method to gauge the relative frequency of event occurrence, whether the event in question is representative of a larger phenomenon or is simply an anomalous occurrence, and the inability to estimate the true causal effect of particular variables as they may occur in other cases.

Each of these issues presents a distinct and unique challenge to a researcher undertaking a case study analysis, and any one of these problems alone can cast doubt on the credibility of the model construct, the methods by which the research was conducted, and the reliability of the results. However, no analytical model is without its flaws and the first strength of any model is to unabashedly acknowledge potential weaknesses, and once identified to work to overcome each one systematically or diminish its impact to the study, and finally to duly qualify the results produced.

3.44 Overcoming Model Weaknesses

The largest weakness to overcome in a research model based upon a case study approach is that of selection bias. However, according to Collier selection discernment of cases is more problematic for empirical models, where truncating datasets that have strong relationships with the dependent variable in the study will ultimately skew the results to understate the strength of a correlative relationship.¹⁴ Bias in case study selection would involve a researcher deliberately choosing cases to conform to pre-existing theoretical frameworks, and on which cases are selected solely because of the response of dependent variables to the pressures of proposed independent variables that are consistent with the models projected outcomes.

However, Dion states that this ostensibly biased process of selection should not be arbitrarily discounted as irretrievably prejudicial.¹⁵ He argues that selection based on dependant variable values can be appropriate when using a single case study (as this study does), and that preselecting cases based upon variable response helps identify independent variables that are not necessary or sufficient to achieve a stated outcome. In addition, Dion notes that selective case

study analysis also allows a more uniform approach that isolates independent variables and possible causal links that lead back to the dependant variable.¹⁶

Regarding the issues of case study's inability to ascertain frequencies of occurrence and indications of whether observations are representative of larger phenomenon, this is a widely understood weakness of case study analysis, and certainly could be construed as an impediment to a more robust extrapolation to larger populations. However, a case study's strength in this instance is in its ability to provide a rich, complex analysis of an individual event that could be used as a model to ensure high internal validity through rigorous and intensive scrutiny of individual variables that exist within the model, and sacrifices finite analysis to achieve the more abstract underpinning of the events causal sequence.¹⁷ In conclusion, case study models certainly have limitations and trade-offs, but the overall model validity, both internal and external, and given the limitations of the data in this research, a case study approach a viable model of analysis.

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- ² Collier, David, "Rethinking Social Inquiry: Diverse Tools, Shared Standards," *Littlefield Press*, (2004).
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- ⁴ Tansey, Oisin, "Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling", *Political Science and Politics*, 40 (2007):4.
- ⁵ Bennet, Andrew, "Do we Preach What we Practice? A Survey of Methods in Political Science Journals and Curricula", *Political Science and Politics*, 36 (2003):375.
- ⁶ George, supra note 1, 3-10.
- ⁷ Texas v. Green, 117th Judicial District, Harris County, Texas, Cause No. 1170853
- ⁸ Javier Suarez Medina v State of Texas, 37792-02, Texas court of Criminal Appeals, August 12, (2002).
- ⁹ Guerra v. Collins, 916 F Supp 620, (1995).
- ¹⁰ Reyes v Texas, U.S. 5th Federal Circuit Court of Appeals, No. PD 0972-11, November 2, (2011).
- ¹¹ Garza v Lappin, 121 S. Ct. 2543, (2001).
- ¹² For a robust discussion on data collection in trace process analysis, see David Collier, Understanding process Tracing, *Political Science and Politics* 44 (2011):823-830.
- ¹³ George, supra note 1, 17.
- ¹⁴ Collier, David, "Insights and Pitfalls: Selection Bias in Qualitative Research", *World Politics*, 49 (1996):71.
- ¹⁵ Dion, Douglas, "Evidence and Inference in the Comparative Case Study", *Comparative Politics*, 30 (1998):95-112.
- ¹⁶ Ibid. 95-112.
- ¹⁷ George supra note 1, 18.

Chapter 4

International Influence on U.S. Judicial Policymaking

Stage 1 Policy Context

This chapter considers how international influences can impact judicial policymaking at the lowest judicial level, the criminal trial court in Texas. The case study analysis segment of this chapter will deconstruct and methodically assess all causal factors that contribute to the final policy outcome. However, before the analytical component of the chapter can begin in earnest, it is necessary to conduct a thoughtful and deliberative evaluation of the theoretical policy framework within which judicial decisions are made, to establish a clear contextual perspective by which we can accurately view the motivations that may underpin policy considerations. The policy context segment of this chapter will provide an exhaustive analysis of the different models of trial court policymaking behavior, and discuss the myriad ways the impetus for jurisprudence creation can be influenced.

Judicial Behavior

Judicial behavior among judges residing within different levels of their respective jurisdictional hierarchies has long been the subject of scholarly debate. Models of judicial behavior have been often devised to shed light upon which goals judges strive to fulfill, how judges respond to the pressures and preferences of courts located elsewhere in the hierarchy, and to what extent judges feel free to pursue their own policy preferences unencumbered by either precedent or possible consequences from a higher court. However, some judges would opine that their obligations is to

simply interpret the law, not to make new policies.

Political science scholars who study judicial behavior have explored several different models to explain judicial decision-making, which generally involve the relative level of the court upon which the judge sits, the court's geographic location (or more accurately, which jurisdiction the court resides in), the ideological composition of a jurisdiction, and the applicable precedent and the individual judges' preferences. Each of these models and the criteria which they enumerate will be discussed below. The crux of this segment is how these conflicting interests, at times antithetical, compete and how the different levels in the judicial hierarchy factor into that calculus, and ultimately impact the decisions made at the trial court level in a capital punishment case.

General Models of Intra-Court Decision-Making

When considering judicial behavior, some theorists focus on the judge's goals when creating a model to explain judicial decision-making. Lawrence Baum examined judicial behavior using a goal oriented framework in an attempt to capture an all-encompassing perspective, requiring a "systematic consideration of what people are trying to accomplish and directs attention to the processes that determine their goal orientation".¹ Baum employed a pyramid metaphor to describe the differences among judges goals at various levels of the judicial hierarchy, casting lower court judges as more motivated by goals such as reelection, promotion and public opinion, with higher court judges conversely focused on advancing policy considerations. Baum asserts that for judges to balance the ostensibly competing interests of pursuing legal goals with the pursuit policy preferences, judges within the hierarchy must vote strategically to resolve intra-court issues, voting sincerely only when free of external constraints. Baum sees judges prioritizing their goals on a continuum that essentially aligns with their position within the

hierarchy: as they ascend through the ranks of their jurisdictions judicial ladder, their opportunities to shift their goals to the more policy-oriented spectrum of the continuum increase. This assertion would suggest that trial court judges, when confronting a death penalty case, will heavily weigh the preferences of higher courts, and make policy decisions in accordance to the preferences of those in the higher ranks of the hierarchy. However, as Stead points out, historical judicial precedent is not immutable, and in itself constitutes a form of judicial policy subject to moderate forces of change.²

Other theorists, such as Donald Songer, posit a principal-agent model when examining the vagaries of judicial behavior. Songer and Haire concluded that lower courts, acting as agent for the principal, do follow the dictates of the Supreme Court, finding a shift in appellate court decisions regarding pornography cases, which rippled down from the Supreme Court.³ However, Songer notes that the principal-agent model is more predictive when preferences are closely aligned between courts, or if the issue is of no compelling interest to the appellate judges. Songer perceives the lower courts in the hierarchy as receptive agents, faithfully abiding the ideological guidance of the higher court, but absent a compelling mandate becoming policy entrepreneurs and operating with greater independence. In Texas capital punishment cases however, the law is firmly entrenched in precedent, not allowing much discretion for judicial activism, or as Songer phrases it, judicial entrepreneurship. This theory would make any possible deviation from the firmly established policy norm a profound aberration, and strengthen the probability of an external causal factor, such as international influence, when considering judicial policymaking behaviors.

Specific Models of Judicial Decision-Making

Early in the history of American jurisprudence legal scholars considered the law to be the guiding force behind judicial behavior, and a judge's strict adherence to legal precedent, or the following of the doctrine of stare decisis, became the basis for the legal model of judicial decision-making. The rigid application of "disinterested and objective standards" was what Archibald Cox considered "impartial justice under the law."⁴ By the 1940's, Hermann Pritchett began emphasizing attitudes as the determinative factor in judicial decision-making, and by ranking Supreme Court Justices by political attitude, created an early springboard for the attitudinal model.⁵ This model of judicial decision-making contends that judges flagrantly disregard precedent in order to achieve personal or policy goals, and that judicial behavior is rarely constrained by legal encumbrances. However, scholars such as Walter Murphy have asserted that judges behave strategically, striving to obtain policy preferences by exercising their judicial authority prudently, and by recognizing political or legal impediments and responding to these obstacles accordingly.⁶ Each of these models of judicial decision-making will be considered below, along with a discussion of how judges' goals are contemplated by the model and the empirical evidence scholars have compiled and analyzed to test the efficacy of each model. These models will be drawn upon in the case study analysis that follows the policy segment.

The Legal Model

Although law school professors and some judges continue to extol legal formalism as a sound model with which to examine judicial behavior, few in either the political science or legal community labor under the illusion that judges always strictly adhere to legal precedent, irrespective of any personal preferences they may wish to act upon, leaving the legal model an

antiquated relic of judicial decision-making. Proponents of the legal model have advanced mainly theoretical explanations in support of legal formalism, such as the rigorous training judges undergo in law school, which inculcates the young future jurist with an indelible compulsion to follow well established law, and scrupulously abstain from interposing personal preferences into judicial decisions. However, when any attempt has been made to test the legal model empirically, it has failed to yield positive results. Segal and Spaeth reviewed dissents in seminal cases and found justices who dissented were obstinately clinging to their preferences, refusing to recognize precedent, and continuing to dissent in future cases.⁷ Judges goals under the legal model are to issue rulings that comport with governing precedent, and to dutifully maintain the doctrine of stare decisis. Although a consensus has formed which overwhelmingly refutes the validity of legal formalism as a model of judicial decision-making, scholars do concede that it plays some role in affecting judges behavior. Songer, for instance, has asserted that “precedent, as well as preferences, help shape the judicial policies handed down by the court.”⁸

Attitudinal Model

As opposed to the legal model, which postulates strict obedience to legal precedent, the attitudinal model holds that judges behave according to political or ideological preference, willfully flouting the rules of institutional constraint that purportedly binds them (i.e. disregarding external legal or political restraints). Under the attitudinal model the goals of judicial behavior are directed to achieving desired policy outcomes, and according to Baum, it is tacitly assumed that judges “policy preferences are expressed directly in their votes, without deviating based on strategic consideration.”⁹ The attitudinal models emphasis upon judge’s pursuit of policy goals disrupts the legal models assumption that judges are dispassionate arbiters

of justice, and assigns judges personal and political motivations that would compromise their impartiality. Empirically, the attitudinal model has been widely supported in political science literature, and two primary advocates of the model, Segal and Spaeth, argue that no empirical evidence exists which would suggest that justices are compelled to follow stare decisis, and that justices have been repeatedly found to vote according to their preferences.¹⁰ This finding would suggest that judicial policy change can occur much more rapidly if judges are unencumbered by precedent, and free to allow other personal or political influences to dictate judicial policy. In a sweeping study that analyzed research papers that empirically assessed judicial-making, Pinello's meta-analyses concluded that the studies collectively established a positive association between judicial behavior and ideological preferences, further refuting the legal models assumption of an objective judiciary.¹¹ On balance, political science scholars who have studied judicial behavior have amassed an abundance of data that strongly reinforces the core assumptions of the attitudinal model; judges vote their personal preferences, and ignore precedent when it suits their ends. In Texas trial courts, where judges are confronted with meting out the ultimate penalty, many conflicting interests will compete for dominance, but the case study analysis segment of this chapter will demonstrate that international influence can compel a judge to allow their personal preferences to prevail, and counteract the typically dispositive role judicial precedent can play.

Strategic Model

According to Sheehan, the strategic model of judicial decision-making holds that judges act collectively and strategically to advance their own policy agendas.¹² In this rational-choice model of judicial decision-making, judge's behavior is shaped by the policy choices, but is also

inhibited by external influences, such as public opinion, other branches of government, higher courts, etc. The strategic model perceives judges goals as revolving around policy interests, but responding to peripheral actors who exert pressure on the court, including international entities that can wield considerable force. In strategically reacting to outside influences, the judge can preserve the status quo, and effectively maximize his utility to seize policy opportunities in the future. The strategic model has been tested extensively, and has fared well empirically. Epstein and Knight, in examining conference discussions among Supreme Court Justices, found a significant number of Justices voicing reservations regarding the consequences from other branches of government who may respond to the Courts judgment.¹³ In concluding, Epstein and Knight found that judicial precedent acts as a normative constraint on judicial decision making and that justices have a preferred rule they would like to establish but modify their position to reconcile their preference with existing precedent. This can have a progressive impact on capital cases in Texas by slowly eroding precedent, and creating a gradual realignment with a consensus of policymakers, in effect making early concessions for future judicial policy entrepreneurs.

Factors Influencing Judicial Behavior within the Hierarchy:

Threat of Reversal from Higher Courts, the Dynamics of a Judicial Hierarchy

On considering how judicial hierarchy impacts decision making in the federal court, Kevin Scott examined lower courts reversal rates, and posited that higher courts reverse lower courts to implement strong policy changes. Lower courts according to Scott, are political actors motivated to create policies, but are constrained by the threat of reversal from higher courts.¹⁴ Scott advances four reasons that compel lower court judges to behave in a manner which comports with higher court dictates. First, deference to precedent maximizes judicial economy by reducing

the possibility of reversal and establishes consistent guidelines for future litigants. Secondly, lower court precedent is more clearly defined compared with issues taken up by higher level appellate courts. Thirdly, the higher one ascends in the hierarchy, the less vertical precedent is applicable, making judicial digression much more tenable for an errant judge. And lastly, judges are motivated by the possibility of promotion, and the low rate of reversal is an enviable attribute for a judge to possess. Scott contends that this translates to limited opportunity for lower courts to deviate from high court precedent, and the cost of refusing to adhere to precedent exceedingly prohibitive.

The existence of different decision making environments produced by a judicial hierarchy has a profound impact on the judge's ability to behave according to his or her ideological preferences. The goals of judges will therefore vary, with lower court judges carefully adhering to precedent and constrained by the prospect of reversal, where as Supreme Court justices are seemingly less confined by these pressures and act more in furtherance of political goals and enjoying the freedom to ignore controlling doctrine. The Supreme Court, however, may be inhibited by the possibility of adverse legislative action, taken to correct a seemingly overreaching, or activist, Court. Rational-choice theorists such as Brian Marks espouse a separation of powers approach to Supreme Court in which Justices must defer to legislative majorities or face policy reversals less preferable than what the Court would have achieved through a more tempered adjudication.¹⁵

Strategic Pursuit of Policy Goals, Managing the Threat of Reversal

The threat of reversal from a higher court may in some instances be acceptable, considering the possible gain. Tracy George and Albert Yoon proffer another model of considering the dynamic between federal courts based on a principle-agent paradigm. Most commonly applied to

the Congressional bureaucratic relationship, Yoon's model defines the relationship between Congress and administrative agencies as analogous to the federal judiciaries interconnected hierarchy, and that the Supreme Court formulates doctrine then delegates the implementation of its edicts to lower courts much as Congress does to the EPA, for example.¹⁶ The agent (i.e. the lower courts) may have conflicts with the principle (i.e. the Supreme Court), but can choose to neglect to follow its directives if the concomitant risk is low (reversal unlikely) given the issue (also weighing the small number of cases the Supreme Court decides to hear per term). Weighing the cost of reversal (or other court imposed sanctions such as negative dicta) with the potential gains of creating new policies, the lower courts devise a calculus to determine the likelihood of success in defying the higher court. It could be further posited that the large human stake in death penalty policy outcomes (in a capital case the stakes naturally being extremely high, as a life hangs in the balance), reduces the cost of reversal, making the calculus far more acceptable in terms of the potential loss for the policymaker.

Size and Ideological Composition of Court's Jurisdiction, and Its Impact on Behavior

The primary goals of the lower courts in the judiciary are to maximize the ability to produce sound judicial policies and avoid reversal by higher courts. However, several issues arise when attempting to empirically demonstrate the behavior of appellate court judges, and the faithful application of legal doctrine is more a hopeful assumption of judicial rectitude than demonstrable fact. Scholars have found no quantitative proof that justices are compelled to follow the principle of stare decisis and have struggled to develop any testable hypothesis that would indicate that judges are moved to adhere to the law in their decision-making behavior.

However, several studies at the lower court level suggest that judges modify their behavior to conform to higher courts. These lower court adaptations could be either a positive response to

higher court doctrine affected to minimize the possibility of reversal or lower court acclimation to a shift in higher court ideology. Scott's empirical analysis is essentially an extension of Richard Posner's work, which also considers the implications of the variable reversal rates of the U.S. circuits (the 9th Circuit specifically) by the Supreme Court as indicia of hierarchical deference. Posner found that the size of circuit is a determinative factor (the 9th Circuit, geographically the largest, is reversed most frequently).¹⁷ However, the model of this approach does not account for ideological distance from the Supreme Court (the 9th Circuit being the polar ideological opposite of the Supreme Court) as well as the employment of en banc procedural rules, which putatively results in an elevated rate of reversal (according to public remarks by Justice Scalia). Scott proposes a model that incorporates both legal and ideological criteria when assessing the behavior of circuit court judges. Scott sets forth four primary hypotheses to evaluate judicial behavior: (1) the larger the circuit, the higher the reversal rate; (2) the more judges in a circuit, the higher the reversal rate; (3) the greater the ideological distance between the Supreme Court median and the circuit court median, the higher the reversal rate; and (4) the more ideologically diverse a circuit is, the more reversals it will suffer.¹⁸

The dependent variable Scott uses in his analysis is the reversal rate of each circuit for each Supreme Court term between the years 1980-2002 (using data from Spaeth's 2003 Supreme Court database) for both reversals in part and Supreme Court decisions which vacated a lower court's ruling. The Circuit size variable was not measured geographically, but by the number of judgeships- a more accurate metric considering the many ways to measure a Circuit's size (population, geography, etc.). Finally, the ideologically component of the model was determined by inter-institution preference estimates established by Bailey and Chang, which assigned an ideology score based upon either the appointing Presidents ideology, or based upon the home-

state senator who appointed exercising senatorial courtesy.¹⁹

Scott's results suggest that larger and busier circuits, which are more ideologically distant from the Supreme Court, have their opinions reversed with greater frequency. Scott infers from this result that federal court judges inundated with work residing in larger circuits forgo their policy aspirations, choosing instead to devote themselves to judicial efficacy and the prudent disposition of their dockets, whereas judges less encumbered are more free to pursue policy goals.

Inter-Court Influences on Judicial Behavior

Cross and Tiller undertake an equally revealing, yet more novel, empirical approach to analyzing the judicial behavior of federal court judges. Cross examines the existence of "whistleblowers" on a lower appellate federal bench (or more simply put, judges who languish in a minority but who threaten to expose, or blow the whistle, on the majority's neglect of precedent in order to gain leverage).²⁰ Cross opines that judges in the majority will abandon pursuit of ideological preferences if threatened with exposure by a dissenting minority of the court. Cross limits the inquiry to cases involving Chevron v Natural Resources Defense Council, a case in which the Supreme Court carved out the Chevron doctrine.²¹ This doctrine essentially ordered lower federal courts to grant greater deference to an administrative agency's (e.g. the EPA) interpretation of a statute. Application of the Chevron doctrine involves a two step process. The agency's interpretation of the statute must be consistent with its plain meaning and its effect must be reasonable. This rather ambiguous test created a loop hole with which the court could choose to adhere to the legal model and defer to the agency's interpretation or disregard Supreme Court precedence and rule according to preference. Cross tracked opinions, which invoked the Chevron doctrine from the D.C. court of appeals from years 1991-1995, assigned

political preferences for each judge based upon their presidential appointment, and examined the convergence between policy preference of the court's majority and the judicial outcome (i.e. panel only follows Chevron when the outcome coincides with majority preferences). Cross found that minority judges, when supported by incontrovertible legal precedent, can successfully frustrate the preferences of the majority by threatening to expose to a higher court their failure to defer to the Chevron doctrine. This is analogous to death penalty case law in Texas where lower court judges, who view the implementation of capital punishment as *prima facie* unconstitutional, attempt to "blow the whistle" on a higher court that they view as complicit in disregarding the precepts of the Constitution relating to procedural safeguards. These attempts, as discussed in the case study segment, have yet to elicit concessions from higher courts in Texas, but indicate willingness by trial court judges to challenge higher court edicts, and create precedential policy in the process.

On balance, lower courts are confined by precedent and the fear of reversal, and are mainly motivated by avoiding the cost of violating the rules established by the higher courts. However, opportunities do exist to advance a judge's preferences by defying precedent and creating judicial policies which flout established doctrine. These opportunities are narrowly bound, and the consequences of refusing to conform can be dire. Lower court judges deferential behavior can also be positively reinforced by promotion to higher court appointments, and the incentive to earn a reputation as an efficient jurist, whose judicial dispositions remain unchallenged by the Supreme Court.

Policy Context Conclusion

Within the judicial hierarchy, a judge's behavior is constrained by pressures that generally originate from above, and the ability to adjudicate disputes based upon ideological preferences

becomes more difficult depending on the judges relative position in the hierarchical order. Lower court judges are influenced by the possibility of future reversal by higher courts, and are inclined to follow precedent to protect their reputations as consistent jurists. Other variables, such as the size and business of the jurisdiction can also impact a judges deferential behavior. Higher court judges are less constrained by judicial precedent, but their behavior is confined by other factors, mainly the attitudes and interests of other members of the ruling coalition. Judges goals of crafting a legacy of enduring judicial policy is tempered by the prospect of coalition retaliation. On balance, no judge is free to behave in a way solely consistent with her own interests, and is accountable to many other actors within the hierarchy.

Stage Two, Individual Case History

On June 16th, 2008 Huong Thien Nguyen, 34, and her sister were robbed at gunpoint while returning to their home in the Bellaire Gardens neighborhood in the southeast part of Houston, Texas.²² It is alleged that John Edward Green, 23, approached the women, demanding money, then shot them both, killing Nguyen and critically wounding her sister. The evidence upon which the subsequent arrest of Green was based consisted of latent prints found at the scene, eyewitness identification of Green as the perpetrator, and an informant who claimed that Green confessed to the crime during his post-arrest incarceration. On March 5th, 2010, during a routine pretrial hearing on a motion filed by Green's defense attorneys, Richard Burr, Bob Loper and Casey Kiernan, which challenged the Constitutionality of procedural rules that implement the death penalty in Texas, District Court Judge Kevin Fine granted the motion, saying from the bench "It's safe to assume we execute innocent people."²³ In the defense motion Burr argues that "the system that determines who should die in Texas is truly broken."²⁴ Judge Fine concurred with the

defenses assessment, and concluded that the procedural rules that govern the imposition of capital punishment in Texas violated the 8th and 14th Amendments of the U.S. Constitution, namely the provisions that prohibit cruel and unusual punishment.

The response to Judge Fine's ruling was swift and unequivocal. Harris County Texas District Attorney, Pat Lycos, who oversees all prosecutorial case management in the Houston jurisdiction, issued an immediate statement saying "words are inadequate to describe the office's disappointment and dismay with this ruling," and "we respectfully but vigorously disagree with the trial judge's ruling as it has no basis in law or fact."²⁵ The Texas Attorney General, responsible for representing the state in all legal matters both civil and criminal, weighed in as well calling Judge Fine's ruling in Green's case "an act of unabashed judicial activism," and pledged to provide Lycos with all the resources necessary to appeal the decision to a higher court.²⁶ The following day, March 6th 2010, Judge Fine, in response to an outpouring of opposition generated by proponents of capital punishment, issued a clarification of his ruling.²⁷ He asserted that his ruling on the Green motion did not find the death penalty unconstitutional per se, but rather the procedural mechanisms employed to administer capital punishment sentences (in particular Art. 37.071 of the Texas Code of Criminal Procedure which addresses Texas death penalty trials). However, Harris County District Attorney (HCDA) Bill Exley noted that if the procedures are unconstitutional, by logical extension the death penalty itself cannot be used as a permissible punishment, in that its very performance is unconstitutional.²⁸

Judge Fine ordered that an evidentiary hearing be scheduled for December 6th, 2010 to argue the Constitutionality of the procedural guidelines set out by the Texas Criminal Code. HCDA

objected to the hearing on the grounds that the Constitutionality of the death penalty had been firmly established by both state and federal jurisprudence, and that Green's legal challenge lacked standing and was premature in that he had not yet been sentenced to death. Judge Fine dismissed the argument inveighed by the HCDA, and the evidentiary hearing on the Constitutionality of the death penalty commenced on December 6th, and lasted two days. Defense counsel proffered testimony from many illustrious law professors and legal experts who assailed the procedural flaws in the Texas Criminal Code (TCC) that they concluded led to wrongful convictions and most likely innocent persons being executed.²⁹ HCDA attorneys were ordered by Lycos to "stand mute" in opposition to the hearing and to respond to questions by the court with "no comment". Lycos issued a writ of mandamus to the Texas Appeals Court to stop the hearing, which the court eventually did on December 7, finding that Judge Fine exceeded his authority under Texas law and ordering him to withdraw his earlier ruling on Green's motion.³⁰

Stage 3 Trace Process Analysis

After a recounting of the facts of the Green case, the third stage of the case analysis involves constructing an analytical model based on trace processing, to ascertain the impact of all variables under examination, and to allow for analysis of any intervening variables that may present any influential pressure on the dependant variable under scrutiny. In the Green case, in which this chapter seeks to measure the ability of a judge to create death penalty policy from the bench, the event's dependant variable will be his ruling on the motion declaring the death penalty in Texas unconstitutional.

Judge Fine's ruling was inconsistent with higher court precedent, and arguably manufactured new policy, albeit a weak precedent. This action may have been fomented by a number of factors, and this chapter will enumerate the possible hypothetical variables that could explain Judge Fine's behavior, and eliminate those factors which the analysis disproves. Causal process observations (CPO) will then be amassed (drawn from statements, legal documents, etc.), categorized appropriately and then applied to each respective variable to create inferences which will establish causal relationships between variables, and form connections between the judge's ruling and the possible causes.

Of all the variables this dissertation considers when studying the impacts on judicial behavior (and in particular Judge Fine's ruling), several can be summarily eliminated due to a lack of relevancy. As Green is a U.S. citizen, extradition and foreign consul intervention can be quickly dismissed as not germane to this particular case. Public opinion and international litigation can still be considered as potential variable candidates, as well as personal policy preferences as an intervening variable (which would indicate that the policy pronouncement issued out of personal conviction, not as a product of purely external influence). However, this does not wholly negate the possibility that another variable ineffably insinuated itself into his thought process in deliberating new policy, but that it cannot be firmly established. Therefore, the three independent variables this analysis will examine will be international litigation, public opinion, or personal preferences. Thus forming the following falsifiable hypotheses:

Hypothesis 1 Fines ruling was not the result of international litigation

Hypothesis 2 Fines ruling was not the result of public opinion

Hypothesis 3 Fines ruling was not the result of personal preferences

Hypothesis 1 Judge Fine's ruling on Green's Motion Was Not Influenced by International Litigation

After an exhaustive review of all court documents (briefs, motions, memoranda), interviews with participants and records of proceedings and press statements, as well as conversations with participants documented by this researcher (attorney and expert witnesses who testified during Greens evidentiary hearing) no arguments were ever made by defense counsel, or raised by the state (HCDA or Judge Fine) that would suggest that issues of international law impacted Judge Fine's ruling.³¹ During the elite interview stage of the research process, Judge Fine declined to comment on his rationale for the ruling, leaving scant evidence to either support or refute the hypothesis. However, absent any evidence to the contrary, it must ultimately be concluded that no evidence exists that would demonstrate the hypothesis that international litigation played a factor in Judge Fine's decision to be false, thus eliminating this possibility as logically inconclusive.

Hypothesis 2 Judge Fine's ruling on Green's motion was not influenced by Public Opinion.

To establish that Judge Fine's ruling on Greens motion to find the death penalty in Texas unconstitutional was motivated by a need to respond to public opinion, clear statements would need to be introduced that directly address public concern for the legality of capital punishment.

Fine, as we understand from the policy segment in the earlier part of this chapter, was naturally predisposed to be receptive to public opinion, in that he was elected to the bench just two years prior to this case, and must run for re-election again in 2012. His judicial district is heavily Democratic-leaning (Fine was elected to his office in a 2008 Democrat electoral sweep), a political party that is more opposed to the death penalty than their Republican counterparts.³² According to the strategic model of judicial decision-making discussed *infra*, Fine's ruling could be seen as a calculated policy choice that defies prevailing judicial convention, but designed as an alluring appeal to a political constituency whose favor Fine would need to curry for future electoral support. This CPO creates a contextual inference that Fine may be susceptible to public opinion influence. In a statement made from the bench, Fine said "Are you willing to have your brother, your father, your mother be the sacrificial lamb, to be the innocent person executed so that we can have a death penalty so that we can execute those who are deserving of the death penalty? I don't think society's mindset is that way now."³³ This statement is ostensibly an allusion to declining public support to the death penalty, which Fine's cites in an attempt to bolster justification for his ruling.

An additional CPO that further supports the contention that Fine is amenable to public opinion influence is his response to both public outcry and the swift condemnation in the press by his own political party, the support of both being necessary for a successful bid for reelection. Texas Democratic Party chairman Boyd Ritchie announced in a press release that "This decision applies specifically to this particular case" and "Democrats believe that individuals who commit violent crimes and are found guilty in a fair trial should be punished harshly."³⁴ After swift and unrelenting pressure was brought to bear on Fine in public by the citizens of his district, victims

groups, his own political party and the state of Texas itself, Judge Fine revised his initial ruling and issued a clarification.³⁵ This clarification is the second CPO that would satisfy the Doubly Decisive test and create the presumption that public opinion was a decisive factor in influencing Judge Fine's behavior in the Green case.

Under the test, a refutation of a potential counter or intervening variable is required to further solidify the inferential assumption, and falsify the hypothesis. One glaringly obvious variable that can be used to quickly dispatch the assertion that Fine acted in accordance to some other influence, would be the variable of following precedent. Clearly Judge Fine acted well beyond the judicial purview the law endows, and not only did Judge Fine neglect to follow precedent, he purposefully attempted to create his own. This final refutation of a possible countervailing variable completes the Doubly Decisive test. The hypothesis that Judge Fine did not allow public opinion to influence his decision in the Green case is proven false.

Hypothetical 3 Judge Fine's Ruling in the Green case was not based on Personal Preferences.

As discussed in the earlier policy statement, a judge's behavior in adjudicating legal disputes and creating judicial policy by setting precedent can be influenced by many different factors. Following their personal preferences by selective adherence to precedent has been an intervening variable that was addressed in the earlier policy context segment. While it may be difficult to discern when personal preferences are outcome dispositive in a particular case and how much influence preferences has among other factors (such as public opinion), in the present case we can examine Fines statements made both orally from the bench and in his written opinion, to

deduce the presence of personal preference for a particular policy. As trial judges are clearly constrained in their behavior by the obligatory nature of following the legal doctrine of *stare decisis* (which holds that widely accepted precedent must be followed), any deviation from that rigid stricture must alone create CPO's that indicates a possibility that the digression is related to the policymakers assigning superiority to his personal preferences.

To determine whether Fine was discarding precedent to promote preferential policies in granting Green's motion challenging the constitutionality of the death penalty, we can examine statements made by Fine and other participants in the event which all comprise valuable CPO's and develop a causal connection between those pieces of evidence and the dependant variable.

In a statement from the bench, evaluating the personal preference consequences of the death penalty, Fine stated that "based on the moratorium in Illinois... we have executed innocent people".³⁶ In a judicial proceeding strictly governed by applicable procedural rules and valid precedent, invoking authority from an outside jurisdiction (when clear controlling authority exists in abundance within your own jurisdiction) and studies conducted by independent nonprofit organizations as sound authority upon which to base a ruling, was called by the Texas Attorney General as "judicial activism" which overturns "long-standing U.S. Supreme Court precedent" by issuing an "improperly granted" motion on Green's behalf.³⁷ On balance, these statements create the jarring presumption that Fine's ruling was blatantly unendorsed by any colleagues and unsupported by any legal basis in fact or law. His tenuous arguments predicated on legally unpersuasive authority only create a thinly veiled justification for Fine's acting upon his personal policy preferences.

It was further recognized as an attempt to create new policy by HCDA Pat Lykos who said that Judge Fine's courtroom was "not the venue for speculative oratory... Verdicts are based on law and evidence."³⁸ She further remarked that "the "people through their elected representatives make the decisions " regarding the death penalty, not Judge Fine, implying that capital punishment is a legislative issue not to be challenged by the courts.³⁹ The Texas Court of Criminal Appeals went even further when it held that Fine was "acting beyond the scope of his lawful authority" by conducting a hearing to entertain challenges to the constitutionality of the death penalty.⁴⁰ Taken together (and in tandem with the elite interview statements below which offer further corroboration) of the CPO's create strong inferential evidence that Fine openly disregarded precedent, which was plentiful in Texas, and followed his personal preferences when arriving at this decision. The trace process analysis proves the hypothesis that Judge Fine was not influenced by personal preferences to be false.

While it seems clear that Fine's actions were also in part influenced by public opinion, which his policy pronouncements shift in relation to both indicates that a precarious balance exists by which he issues rulings premised upon myriad external factors. In referring back to the policy context segment, Fine has employed both attitudinal and strategic models of policy decision-making in rationalizing the inclusion of personal preferences and masking them with a light veneer of precedential powers, but also challenging the established authority with a strategically tactical approach to burnish his political party credentials in anticipation of a reelection bid.

Stage 4 Elite Interviews

International Litigation

Elite interviews with those participants to the event will aid in corroborating statements made by other participants, provide background information invaluable in placing the statements into proper context, and give insight into the motivation of those who were directly involved in the events unfolding. The interviews also confirm or refute suppositions made by the hypothetical model, assess the strength of inferences and the causal relationships between variables, or weaken assumptions about causal connections.

Aside from the lack of mention in the extant literature and court documentation of the influence of international litigation as a factor in Judge Fine's ruling, the elite interviews further substantiate the complete absence of foreign authority, reference to foreign judicial bodies, or any customary international laws that might provide some persuasive basis upon which to render a ruling. When Richard Burr, defense attorney for Green, was asked if any foreign sources at all had been cited, he simply stated "no, there were not-sorry."⁴¹ Richard Dieter, Director of the Death Penalty Information Center, and an expert witness called to testify before Judge Fine during Green's evidentiary hearing, responded by saying "I'm pretty sure that I didn't make reference to the impact of foreign jurisprudence in my testimony... As I'm sure you're aware, the testimony was cut off after about two days, so most of the prospective witnesses did not get to testify. .. I didn't see any references to foreign influences" in the defenses motion.⁴² Finally,

Sandra Guerra Thompson, Professor of Law and the University of Houston School of Law, who also testified as an expert witness at the Green hearing, stated that no international sources were cited by her during the testimony.⁴³ Therefore, the elite interviews conclusively establish that the first hypothetical is highly unlikely in this case, based on the evidence available.

Public Opinion

Although Judge Fine himself declined to be interviewed for this chapter to state his reasoning and rationale for granting Green's motion, and ordering the evidentiary hearing, other participants in the process made clear that much of the evidence presented to the court in the form of briefs or hearing testimony focused on innocence (an issue widely reported on, and argued by many to have contributed to the decline in popularity of the death penalty as an appropriate punishment). Burr points to the fact that issues of innocence and wrongful convictions that are cited in defense counsel's brief, which prevailed upon Judge Fine's judgment, are widely reported in the press and have eroded support for capital punishment. The studies cited are referenced by Fine during his hearing when he states that the sacrifice of innocent lives in favor of retaining the death penalty is not what the public wants, saying of the public "I don't think societies mindset is that way now." By invoking the will of the public, as he perceives it, Fine presents a tacit admission of the influence of public opinion on his decision, as opposed to following the black letter of the law and abiding precedent. Richard Dieter says his testimony was "focused on the issue of innocence," a theme Fine reiterated in his statements from the bench and largely reflected in public opinion sentiments on the ineffectiveness of the death penalty.⁴⁴ The elite interviews confirm the hypothesis, and suggest that Fine's ruling was

motivated by a need to appease public opinion concerns about the death penalty.

Personal Preferences

The elite interviews addressed Fine's propensity to act outside of his designated scope of authority, and in effect craft new policy and law. Brian Wice, a criminal defense attorney who worked with Fine several years before his ruling in Green's case said of Fine "you couldn't find a nicer guy, or someone who cares more deeply about what he does."⁴⁵ Wice said that he'd been "told that he finds the sentencing part of his job the most distasteful," and that "if you said to me who is the most likely among them to find the death penalty unconstitutional, I'm thinking I would have to tell you it was Kevin Fine."⁴⁶ Wice's statements bolster the inferential assertion that Fine is prone to inject personal preferences into his decision-making regarding the death penalty, and adjudicate disputes based not always on the law, but visceral reactions to judicial circumstance. When asked about Fine's knowledge that his ruling would ultimately not stand, and would most likely be repealed by a higher court, Sandra Guerra Thompson said that Fine was "bound by precedent. There are laws on the books which have ruled on this type of question."⁴⁷ As to why Fine choose to discard precedent and grant a motion most certainly facing reversal Thompson opined that judges like Fine "if they feel strongly enough, sometimes they will grant a motion like this to buck the system, just to stir the waters."⁴⁸ The elite interviews confirm the inferential assumption that Fine was likely to act in creating new policy based upon personal preferences.

Stage 5 Comparative Cross Case Analysis

The Green case was selected because it is the singular instance of record in which a Texas trial court judge displayed a flagrant refusal to recognize higher court precedent in finding the death penalty unconstitutional in an attempt to create new capital punishment policy. However, after extensive research it was discovered that no evidence exists that would suggest the policy decision was influenced by any foreign (not to mention Mexican) action or jurisprudence. The Green case does illustrate the willingness of certain members of the judiciary in Texas to engage in new policy creation through judicial activism, but is unsuccessful in tying that activism to foreign sources of coercion or authority.

However, a comparative cross case analysis can show that under similar circumstances trial court judges in other jurisdictions that have adjudicated cases that involve the death penalty and have in fact applied foreign treaties and conventions to affect the trial outcome through parallel rulings on motions in pretrial hearings under fact similar circumstances comparable to the Green case.

The Reyes Case

On August 17th, 1998, David Reyes, a Guatemalan national in the state of Delaware, U.S., admitted while being detained by New York law enforcement officers to the May 3rd, 1998 shooting death of Alejandro Villalobos, but claimed in his confession that he shot in self defense.⁴⁹ After recording his confession, Reyes was then advised of his Miranda rights

(regarding his use of speech constituting evidence and his right to counsel). Reyes was not, however, informed of this right to consular contact, as provided by the Vienna Convention. In a pretrial motion, Reyes Public Defender, Brian Bartley, argued that authorities neglecting to inform Reyes of his rights under international law deprived him of counsel. The trial court judge ruled in Reyes favor and effectively suppressed Reyes confession as being obtained under violation of international law, and removing his confession from evidence at trial. The Delaware judge cited Article 36(2) of the Vienna Convention, which “provides that the laws and regulations of the receiving state must allow full effect to be given to the rights” enumerated under the treaty.⁵⁰ In the courts legal opinion, the Judge wrote that “as a treaty made under the authority of the United States, many courts in the last two decades have recognized the Vienna Convention as the law of the land.”⁵¹ The judge went even further, citing the fundamental principle of *pacta sunt servanda*, “which states that ‘treaties must be observed’, the U.S. has consistently invoked the Vienna convention to protest other nation’s failures to provide Americans with access to consular services.”⁵² In particular the court points to the condemnation of Iran during the hostage crisis, where Iranians refused to allow hostages to confer with consular officials in violation of the Vienna Convention. The judge’s ruling on the motion to suppress Reyes confession was appealed by the prosecution to the Delaware Supreme Court, which declined to overturn the trial courts finding.

The Green and Reyes case present an interesting opportunity for comparative analysis in that they share many similar facts and event patterns, but also some discordant approaches employed by each judge in adjudicating their respective disputes. Points of CPO commonality include both judges operating at the state trial court level, presiding over capital murder cases where the death

penalty is a possible sentence. Both judges are ruling on motions in pretrial hearings that ask the court to consider the admission of evidence based upon the constitutionality of procedural rules. Both judges ultimately grant rulings in favor of the defense, and both rulings were subsequently appealed to a higher court. However, there is a stark departure in approaches, primarily in methodology and the authority cited upon which each judge predicates his judgment.

Judge Fine in Texas choose to grant the motion on Green's behalf and order a new evidentiary hearing based upon some persuasive studies that found the procedural rules in Texas that govern the administration of the death penalty unfair, biased and resulting in wrongful convictions. The authority Judge Fine cited was secondary in nature and not binding on the court. His methods in making certain pronouncements from the bench regarding the flaws of capital punishment policies also suggested a presentiment of the issue inconsistent with the dispassionate, deliberative notion of a judicial proceeding and ostensibly colored his judgment as based solely on personal preference and lacking the element of stare decisis. Judge Fine's noticeable absence of controlling authority, and the ubiquity of legally unfounded assertions of policy failures contributed to the final result; the higher court reversal of his ruling on Green's motion.

The Delaware Judge choose to grant the motion to suppress the defendant's incriminating statement based upon a procedural violation of an international treaty, which certain courts will find to be primary authority which must be duly followed, and others merely secondary authority which must defer to local precedent and procedural rules. The Delaware Judge's opinion was well reasoned, cited appropriate authorities that while legal scholars may debate their applicability, were methodically applied. The prosecutors appeal was not granted, and the trial judge's ruling was allowed to stand.

Conclusion

This chapter began with an extensive policy oriented overview of how judges ascend to the bench, maintain their authority and respond to judicial challenges, and how different factors influence and shape decision making behavior on the bench, and whether judges can exercise latitude and act as policymakers, creating new law through their rulings. Different models of judicial decision-making were addressed in the policy context segment, then applied in the case study analysis to ascertain the motivations judge's operated under, and how those motives were translated into policy actions.

The case study analysis of *Texas v Green*, in which Judge Fine rejected all precedent to the contrary and found the Texas Code of Criminal Procedure unconstitutional, determined through a trace process analysis of critical pieces of CPO evidence that Judge Fine did not explicitly rely upon foreign sources of law, but instead followed both public opinion and his own personal preferences to arrive at his decision. The analysis further established that Judge Fine's ruling was wholly inconsistent with the premise of *stare decisis*, and was an unabashed attempt at judicial activism, and a bold overreach to create new death penalty policy by provoking the institutional forces responsible for implementing capital punishment policy to respond to strenuous allegations of a flawed process. Although his attempt was short lived and ultimately foiled by the Texas court of Appeals, and Fine was defeated in his bid to challenge existing policy by supplanting it with his own proffered policy preferences, he was successful in igniting a national dialogue that could prove prelude to move permanent policy changes.

The cross case analysis, which contrasted the Delaware trial court judge's ruling to Judge Fine's, examined a fact similar case with a dramatically different outcome. In applying international law in the form of the Vienna Convention, and employing sound legal reasoning, the Delaware judge was able to rule, for the first time in U.S. jurisprudence, that a motion to suppress evidence in a capital murder trial involving a foreign defendant can be based on an international treaty. The Delaware judge, in his opinion, issued a resounding affirmation of the applicability of international sources of law to trial level procedures. This decision, unprecedented in the annals of American jurisprudence, created new policy now relied upon by other Delaware courts, and cited as valid precedent.

In its entirety, the case study analysis of the Green case and its Reyes companion strongly suggest that trial court judges in Texas can create new policies regarding death penalty procedural issues if personal preference and public opinion are subordinated as a basis of legal rationale and valid domestic and international precedents are invoked in a logical, well reasoned fashion.

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Chapter 5

Public Opinion, the Death Penalty and International Influence

Stage 1 Policy Context

In recent years technological advancement, primarily in the form of increasingly sophisticated DNA analysis, has shed disturbing light on the fallibilities of the U.S. justice system. The number of convicted murderers exonerated through scientific evidence, which was previously unavailable, suppressed by the state or not amenable to analysis at the time of trial, has cast fresh doubt on the efficacy of the process. This development has fomented a new examination of the certitude required before the ultimate punishment is meted out. The burgeoning number of overturned convictions (since the death penalty was reinstated in 1976 no fewer than 116 people have been freed from death rows nationally) has engendered growing reservations among citizens who are beginning to question the reliability of the entire system, and these concerns are becoming manifest in both legislation and judicial policy.¹ States such as Illinois have declared a moratorium on the death penalty.² Death sentences have dropped 50% over the last ten years, and the number of inmates on death row has been gradually declining over the last several decades.³

This nascent trend in American society reveals that the United States may be teetering on the brink of change, perceiving the risk of errors in capital punishment implementation exceeding the social benefits, and creating a crisis in the administration of death penalty administration. As a public policy dilemma, the possible flaws with capital punishment are manifold, and involve moral, legal and political ramifications. Mistakes in the implementation of death penalty policy can vastly undermine confidence in political decisions related to crime and punishment, challenge

the integrity of the judicial institutions that preside over the implementation of death penalty policies, and impugn the moral credibility with which the public imbues government to make decisions that result in the loss liberty, property or even one's very life. The policy segment of this chapter will examine how the advent of new technologies have exposed the flaws within our judicial system's administration of the death penalty, the public's perception of this new technology and its reconciliation of past injustices with the possibility of future miscarriages, and explore how shifting public opinion about capital punishment has manifested itself, and how this public sentiment can be exploited by foreign actors who seek to manipulate public opinion and thereby alter public policy regarding the implementation of the death penalty.

This policy segment will consider the relationship between the increase in death penalty exonerations (or commutations and pardons) arising out of newly discovered evidence, and the declining support of the death penalty among U.S. citizens (approval rates remain relatively high at roughly 69%, but have been steadily dwindling over the last eight years), and the following case study analysis will examine two cases that explore how international actors can impact domestic death penalty policies by influencing public opinion.⁴ This chapter will proffer demonstrable evidence that indicates that an inverse correlation exists between the increased inclusions of exculpatory evidence, which leads to the exoneration of a wrongly convicted person, and the recent decrease in public confidence in the administration of the death penalty, and how international actors can exploit that information to obtain policy concessions.

Because this chapter concerns itself with a relatively recent developing trend, the extant literature reflects this dearth of coverage and analysis. A seminal work, however, can be found in Dwyer, Neufeld and Schenk, *Actual Innocence*.⁵ Most of the other literature (excluding death

penalty treatises relied upon to build historical context and an overview of capital punishment in the United States) which discusses the advent of DNA exonerations and public opinion are contained in journal articles and periodicals, the most influential of which will be discussed in this policy segment.

Dwyer and Neufeld frame the debate of death penalty reliability by first considering the effect of improper judicial administration in capital cases.⁶ The evidence that the authors submit demonstrates that the courts continuous failure to correct serious trial errors is both substantial and systemic. The authors point to cumbersome laws and procedures that impede the full scrutiny of evidence, discriminate against the wrongly accused, and actively subvert the process to avoid overturning convictions. Dwyer and Neufeld offer compelling anecdotal evidence from cases in which they have personally participated that suggests that innocent men have already been executed in America.

In Ron Tabak's *Finality Without Fairness*, Tabak argues that changes in public perception of the death penalty have occurred in many states, and after the Supreme Court reinstated the death penalty in 1976, it was no longer a mandatory punishment for murder, capital punishment became a political issue and courts began to doubt the effectiveness of the death penalty as a deterrent to violent crime.⁷ In line with this changing discourse among the judiciary and the public at large, Tabak asserts that prosecutors were less pressured and felt free to opt out of the death penalty without appearing soft on crime.

In John Wefing's *Wishful Thinking*, Wefing posits that DNA will, once techniques become perfected, ensure that only the guilty are executed, reinforcing their guilt and further strengthen death penalty policies, not lead to their abolition.⁸ Wefing refers to the consistently overwhelming approval rates for the death penalty, primarily in conservative southern states, and sees slight shifts

in popularity as a response to the fledgling technologies initial discovery of post conviction errors, and simply correcting past mistakes.⁹ Wefing also points out those judicial and procedural deficiencies have been, throughout the history of death penalty in the U.S., addressed by legislative bodies to make capital punishment consistent with both judicial edicts and responsive to public opinion.

U.S. Public Opinion and the Death Penalty

Public opinion of the death penalty has been steadily declining. Through the 1980's and 1990's public approval rates for capital punishment were at record highs. This dissertation will examine the possible explanation underlying this shift in public opinion, and what the implications of these causal connections suggest for the future of the death penalty in America.

Several polling organizations have tracked opinion in the United States for the death penalty for over fifty years, most notably and most extensively the Gallup Poll.¹⁰ However, the General Social Survey and the National Opinion Research Center have also conducted polling concerning the death penalty. Although some fluctuations are noted between polls, they can be attributed to sampling error or localized events that skew poll results (e.g. a violent murder in local neighborhood).¹¹ The context or wording of the poll question has been deemed largely inconsequential by polling experts, however, in that most opinions on the death penalty have been pre-formulated, and are not subject to change in response to the questions context. These unique nuances in death penalty polling will be explored in detail in the dissertation.

The general trend in declining approval can be sustained across all polls, irrespective of sporadic oscillations seen occasionally among individual years. A decrease in support for capital

punishment of 10% is observable from 1996 to 2000, when the national approval rate dropped from 76% in favor of the death penalty, down to 65%. Although overall support remains strong, an incremental decline over the course of recent years suggests a trend, not a statistical aberration.¹²

An interesting component to consider when weighing the poll figures is how profoundly media broadcasts of crime can indirectly influence responses to death penalty polling questions. It has been statistically demonstrated that violent crime rates are directly proportionate to death penalty approval rates. As most citizens learn of crime through mass media outlets, their awareness of violent crime is contingent upon media coverage, which may skew reality by overemphasizing the true occurrence of crime. However, according to a 1996 Harris poll, 90% of respondents reported that the media were more inclined to report violent crime than good news.¹³ Notwithstanding the general distrust of media objectivity, Harris poll respondents reported that crime was becoming worse, even during an era of decline in actual crime rates.¹⁴ Gallup polls would seem to indicate that this inscrutable phenomenon could be attributed to a perception that crime is a national trend that simply misses the respondent's neighborhood. The Gallup poll found that respondents believed that crime nationally was on the rise, but down in their own communities.¹⁵ This dissertation will examine the impact that this ostensible disconnect between the public's perception of crime nationally, and their own observation of declining crime rates locally, has on their opinion of the death penalty.

However, this clearly established connection between crime rates and death penalty approval doesn't tell the whole story. Certainly violent crime has a meaningful impact on the perceived feasibility of capital punishment as a policy, but other recent developments (namely exoneration through new evidence) has worked in tandem with declining crime rates and has created a synergistic dynamic that has worked to speed the downward trajectory of death penalty approval

rates. Death penalty exonerations have become a variable in this calculus, the importance of which international actors have used in media campaigns to shift public opinion and advance an abolitionist agenda, attempting to achieve policy concessions.

Evidence and Innocence

New technologies used to conduct analysis of criminal evidence, which has resulted in an overturned conviction, ultimately exonerating an innocent person, has contributed to the decline in U.S. death penalty approval rates. At its foundation, public confidence in the justice system has been so dramatically undermined by recent developments; the entire population is beginning to shift its long held belief regarding not only capital punishment, but the administration of justice itself. This policy segment, and in particular the case study analysis, will examine how evidence is collected, submitted and analyzed, and what impact this process has on public opinion and whether international governments and organizations can use these events to spur change in U.S. domestic policies.

In 2000 Professor James Liebman of Columbia Law School released a startling study on attitudes toward the death penalty in the United States. Liebman examined every death penalty appeal from 1976 through 1995 and discovered that, of those cases that exhausted all appellate avenues, an astonishing 68% were found to contain reversible error, and were remanded back to trial or sentencing phases.¹⁶ Rebutting the claim by many staunch critics of the appellate process, countering what they saw as wasteful commitment to criminal's rights; Liebman argued it was an essential process in exposing the errors committed during trial. Tracking those remanded cases through their new trials, Liebman found that 82% of the cases resulted in sentences less than death,

and that 7% were found to be innocent.¹⁷ This study seems to overwhelmingly repudiate arguments advanced by death penalty advocates who contend that the process is methodically deliberate and infallibly guarantees an accurate disposition of all capital cases. The errors revealed in the Liebman study (among others more exhaustively contemplated in my dissertation) give ample cause to engender increased public discourse about the efficacy of capital punishment as an acceptable policy, and give merit to a more rigorous statistical assessment of the implications of these errors, and how they influence public support for death penalty policy. This dissertation will seek to establish a causal link between public opinion concerning capital punishment through the exonerations of innocent persons via evidentiary errors exposed by new technology, and the tactics foreign actors can use to leverage these events into substantive policy change.

Policy Conclusion

Support for the death penalty has been waning over the last ten years, judging from a number of metrics. Fewer executions have been carried out, and the number of death sentences has declined precipitously. Based in part on the new technology of DNA analysis, exonerations have increased and public opinion for the capital punishment is steadily falling. Scholarly studies, legislative decrees, new moratoriums on the death penalty and judicial reservations regarding the administration of the death penalty expressed from all corners of both the federal and state bench have all challenged the long-standing legitimacy of capital punishment as a tenable public policy solution to deterring crime in America. This concerted outpouring of doubt from different branches of government regarding the reliability of evidence used to sentence people to death has, this dissertation contends, contributed to the erosion of public support for the death penalty. The

central tenet of this argument is that DNA science, much like the fingerprint revolutionized the public perception of guilt in the past, has fundamentally altered our confidence in the ability to determine guilt incontrovertibly.¹⁸ The following case study will objectively assess the role this new technology plays in forming public opinion regarding one of the most controversial issues of our day, the issue of capital punishment, and how international organizations can engender policy change by further inculcating doubt using media campaigns and funding studies.

Stage 2, Individual Case Study

Public Opinion Introduction

As the preceding policy analysis segment amply demonstrates, public opinion regarding the death penalty has been waning in the United States for the past decade based upon myriad factors discussed previously. This case study will examine two instances in which the pressure from an international organization, namely Amnesty International, was brought to bear upon the chief executive of two different states, Texas and Illinois. The final disposition of both defendants has been meted out, one resulting in execution and the other a full commutation of sentence. The primary case study will focus on a Texas case, a state which still actively employs the death penalty. The companion case from Illinois, a state which has recently discontinued the use of capital punishment (its governor declaring the practice unconstitutional), will be used as a cross case analysis to illustrate different outcomes and explore possible causal explanations.

The central thesis of this chapter is that foreign actors, primarily international organizations

such as Amnesty International, through conducting publicity campaigns and insinuating themselves into the legal process (e.g. by filing amicus briefs with the court in an attempt to persuade the judiciary to reconsider its position) can raise public awareness to the plight of the defendant, present more evidence for the scrutiny of the public, compel judicial and political officials to re-examine facts and evidence and rally public opinion around the defendants cause for the judicial review. This chapter will evaluate the effectiveness of the foreign actors concerted behavior, and address the results using a case study analysis to determine what factors can be activated to shape public opinion, and motivate public policy choices.

Individual Case History

In North Houston Texas on May 13, 1981 at approximately 9:35 PM Bobby Grant Lambert, a 53-year-old white male from Tucson, Arizona was exiting a Safeway grocery store and was approached by a black male later described by witnesses as roughly 5'10" tall, between 18 to 20 years old, slim build, clean-shaven with close cropped hair.¹⁹ One witness, Bernadine Skillern, a 53-year-old black clerk, later testified that she saw this male accost Lambert, and draw a revolver. Skillern testified she screamed "don't don't don't", briefly distracting the gunmen who then turned back to Lambert, reached into his pocket and then shot him once in the stomach, before fleeing the scene.²⁰ Lambert dropped his groceries, and stumbled back into the store before collapsing face first into an aisle. Lambert was pronounced dead at the scene. The perpetrator was observed by five witnesses at the scene, including two Safeway employees who noticed him conspicuously lurking close to the entrance to the store, two customers in the parking lot (one loading groceries into her car, the other waiting in the passenger side of a car for his wife to return) and Skillern. All

were questioned by the police and gave detailed statements.²¹

On May 20, 1981 Gary Graham, a black male, 17 years old, abducted a 57-year-old cab driver named Lisa Blackburn from a Houston service station.²² After raping her in an abandoned lot, he took her back to her house, robbed her, and then inexplicably dozed off in her bed. Blackburn recovered her money from Graham's wallet, and immediately alerted police. Upon their arrival, Graham was arrested for rape, robbery and kidnapping and taken into police custody. Graham was quickly connected to twenty-two independent crimes spanning the previous week, including twenty armed robberies, three kidnappings, one rape and three attempted murders. Graham subsequently confessed to all the crimes shortly thereafter on May 26, mainly because all of the crimes were committed with a .22 caliber revolver, the very same weapon ballistics experts determined was used in the Lambert killing.²³ Skillern was called into police headquarters to view a photo array of suspects, with Graham's photo present in the array.²⁴ Of the photos, however, only one fit the description Skillern had given earlier of a young thin black male clean-shaven with short hair. All other photos were of men with long hair or facial hair. Ms. Skillern identified Graham as the perpetrator, but added that the robber had a dark complexion. The following day she identified Graham again in a physical lineup face-to-face. "That's him" Skillern said. However, again none of the other men resembled her earlier description, and Graham was the only perpetrator from the previous photo array.²⁵

None of the other witnesses, whose earlier description contradicted Skillern (all saying that the perpetrator was shorter than Lambert who is 5'5") were asked to corroborate Skillern's identification. These witnesses, who were later questioned by private investigators, would say

Graham was not the shooter.²⁶ Based solely upon Skillern's identification, Graham was charged with the murder of Bobby Lambert. Graham confessed to all other crimes he was charged with, but denied he murdered Graham. When police escorted Skillern home, she tellingly informs the officer that Graham is certainly the man "in the photo", that she identified the previous night.²⁷ She's never wavered in this assertion.

Trial

Gary Graham's trial was a brief affair that lasted a full two days.²⁸ Graham's lead counsel, Ron Mock, was appointed by the court, as Graham was found indigent and lacking funds to mount a defense independently. Mock, who had been selected to represent 10% of death penalty defendants in the three years prior to Graham's trial, had a dismal record in defending capital cases; of the sixteen capital murder cases Mock had handled, twelve of his clients had been sentenced to death.²⁹ Mock began by requesting a pretrial conference challenging Skillern's identification of Graham in the photo array, arguing her positive identification was the product of suggestive police procedures, and the subsequent identification in the lineup was a further result of her coerced photo identification. Judge Richard Trevathan finding against Graham, allowing Skillern's testimony at trial, ruling that the identification was "made independently of any conversation or processes that were performed by members of the Houston Police Department" and "based solely on her recollection of the facts as occurred on May 13, 1981."³⁰

After disposing of pretrial issues, the state presents its case by relying mainly on Skillern's eyewitness testimony.³¹ Graham's defense only argued in their cross-examination that no other

witnesses had identified Graham. Mock called no witnesses, and offered no evidence at trial (e.g. the ballistics experts determined that the .22 caliber gun taken from Graham was not the murder weapon³²). Mock declined to present exculpatory evidence on tactical grounds, believing it would remind jurors of other crimes he confessed to committing with the gun. Following a brief deliberation, the jury quickly finds Graham guilty of capital murder.

After completing the trial phase, in which Graham's guilt was established, the Houston prosecution then moved to the penalty phase where, under Texas statutory law (which has since been modified) if three conditions are determined to exist (were the defendants actions deliberate, does the defendant pose a continuing risk to society, and no mitigating factors exist) the judge must mandatorily sentence the defendant to death.³³ The prosecution cited Graham's propensity for violence, as demonstrated by his previous criminal behavior, as grounds to pursue the death penalty. The state offered evidence of the violent robberies that immediately preceded Lamberts murder, which involved beatings and the shooting of victims.³⁴ Mock called two witnesses who were both relatives. Graham's grandmother Emma Chron and stepfather Joe Samby both testified that Graham was a "real nice, respectable" boy who "loved the Lord".³⁵ The jury was unmoved by Graham's character witnesses, and answered all the statutory questions in the affirmative, and he was sentenced to death as a matter of law.

Appeal

Gary Graham's post conviction appellate process was long and protracted, lasting sixteen years and involving over thirty different judicial and executive reviews from both Texas and federal

courts and agencies.³⁶ The issues upon which appellate challenges were based were wide ranging, but focused primarily on ineffective assistance of counsel at the trial level, new exculpatory evidence not heard during trial (examples being contradictory witnesses, ballistics evidence), and the unconstitutionality of the death penalty (issues of institutionalized racism and fundamental procedural flaws). However, the appellate defense team (which assumed a shifting character over the course of sixteen years as different legal counsel became involved at different phases, moved on, then occasionally returned, and was comprised of over ten different lawyers) was effectively barred from presenting new evidence under the Texas 30 Day Rule, which maintains that new evidence must be presented within thirty days after the defendant's conviction to be deemed admissible.³⁷ The rule has since been revised, largely as a result of genetic testing for cases when the offense occurred before the advent of DNA technology.

In Texas all death penalty sentences are immediately subject to an automatic direct appeal which is undertaken at the Texas Court of Criminal Appeals (TCCA). Post conviction relief is only granted if there was judicial error made by the trial court which rises to the level of reversibility (for instance improper jury instruction by the judge). No new evidence or arguments to establish innocence are considered. The direct appeal managed by court appointed appellate counsel O'Brien was denied on June 12, 1984, and the Court affirmed Graham's conviction and death penalty sentence.³⁸

Subsequent appeals to both state and federal judicial venues challenged Graham's conviction on multiple grounds, and were handled namely by Richard Burr, Mandy Welch and Jack Zimmerman.³⁹ Burr's arguments were manifold, but struck recurring themes: Graham's age (he

was a minor, seventeen years old, when the murder was committed. Notably, the Supreme Court has recently held minors ineligible for the death penalty⁴⁰); Inadequacy of Texas criminal sentencing procedures, in failing to include more mitigating evidence that could place his actions in the context that would make his behavior more easy for jurors to sympathize with (another instance where Texas law has been revised to allow the introduction of more mitigating factors); Ineffective assistance of counsel (further example of law change in that Graham's attorney Ron Mock no longer is capable of representing death penalty clients, after Texas required attorneys to take an exam testing their knowledge of death penalty law to earn eligibility; Ron Mock failed this exam).⁴¹ Each of the claims was duly heard and summarily rejected by the courts. Graham was, however, issued an execution reprieve by then Governor Ann Richards, in response to a petition filed by Burr with the governor's office in 1993, shortly after Amnesty International became involved in a publicity campaign to secure a new trial for Graham, spearheaded by Amnesty International's (AI) spokesperson Bianca Jagger and AI representative Ashanti Chimurenga.⁴²

In Texas executive clemency can take several forms; a pardon, which eliminates the conviction entirely, a commutation which would reduce a sentence (e.g. from death to life without parole), or a reprieve, which would delay the execution.⁴³ In Texas the governor can only respond to pressure reactively in that the Texas Board of Pardons and Paroles (TBPP) must first make a recommendation to the governor, upon which she is authorized to act. The only exception to the rule is reprieve, with the governor given one opportunity to grant a 30 day reprieve in each death penalty case without TBPP recommendation.⁴⁴ In 1993 Richards granted a reprieve to Graham citing unanswered questions about Graham's case.⁴⁵ The TBPP was unmoved and refused to grant Governor Richards recommendation to pardon, after being petitioned twice by Graham lawyers,

once in 1993, and again in 2006.⁴⁶

Having exhausted all appeals and post conviction remedies, on June 22, 2000, Graham was forcibly removed from a holding cell, strapped to a gurney and injected with a lethal cocktail of sodium barbitol and depressants.

Stage 3 Trace Process Analysis

After the foregoing historical assessment of the Gary Graham case, this case study analysis moves to the analytical phase, applying the trace process analysis to identify the dependent and independent variables under study, discern the relevant CPO's involved that can establish causal relationships between variables, and then testing these putative linkages using the doubly decisive case study method to either include or exclude variables that have impacted the policymaking process. The results of the case study will be juxtaposed against the elite interviews from actual participants to the process, to either strengthen or rebut the validity of the inferential causal connections. Finally a cross case comparative analysis will illustrate commonality and distinctions between case study events, and final conclusions will then be drawn.

Dependent Variable

The dependent variable subject to scrutiny in this case study analysis is the gubernatorial discretion to grant reprieve to those facing imminent execution. This study will critically examine when the grant is issued, and what causal factors have potentially contributed to its exercise,

focusing attention mainly on the intervention of foreign organizations and their ability to influence a Governor's policy stance by shaping public opinion, thus compelling a political executive to act upon a petition for reprieve. The main independent variable will be the action of Amnesty International and its ability to affect public opinion and subsequently the governor's discretion. Intervening variables under consideration that may act as either contributory factors forcing policy concessions or as true motivators that countervail or supersede other factors will include the governor's compulsion to follow legal precedent or personal preference in pursuing the issuance of a reprieve. Each variable will be considered independently.

Hypothesis 1 : The Governor in issuing a reprieve does not allow personal preferences to dictate gubernatorial behavior.

As noted in the historical account of the Graham case, Graham petitioned twice for reprieve to two different governors, and Richards and George W. Bush, in 1993 and 2000, respectively. Richards granted the request for reprieve, and Governor Bush did not. This case analysis hypothesis posits that the governor acted in accordance to the personal preferences in ruling on the reprieve accordingly.

CPO's for Richards

Although strictly speaking Governor Richards was a Democrat and member of a nationally liberal political party, Governor Richards was a vociferous proponent of capital punishment, and her record does not indicate any sympathy or inclination to arguments of racial injustice or judicial

disparity.⁴⁷ As evidence of the level of her concern for judicial policies that created the statistical appearance of impropriety in racial balance, and speak to Richards proclivity to endorse death penalty sentences, during her tenure from 1990 to 1994 as governor, Richards authorized the execution of a record 49 people (before Bush), half of which were from minorities (when minorities comprise only 25% of the Texas population), and while only 4% of those executed were accused of murdering minorities, a staggering 87% of death row inmates had been convicted of killing whites.⁴⁸ When asked whether she would approve legislation that barred the death penalty in Texas, Richards responded that "I would faint".⁴⁹ These CPO's for Richards weighed in their totality clearly refute the assertion that granting a reprieve was an action consistent with her personal preferences.

CPO's for Bush

George W. Bush's legacy as the governor of Texas with the largest number of accumulated death warrant authorizations for the execution of convicted inmates (152 executed during his governorship) alone would create a presumption of personal preference for death penalty issuance that would seem incredibly difficult to rebut. However, officially Bush's refusal to grant a reprieve to Graham was based upon procedural grounds. In a released statement Bush said he was advised by counsel that because Governor Richards had previously issued a reprieve, and under Texas statutory law only one reprieve can be issued by a Governor in each case, per statutory mandate his hands were tied.⁵⁰ However, at a press conference later that week, when asked if he was unbound by precedent would he grant a reprieve Bush responded in the negative.⁵¹

Further indicia of Bush's personal preference for the death penalty involve the potential for innocence, in which Bush declined to issue a reprieve. Examples of his recalcitrance in refusing to issue reprieves to allow further exploration of new evidence (as in the Graham case) would include; Odell Barnes, whose attorneys also failed to interview key witnesses at trial;⁵² Joseph Stanley, for whom it was later discovered that state prosecutors withheld evidence at trial and the psychiatrist whose testimony was critical in obtaining a death penalty was later expelled by the American Psychiatric Association for presenting false testimony at a death penalty trial;⁵³ Andrew Cantu who resorted to defending himself when his court-appointed lawyer withdrew from the trial, and the third attorney never met with Cantu.⁵⁴

A final CPO that is entirely emblematic of the disdain Bush had for the death penalty due process, when asked if he would consider a reprieve for Karla Faye Tucker, a reformed drug addict and converted evangelical Christian (Bush's own faith) he openly mocked her appeal by mimicking her voice and saying in a false female tone "please don't kill me". Tucker was executed several days later by lethal injection. These CPO's when assessed in their totality, give strong support to the conclusion that Bush was acting in accordance to his personal preference when declining to issue a reprieve to Graham.

Hypothesis 2: The Governor was not following precedent when refusing to grant reprieve.

As discussed previously, Texas statute affords a governor a wide latitude of discretion in authorizing the grant of reprieve independent of the Texas Board of Pardons and Paroles. The only restriction (as noted in the Bush example) is that only one reprieve may be issued per petitioner

(although whether that extends to one per governor per petitioner is legally undecided, and Bush avoided the challenge in Graham). As legal precedent by strict definition, is inapplicable here, the definition will be revised to include the precedent established by the governor him or herself, and will examine whether the decision in Graham was consistent with the prior judgments on reprieve under fact similar circumstances and whether Graham was an aberration or product of following prior decisions.

CPO Richards

With a history of high public approval rates for the death penalty in Texas (especially during Richards tenure in the 1990s) and a conservative Texas Legislature that would threaten open hostilities to challenges to death penalty policy, the grant of reprieve by the governor was an extreme rarity. In point of fact there is only one case that is fact similar to Graham (in that they both raise issues of innocence) in which Governor Richards consented to a reprieve.

Lawrence Buxton was convicted of murdering Joel Slotnick, a customer at Safeway grocery store in 1980, during a robbery.⁵⁵ According to witnesses, Buxton shot Slotnick when his five-year-old son would not stay motionless on the store's floor as directed by Buxton. Buxton's attorney argued that jurors were prevented from hearing evidence in the form of mitigating testimony during the penalty phase of the trial.⁵⁶ Additionally attorneys had located a new witness who produced evidence which may have cast doubt on Buxton as the actual trigger man in the robbery. Based upon this new evidence, and pointing to evidence not presented at trial, Buxton's attorney petitioned Governor Richards to grant a reprieve to examine further evidence.⁵⁷ Richards

summarily denied, without comment, and Buxton was executed on February 26, 1991.⁵⁸ This denial of reprieve given similar fact and legal circumstances to the Graham case, demonstrates that in her issuance to Graham Richards broke with her own limited procedural policy history.

CPO Bush

George W. Bush, an unflappable proponent of the death penalty, was resistant to any overture by attorneys or death penalty abolitionist groups advocating on behalf of the petitioner, to grant reprieve for additional judicial review. The only exception to Bush's firm reprieve policy is if new DNA evidence had been obtained for analysis, and it would provide categorical proof of innocence. This happened during the appellate process of Ricky McGinn, when Bush granted his first and only reprieve in order to test genetic evidence of the rape and murder of McGinn's stepdaughter.⁵⁹ The test subsequently found McGinn's DNA on the murder weapon and in genetic material found on the victim's body.⁶⁰ McGinn was executed September 27, 2000.⁶¹ This only reprieve issued by Bush, in the extraordinary circumstances under which the evidence was presented (DNA exculpatory process testing was still a nascent science, and opposed by many Texas prosecutors postconviction) reinforces the conclusion reached after a thorough examination of Bush's death penalty policy implementation, Bush was acting in accordance to personal preferences when denying Graham's reprieve, and the solitary evidence deviating from that record is one characterized as an anomaly due to scientific advances and new potentially exculpatory evidence.

Hypothesis 3: The Governor was not affected by public opinion when deciding to issue the reprieve.

This primary hypothesis, which will examine the chapters dependent variable, public opinion's ability to shift a policymakers decision, posits that a concerted publicity campaign orchestrated by Amnesty International which spearheaded a movement to provide both death penalty scholarship and advocacy, influenced the governor to issue a reprieve. Richards, a member of the Democratic Party, was presiding over a staunchly conservative Republican state controlled by a Republican-led state legislature, only having served one precarious term before being ousted by George W. Bush, and was always torn between serving her core liberal constituency and appeasing the pro-death penalty majority of Texas, a divisive political issue in the state. Maintaining this tenuous balance among the diverse constituencies of the state involved much delicate posturing and political maneuvering. Amnesty International positioned itself strategically to take full advantage of this precarious position, and lever the mechanisms of power to gravitate the governor to its position. The following CPO's provide strong evidence that Richard's decision was motivated by public opinion and not political acquiescence, and casts equally strong doubt on the most probable intervening variable, personal preferences.

CPO's for Public Opinion

In March 1993, six weeks before Graham's scheduled execution date Amnesty International published a scathing report on death penalty practices in Texas, highlighting the issue of innocence (pointing to several recent high profile death penalty exonerations), racially discriminatory

practices (a disproportionate number of death row inmates are minorities), and flawed procedural safeguards and inhumane death row conditions.⁶² This report by Amnesty International was a basis for an NAACP Legal Defense fund complaint filed with the U.S. Justice Department on Graham's behalf in March 1993 alleging that Graham was the victim of a pervasive system of racial inequality that was endemic to the Texas judicial system.⁶³ The complaint drew nationwide public attention and attracted prominent members of the African-American community to rally to Graham's cause. Reverend Jesse Jackson and Al Sharpton, two political luminaries of the black community, called on Richards to issue a reprieve.⁶⁴ Amnesty International coordinated massive multicity rallies to call attention to Graham's pending execution and for thirty days prior to his scheduled death, held protests outside the prison where he was incarcerated.⁶⁵ The rallies drew national publicity and gave Amnesty International a platform to espouse the findings of its early report on inconsistencies in Graham's trial and post conviction problems, and to level an indictment against the Texas system of justice as a whole. Hours prior to his execution, Richards relented and issued a reprieve, stating that there were unanswered questions about Graham's guilt.

A year prior to the governor granting reprieve the facts surrounding the inadequacies of Graham's case were widely reported by the Texas media. Governor Richards had a full year within which to take action to ensure Graham had the support of her office to address any concerns over troubling aspects of his case. Richards refused to take any opportunity to allow Graham recourse under the governor's auspices of the state executive, and declined to offer any relief to assist in the resolution of his appeal. Only after the intense scrutiny by the national media which propelled Graham into an international spotlight, did Richards feel compelled to grant a reprieve, the first one in her term as governor. This change in public policy stance and a reversal from her stated

personal political preferences, strongly suggests that the governor was pressured to grant a reprieve by the publicity initiated by Amnesty International both in its report and its coordinated protests.

The second CPO that creates an even stronger inferential causal link between Gov. Richards' decision to grant Graham a reprieve from his death penalty sentence and the concerted efforts of Amnesty International to generate sufficient publicity to sway public opinion and compel action on the governor's part, is the case of *Texas v. Johnny Frank Garrett*.⁶⁶ Garrett, mentally handicapped and diagnosed as both psychotic and brain-damaged, had suffered a life of abuse and depravity. Raped by a stepfather, who at fifteen years old sold him into sexual bondage and forcing him into making child pornography, Garrett was subjected to routine beatings and forced drug abuse. He was later convicted of raping and murdering a Catholic nun.⁶⁷ The crime was so savage and brutal that Garrett's execution was immediately hailed by Texas as a *prima facie* justification for retaining death penalty policies as a continuing punishment in Texas. Amnesty International, along with other international human rights groups launched a publicity campaign targeting both Richards and self-proclaimed "compassionate conservatives" in Texas to show mercy on a man who one mental health expert described as "one of the most virulent histories of abuse and neglect I have encountered in 28 years of practice."⁶⁸ In response to public outcry fomented by Amnesty International, Richards for only the second time in her tenure granted a reprieve to Garrett.⁶⁹

In accordance to the doubly decisive methodology, and to refute the strongest intervening variable, personal preferences, the CPO both above examples use can be used to demonstrate that Richards, if public opinion demands, will turn from personal preferences to satisfy the will of the

electorate, aroused by Amnesty International's efforts to abolish capital punishment entirely.

Stage 4 Elite Interviews

The elite interview phase of the case analysis process is designed as a tool to aid in either bolstering the strength of the inferential assertions made during the trace process stage, or refute the validity of these assertions. Interviews for this chapter were conducted with many key essential participants in the event and most of the actors involved readily reconfirm the influence that Amnesty International and the organizations impact on public opinion had on the issuance of the stay of execution granted by Governor Richards in Graham's case.

Rick Halperin, the Amnesty International director of the Embry Human Rights Program and the Texas Death Penalty Abolition Coordinator was adamant in his assertion that Amnesty International fundamentally altered the public opinion landscape in Texas by holding publicity protest campaigns throughout the state.⁷⁰ "I can state unequivocally that the media attention that Amnesty International generated on behalf of Graham most decidedly helped extend his life" Halperin contends. "Many condemned inmates had no individual or organization to do more on their behalf, and went to their deaths here in near or complete media silence. It was awful". Halperin notes that "Graham's case brought many issues into the public forum for discussion; i.e., execution of juvenile offenders, single witness identification, conditions of death row, etc." that would later lead to higher court action. "While Graham was indeed executed, the effect on his behalf was not in vain, as Richards was forced to confront the human rights issue on his behalf, and did extend his life so that further discussion and legal wrangling could continue", Halperin

concludes.

Doug O'Brien, the attorney to first represent Graham in his automatic appeal post conviction to the Texas Court of Criminal Appeals, reported that "Amnesty International's support helped to raise awareness of Gary's case around the world. He gained many supporters in Europe who even came to Texas to visit him", and that as a result Governor Richards was "very fair and open to issues concerning the death penalty".⁷¹

Finally, Richard Burr appellate death penalty attorney for Graham and directly involved in Graham's petition to Governor Richards for the stay of execution, was remarkably strident in his opinion that the critical role Amnesty International had in shaping public opinion was largely responsible for the issuance of the stay. "Public opinion played a huge part in that stay", Burr says. "What did it was that the effort to stop the execution became a truly grassroots campaign. It was picked up by local radio stations all over Texas and the governor got hundreds of calls and faxes (maybe e-mails but they were not as common as breathing back then). There were some news accounts about the deluge in the governor's office back then, if you can find them", Burr concludes.⁷²

Judge Trevathan, in phone interviews, declined to address political aspects of the Graham case and Governor Richard's stay, but emphatically impressed the point that Graham was lawfully found guilty and executed in accordance with Texas law, and that "it was Graham's heinous acts that did him in".⁷³ The Texas Board of Pardons and Parole's also refused to openly comment, suggesting compliance with the Texas Open Records Act for release of Graham related documents

that were held in their possession. Unfortunately Ann Richard passed away and was unable to be interviewed.

Although it should be noted that the statements of event participants regarding their perception of public opinion is fallible from an evidentiary perspective, overall the elite interviews conducted reaffirm the inferential assertion proven in the trace process case analysis and falsify the third hypothesis proving that Amnesty International, through exerting persistent pressure upon the governor's office compelled Governor Richards to issue a reprieve to Gary Graham extending his life and allowing further debate on the issue of death penalty policies to continue.

Stage 5 Cross Case Analysis

A comparative cross case analysis will illustrate how Amnesty International in another fact similar death penalty case used high profile figures (the case selected also involves Amnesty International spokeswoman Bianca Jagger and her direct appeal to a state governor) to draw public and political attention to the circumstances of a capital punishment case, and impact the policymakers outcome. The case chosen for cross case analysis examination is *Illinois v Garcia*.⁷⁴

In 1991 Guinevere Garcia, age 32, was convicted of murdering George Garcia, age 66 and her husband, during an argument that according to testimony escalated to a robbery when Garcia brandished a gun and demanded money from her husband. A fight ensued, during which Garcia's husband was shot and killed. After her conviction and the subsequent denial of her automatic appeal to the Illinois Supreme Court Garcia became resigned to her fate and refused to file any additional appeals for relief, and seemingly accepted her execution. An investigation by Amnesty

International revealed startling facts about Garcia's life that led to conclusions that her resignation was a symptom of battered women syndrome, a legally recognized full defense in Illinois to murder.⁷⁵ The investigation uncovered evidence that when Garcia was two years old she witnessed her mother's suicide. At age 5 she was repeatedly raped by an uncle who eventually sold her at sixteen for \$1500 to an Iranian immigrant seeking to marry a U.S. citizen.⁷⁶ Shortly thereafter she became alcoholic and a prostitute. At 18 she smothered her 11-month-old daughter to death, and served ten years for her murder. Upon her release, according to Amnesty International's investigation, Garcia returned to prostitution to survive, and married one of her most abusive clients who according to police reports and court documents "ripped her private parts with a broken bottle."

Jagger personally appealed to the Illinois Governor Jim Edgar to grant executive clemency and reduce Garcia's sentence from death to life without parole, arguing that she deserved mercy based upon her husband's past and her current mental state, pointing out that Garcia's willingness to die was an indication of her psychological degeneration and that the state would be party to an assisted suicide.⁷⁷ Garcia however, repudiated all attempts by Amnesty International to secure an executive pardon, stating "this is not a suicide, I am responsible for these crimes". She also told Jagger and Amnesty International directly during a clemency hearing "stay out of my case".⁷⁸ Governor Edgar, in response to the only petition for clemency filed by Amnesty International's Jagger, granted the petition and spared Garcia's life. Refusing to carry out Garcia's wish to be executed, William Roberts, counsel to the governor, read in a statement from Governor Edgar "it is not the state's responsibility to carry out the wishes of the defendant," but to "assure that the death penalty continues to be administered properly".⁷⁹

This case clearly illustrates the power of Amnesty International to draw both public and political attention to the real impact of death penalty sentences. Although each case (Graham and Garcia) involve different defendants, different circumstances surrounding their crimes and prosecutions in separate jurisdictions (which ultimately led to a different policy outcome) they both show that the involvement of Amnesty International which in both cases prolonged each defendant's life and in effect had a profound change on death penalty policy in each of their respective states.

Conclusion

This chapter through exhaustive examination of all CPO's present in the Graham case firmly established a highly probable causal linkage between efforts by Amnesty International to focus public scrutiny on individual cases and compel and provoke political and judicial redress of previously litigated death penalty cases. The strength of the inferential assertions marshaled by each hypothesis both supported the influence of the dependent variable of public opinion and defeated the probability of intervening variable impacts. The validity of the inferential assumptions supported by trace process analysis were then tested by a rigorous elite interview analysis where participants to the event corroborated the findings of the first stage of the case study analysis, and the cross case comparative analysis used another fact similar case involving the same dependent variable protagonist (Amnesty International) and demonstrated that the results of Amnesty International's action has remarkably reproducible effects, and the variations in policy outcomes explained to the unique circumstances surrounding the individual event.

On balance, it can be concluded that foreign organizations who engage in high profile media and political activities and campaigns can arouse public interest on an issue like the death penalty and impel government actors responsible for domestic policy creation regarding the death penalty to respond affirmatively. Amnesty International has acted successfully to frame an issue for both political and public consumption which can have an indelible impact on policymakers. Ultimately the specific policy outcome, although affected by Amnesty International, is also affected by the political capital the governor is willing to spend.

¹ The Death Penalty Information Center, a United States non-profit organization headed by attorney and death penalty expert Richard Dieter (who serves as Executive Director), has compiled a death penalty searchable database online that encapsulates the entire modern era of U.S. execution data. This database can be accessed at <http://www.deathpenaltyinfo.org/views-executions>.

² <http://www.illinois.gov/pressreleases/showpressrelease.cfm?subjectid=3&recnum=359>

³ "A Crisis in Confidence, Americans Doubts About the Death Penalty", DPIC Report Based on a National Opinion Survey, Richard Dieter, published online at <http://www.illinois.gov/pressreleases/showpressrelease.cfm?subjectid=3&recnum=359>

⁴ DPIC database of national exonerations can be accessed at <http://deathpenaltyinfo.org/innocence-and-death-penalty>

⁵ Schenk, Barry, "Actual Innocence: When Justice Goes Wrong and How to Make it Right" *NAL Trade Publishing*, (2003).

⁶ Supra Dwyer at note 5, 1-20.

⁷ Tabak, Ron, "Finality Without Fairness, Why We Are Moving Toward a Moratoria on Executions, and the Potential Abolition of Capital Punishment", *Connecticut Law Review*, 33(2001):733.

⁸ Wefing, John, "Wishful Thinking: Why DNA Evidence Will Not Lead to the Abolition of the Death Penalty," *Connecticut Law Review* 33(2001):861.

⁹ Ibid. 861-872.

¹⁰ <http://www.gallup.com/poll/1606/death-penalty.aspx>

¹¹ <http://www.deathpenaltyinfo.org/national-polls-and-studies>

¹² http://www.deathpenaltyinfo.org/documents/death_penalty_poll_gallup_10_13_11.pdf

¹³ See compilation of national poll data at note 11.

¹⁴ Supra note 11.

¹⁵ Supra note 11.

¹⁶ Liebman, James, "A Broken System: Error Rates in Capital Cases", 1973-1995, *Columbia University Report*, published online at http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf

¹⁷ Ibid. 23-37.

¹⁸ Newman, Andy, "Fingerprinting Reliability draws Growing Court Challenges", *New York Times*, (April 7, 2001).

¹⁹ Texas Attorney General John Cornyn, in a media advisory press release prior to Graham's execution, summarized the facts of Graham's case (taken from police reports and trial testimony, as well as the court record) from the perspective of the state of Texas, and archived it on the Texas AG website, accessible here: <https://www.oag.state.tx.us/newspubs/newsarchive/2000/20000614graham.htm>

²⁰ <https://www.oag.state.tx.us/newspubs/newsarchive/2000/20000614graham.htm>

²¹ Houston Police Department Offence Report, Incident Number 025257034. All the facts of the crime, as reported by eyewitnesses, together with police observations of the scene, collected evidence and the interview with Graham are contained in this 36 page police report.

²² Transcripts of interview with Blackburn, airing on June 22nd 2000, where she discusses her trial testimony in the Graham case, archived and accessible here: <http://edition.cnn.com/TRANSCRIPTS/0006/22/tod.02.html>

²³ State of Texas v Gary Graham, Judicial Confession, Cause Number 335136, (May 16th, 1981).

²⁴

www.capitalpunishmentincontext.orghttps://www.oag.state.tx.us/newspubs/newsarchive/2000/20000614graham.htmrg/cases/graham/trial

²⁵ <http://www.capitalpunishmentincontext.org/cases/graham>

²⁶ "State of Denial, Texas Justice and the Death Penalty", a Report on the Gary Graham Case by the Texas Defender, a non-profit organization founded by Texas capital punishment attorneys, report published and accessible online at <http://www.victimsofthestate.org/Docs/Graham.pdf>

²⁷ Supra note 23.

²⁸ www.capitalpunishmentincontext.orghttps://www.oag.state.tx.us/newspubs/newsarchive/2000/20000614graham.htmrg/cases/graham/trial

²⁹ American Civil Liberties Union Report on Ineffective Assistance of Death Penalty Counsel, Factsheet published online at http://www.prisonpolicy.org/scans/aclu_dp_factsheet3.pdf

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- ³⁰ <http://www.capitalpunishmentincontext.org/cases/graham/trial>
- ³¹ www.capitalpunishmentincontext.org/cases/graham/trial <https://www.oag.state.tx.us/newspubs/newsarchive/2000/20000614graham.htmrg/cases/graham/trial>
- ³² Ballistics tests that prove Grahams gun was not the gun used in the murder are found in the Clemency Petition filed by Richard Burr on Grahams behalf with the Texas Board of Pardons and Paroles, titled the Supplemental Report to the Houston Police Department Firearm and Tool Mark Submission, conducted by Firearms Examiner C.E. Anderson.
- ³³ Vernon's Texas Statutes Annotated, Procedure in Capital Cases, Art 37.071.
- ³⁴ <http://www.capitalpunishmentincontext.org/cases/graham/trial>
- ³⁵ *Graham v Collins*, 506 U.S. 461, (1993).
- ³⁶ For an exhaustive review of the appellate process conducted by the Fifth Circuit Court of Appeals in addressing Grahams pending application for habeas relief, see Peter Hofer, "The Case of Gary Graham: After a Procedural Circus, a Pyrrhic Victory", *Texas Journal on Civil Liberties and Civil Rights*, 2(1995):69.
- ³⁷ *Graham v Johnson*, 168 F. 3d. 762, (1999).
- ³⁸ *Graham v Lynaugh*, 854 F. 2d. 715, (1988).
- ³⁹ Gray, Mike, "The Death Game; Capital Punishment and the Luck of the Draw", unpublished manuscript, archived online at http://mike-gray.org/books/death_game_01.pdf. Gray's book contains extensive interviews with the attorneys involved, taken over the course of Graham's post-conviction proceedings.
- ⁴⁰ *Roper v. Simmons*, 543 U.S. 551, (2005).
- ⁴¹ Supra at note 35.
- ⁴² <http://www.nytimes.com/1993/04/29/us/texas-governor-delays-execution-30-days.html?src=pm>
- ⁴³ Texas Administrative Code, Title 37, Part 5, Texas Board of Pardons and Paroles.
- ⁴⁴ Texas Administrative Code, sec. 143.41, Governor's Reprieve.
- ⁴⁵ Supra note 39.
- ⁴⁶ *Graham v Texas Board of Pardons and Appeals*, Cause Number 3-95-00050 CV, 1996, for Grahams appeal of TBPP decision.
- ⁴⁷ <http://www.workers.org/2006/us/ann-richards-1012/>
- ⁴⁸ <http://www.counterpunch.org/2006/09/18/adios-ann-richards/>
- ⁴⁹ <http://texasdeathpenalty.blogspot.com/2006/09/former-texas-governor-ann-richards.html>
- ⁵⁰ Press Release "Bush's Statement on Gary Graham" Jun 22, 2000.
- ⁵¹ <http://www.capitalpunishmentincontext.org/cases/graham/posttrial>
- ⁵² <http://www.clarkprosecutor.org/html/death/US/barnes617.htm>
- ⁵³ <http://www.thecanadianencyclopedia.com/articles/macleans/joseph-faulder-profile>
- ⁵⁴ <https://www.oag.state.tx.us/newspubs/newsarchive/1999/19990216factsheet.htm>
- ⁵⁵ *Buxton v Collins*, 925 F 2d 816, (1999).
- ⁵⁶ Ibid. 816-820.
- ⁵⁷ http://www.chron.com/CDA/archives/archive.mpl/1991_766053/last-minute-reprieve-is-sought-for-buxton.html
- ⁵⁸ http://www.chron.com/CDA/archives/archive.mpl?id=1991_765663
- ⁵⁹ *McGinn v Johnson*, U.S. Fifth Circuit Court of Appeals, unpublished decision, No 99-10068.
- ⁶⁰ http://lubbockonline.com/stories/071300/sta_071300097.shtml
- ⁶¹ <http://transcripts.cnn.com/TRANSCRIPTS/0009/27/bn.02.html>
- ⁶² Amnesty International, "The Death Penalty: A Cruel, Inhuman and Arbitrary Punishment", 1 May 1995, ASA/22/03/95, available at: <http://www.unhcr.org/refworld/docid/3ae6a9dd4.html>
- ⁶³ <http://www.capitalpunishmentincontext.org/issues/publicopinion>
- ⁶⁴ <http://www.nytimes.com/2000/07/11/us/the-2000-campaign-the-texas-governor-response-polite-as-bush-court-s-the-naacp.html?ref=garygraham>
- ⁶⁵ <http://www.oranous.com/innocence/shaka/Anothervictim.html>
- ⁶⁶ *Texas v Garrett*, 1-20692B, 181st District Court, Potter County, Texas, (1981).
- ⁶⁷ *Garrett v Lynaugh*, 842 F. 2d. 113, (1988).

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- ⁶⁸ <http://tcadp.org/2007/04/02/three-steps-to-a-better-texas/>
- ⁶⁹ http://www.chron.com/CDA/archives/archive.mpl?id=1992_1029405
- ⁷⁰ Interview on file with author.
- ⁷¹ Interview on file with author.
- ⁷² Interview on file with author.
- ⁷³ Records of phone conversation on file with author.
- ⁷⁴ *Illinois v Garcia*, 651 NE 2d 100, (1995).
- ⁷⁵ Amnesty International Report, “Guinevere Garcia, A Case of State Assisted Suicide”, AI Index Number 51/146/95, (November 1995).
- ⁷⁶ *Ibid.* 1-3.
- ⁷⁷ Jagger, Bianca, “Sparing Cain, Executive Clemency in Capital Cases”, *Capital Law Review* 28 (2000):585 , in which Jagger recounts her involvement in the clemency petition on Garcia’s behalf.
- ⁷⁸ http://edition.cnn.com/US/9601/garcia_execution/index.html
- ⁷⁹ http://articles.latimes.com/1996-01-17/news/mn-25503_1_death-penalty

Chapter 6

Foreign Actors, U.S. Bureaus and Death Penalty Policies

Stage 1 Policy Context

What determines the behavior of United States bureaus? Can the behavior of a government bureau impact death penalty policies, and can this behavior be influenced by outside actors, more specifically foreign actors? The policy context segment of this chapter will examine the ways in which bureaus in the U.S. create policy, what internal and external factors influence that creation, and can foreign actors exert influence over this process? The case study analysis segment that follows the policy discussion will extrapolate upon that policy foundation by exploring several cases that illustrate how foreign actors have attempted to apply pressure on bureaus to shape particular policy outcomes in specific cases in Texas.

To anyone familiar with contemporary American government, the common conception of the federal bureaucracy as a vastly sprawling and unwieldy monolith is somewhat misguided. Consisting of hundreds of separate and distinct agencies and tens of thousands of different employees, all of which are engaged in different tasks and obligations and laboring under different responsibilities, the federal bureaus are an amalgamation of personnel, resources, powers and duties, accountable to forces both internally and externally. Because each agency performs its own unique function, is possessed of its own regulatory jurisdiction (granted by another branch of government) and is imbued with its own distinct authority, the expanse and limits of its respective behavior and in what way they are influenced is unique to its organization.

Bearing the wide diversity of the federal bureaus in mind, a caveat seems in order regarding any attempt to categorically assert any number of factors as being wholly determinative of a bureaus actions or behaviors, and whether those behaviors can in any way create, shape or define policies regarding capital punishment implementation.

Although one can point to a host of determinative factors that must surely have an impact on most bureaus, the impacts are contingent upon the composition of the agency, the powers of any antagonist (foreign or domestic) attempting to influence the agency, and the political/institutional context in which the actions occur.

The aforementioned qualification having been given, there are a number of determinants of bureaucratic behavior, internal and external, that are most influential. This chapter argues that the most significant factors are internal, and relate to the bureaus culture, which essentially defines the character, motivation and identity of the bureau, and will ultimately determine its success or failure. Other external factors, such as foreign pressures, Congressional oversight, presidential control and judicial intervention, can be critically decisive factors that can profoundly change a bureaus operation and are discussed at length, however these factors don't comprise the type of deeply ingrained and thoroughly pervasive force that a bureaus internal culture possesses. However, the culture itself can be altered or influenced by exogenous forces that impact the internal operating culture of a bureau.

An agencies culture is also the most revealing metric by which we can measure the significance of any determinant by its ability to produce fundamental change within an agency. Although other governmental branches can have a powerful influence on bureaus, its behavior is mainly a corollary of its own internal mechanics, which are guided by its own cultural blueprint. Before a discussion of the different internal and external factors that influence bureau behavior, a

description of the unique characteristics of American bureaucracy and the fundamental elements that constitute a bureau would be appropriate.

Elements of the Federal Bureau

When considering the composition of the average bureau, one can begin by assessing the basic elements that comprise a bureau. A bureau is, at its most simplistic, a structured organization, made of people from diverse backgrounds, united in a particular cause (i.e. the service of the bureau). The bureau functions as an integrated system, the employees serving as the all-important constituent parts. This system cannot be understood without understanding what and who the parts are and how they function together as a whole. It is this combination of diverse attitudes and dispositions, personalities and motivations, goals and aspirations that coalesce into a whole and reflect the spirit of that particular bureau. These core tenets, when integrated, form a dynamic that creates an insular culture unique to the individual bureau. It is this culture that is central to establishing a bureau's internal identity, and once instilled into its members creates uniformity of purpose and cohesion among fellow members, and a deep sense of ideological affinity with bureau policy. Without a culture in harmony a bureau cannot thrive, and its members will languish without direction.

Chester Barnard defines an organization as a “system of consciously coordinated activities or forces of two or more persons”.¹ James Q. Wilson further posits that of primary importance is how that coordination is achieved.² It stands to reason that the means used to attain this coordination are linked to their ends (or their tasks are related to their goals). And because the means and ends of each bureau are different, one must assess the tasks and goals of each bureau in question to determine the most effective method of organizational coordination. It seems

abundantly evident that in refusing to recognize bureau differences, even those which are nuanced or idiosyncratic, one is thwarted in applying a uniform approach to understanding bureau organization.

Bureau leadership generally advances these goals referred to above in abstract terms. However, organizational support of these goals may be insufficient to see them through to completion. Actors operating outside the scope of the bureaucratic organization may subvert implementation of policies designed to achieve these goals. Influence wielded by other governmental actors can impact bureau operations in a number of ways; exerting political pressure, withholding or delaying the allocation of resources, adopting a political posture that works in contravention to bureau interests, etc. For a bureau to successfully execute its governmental mandate and achieve its goals, it must learn to maneuver through dangerous political waters outside its own territory. As Selznik pointed out, bureaus survive by monitoring their environments, avoiding conflicts, and adapting to their (occasionally hostile) surroundings.³

External factors

Before discussing the external determinants that impact a bureau's behavior, the definition of what constitutes behavior in the context of the environment in which the bureau operates should be undertaken. Because bureaus are comprised of many different actors, behaving either alone or in concert on behalf of agency interests, it is important to clearly capture the precise meaning of "bureau behavior" and to distinguish it from incidental or insubstantial actions on the part of bureau members. For the purposes of this chapter, behavior will be defined as any action committed by a bureau agent, acting within her official capacity, which creates new policy, or enforces, modifies or refines existing policy, or would subject policy to negotiation or

interpretation. When examining bureau behavior in the context of death penalty policies, a very broad conception of behavior and policy will allow an equally inclusive approach in construing what constitutes behavior and policy, encompassing such actions as writing official memoranda or attempts to leverage influence over other policymakers. Such actions by policymakers will be widely defined as behaviors that are consequently the predicate for policy formation. Indeed, Lipsky when considering member behavior finds that, “when taken in concert, their individual actions add up to agency behavior”, asserting that concerted actions by members, in the aggregate, are tantamount to the behavior and policymaking of the agency itself.⁴

There are several bodies external to the federal bureaucracy that have the ability to impact the operation of the agency, such as Congress, the President, the judicial system, interest groups (that would include foreign and domestic actors) and the public (which could additionally be activated in response to foreign actor provocation). This paper will focus on the institutional actors that are endowed with the statutory authority to influence bureaucratic behavior, and wield the greatest ability to have the most impact on a bureau's functioning. Foreign actor influences will be addressed in the case analysis segment, drawing upon the underpinning policy context discussed in this segment.

The governmental bodies that exert the most power of federal agencies are constantly embroiled in a perpetual struggle with each other to assert dominance over the agency, a struggle itself rooted in the Constitution, ensuring the proper checks and balances on power. Each external institution will be discussed below, with relevant examples given to illustrate the breadth and limits on institutional ability to control bureaus. Each of these external institutions are also subject to influence by foreign actors, who can in turn exert pressure on a bureau at the foreign actors' behest.

Congress

In dealing with bureaus, Congress has an impressive arsenal of weapons at its disposal which it can use to control bureaus, including legislation, appropriations, hearings and investigations, all of which can be deftly used to coerce and influence the behavior of the agency. Lowi has frequently lamented the power given to bureaucrats to determine policy, and has suggested that Congress can curtail the excessive use of bureaucratic power by simply making applicable statutes more specific.⁵ Congress has often been criticized for using its oversight of bureaus to micromanage agency operation, and impairing its ability to function smoothly. In addition to controlling the purse strings, Congress can also manage the dissemination of information to bureaus through advisory committees that act as liaison between Congress and the agency. However, the ability to control the flow of information is not always within the exclusive domain of the legislature, a fact which hampers the ability of Congress to use the information as leverage. As an advisory committee to the EPA, the National Drinking Water Advisory Council and members of Congress were less informed than the agency regarding the public's policy preferences regarding a particular Act, and this asymmetry in information resulted in an undermining of Congressional influence with the EPA.

In many ways the relationship between Congress and the bureaus resembles a principal-agent arrangement, and many agencies have repeatedly demonstrated a loyal sense of responsiveness to Congressional preferences that conforms to electoral principles of representation. Scholz used a time series analysis to establish that from 1974-1992 the variation in tax law enforcement by the IRS could be attributed to the preference of elected officials.⁶ However, it should be noted that Congress rarely acts as a unified body, and agencies may acquiesce to the demands of part (e.g. one particular committee), and openly defy others. The deference with which bureaus

accord Congress and the concomitant influence congress enjoys with federal agencies is contingent upon many variables; the committee involved, the policy considered, the resolve to implement the policy and the attitude of the bureau, among other factors.

Congress does have power over bureaus but it's limited and can be constrained by these variables. Congress can determine the number of employees in an agency and the bureau's budget, but it cannot hire or fire (civil service laws passed by Congress have precluded this ability). The self-imposed constraints on legislative power over bureaus severely limit congressional regulatory oversight over agency operation. Congressional Acts which remove legislative accountability over bureau affairs, also reduce Congressional culpability for political decisions made involving bureau responsibilities (e.g. when Republicans passed an automatic yearly increase in Social Security benefits, Democrats no longer received political recognition for their annual hike), which at the same time force Congress to abdicate its power over bureau behavior.

On balance, Congress wields extraordinary power over bureaus in a number of respects, including allocation of funds, legislating acts directing the bureau to perform regulatory functions, conducting public hearings to determine the bureau's effectiveness, and initiating investigations into bureau enforcement. All of these actions by Congress can impel specific behavior on the part of the bureau, and force it to respond to the demands of government. However, According to Lynn the "mere exercise of legislative authority hardly ever completely controls the character of primary work," and often has little impact on street level bureaucrats.⁷

President

The Constitution has created a bifurcated system of oversight over federal bureaus, which results in a conflict between Congress and the President over the control of the federal

bureaucracy, creating the “iron law of emulation”, a doctrine which postulates that as organizations compete they begin to adopt their competitor’s tactics. However, the President possesses some authority over bureaucratic institutions that Congress does not. Reagan’s Executive Order 12291 required bureaus to submit impact statements when proposing new reforms, and greatly enhanced his ability to oversee bureaus, creating a unilateral expansion over bureau operation Congress could not duplicate.

Although presidents have the power to appoint bureau chiefs, many ultimately become more devoted to embracing the agenda of the agency than faithfully executing the president’s wishes. Presidents often rely on advisers to select appointees, who may or may not be committed to the president’s ideological agenda. However, ideology is not enough to change a bureau, only skill and perseverance can accomplish fundamental shifts within the bureau itself. Some presidents attempt to change bureau policy by management changing procedures, making bureaus more directly accountable to the White House. This strategy has not proved wholly effective, in that Congress resists the effort to wrest control over the bureaucracy, and often the movement of supervision to the White House has resulted in “management overburden”, where a focus on procedural change within the bureau overwhelmed substance.

Another presidential tactic to shifting policy is reorganization. By subsuming one wayward agency under a more responsive bureau the President hopes to delegate the task of reform to another agency. This has been successful only under limited circumstances, such as when changes to budgets are made or bureau responsibilities are redefined, otherwise reorganization of bureaus by the President has been largely unsuccessful in changing bureau behavior. Most reorganizations are implemented using a top-down approach that involves White House staff shuffling together bureaus that ostensibly appear to be performing duplicative tasks (such as the

FBI and the DEA were once combined), which Wilson consider an ill-conceived approach which basically consists of putting the problems of two agencies under the same bureaucratic roof . However, all reorganizations are subject to the Congressional approval, so the President's power to effect change using this tactic severely curtailed.

Bureaus do not operate solely at the pleasure of the President and are not accountable in any all inclusive way that would dispositively determine the bureaus entire operation, and bureaus have the means of resisting presidential authority. With Congressional support, bureaus can defy the President by acquiring larger budget and congressionally mandated autonomy. Congress can diminish the president's ability to appoint (e.g. by legislating professional qualifications for appointees), and fund programs the president opposed (reducing the president's power to shift funds away from agency).

Courts

Over the course of the last century courts have been increasingly inclined to intervene on behalf of citizens and regulate the behavior of the federal bureaucracy. Lawsuits adjudicated in favor of plaintiffs who have complained of unlawful treatment at the hands of different agencies have compelled bureaus to modify their policies dramatically. Ranging from civil rights act violations committed by segregated public school (which received federal funding) to the failure of the EPA to enforce the Clean Air Act, the courts have exerted a greater degree of control over federal bureaus than ever before in American history.

Although some argue that increased judicial oversight over the bureaucracy has led to increased cost to agencies related to a more convoluted and protracted regulatory process to ensure compliance, many benefits to heightened judicial scrutiny have accrued to the public.

Judicial accountability has resulted in more exhaustive, exacting standards in terms of regulations promulgated by the various agencies. However, a significantly negative effect of increased litigation is the involvement of more lawyers within the agencies, who participate in policy reform, and have little technical appreciation of the regulations that help draft, and are primarily motivated by the specter of impending lawsuits and the political ramifications of regulatory practice, not necessarily the efficacy or the regulation itself, and what it purports to regulate.

The impact a court can have on an agency is determined by a number of factors; the bureau the court's ruling intends to affect, and whether it has been amenable to judicial rulings in the past, and if the ruling clearly enunciates the behavior the bureau must conform to and that the behavior is easily modified. Agencies have also shown a willingness to adhere to the political preferences of the court. Howard empirically demonstrated that the IRS would shift its auditing policies to suit the ideological preferences of the reviewing appellate court bench, finding that when conservative judges occupy the bench, the IRS audits poor taxpayers more frequently, and when a liberal judge presides over the audit wealthier citizens are targeted.⁸ Most important to the implementation of the court's ruling is how receptive the bureau, and its prevailing culture, is to incorporating the edicts of the court. The importance of a bureau's culture is always paramount in the calculus of change when contemplating bureau behavior.

Internal factors

The most critical factor in determining the behavior of a federal bureau is its internal culture. The culture of a federal bureau serves as the foundational wellspring through which all motivations and ambitions for the bureau flow. An understanding of the origin, production and

ways to change agency culture is central to appreciating the integral nature culture plays inside a bureau, and how it determines the behavior of its members.

Wilson enumerated three factors that produce bureau culture and explain its origins: The predispositions of the members of the bureau; the technology of the organization; and the situational imperatives with which the agency must cope.⁹ Member predispositions can be created and shaped by a number of factors. Downs asserts that the urge to maintain status quo is strong, and fitting into a new “informal structure” in the bureau acts as a disincentive to cultural change.¹⁰ Warwick argues that economic and political imperatives make bureaus resistant to change, and that change impeding factors such as an entrenched administrative orthodoxy make culture change improbable, but avers that individual members may opt to “wait out” change until executives leave.¹¹ To the extent the a bureaus culture is determined by its resources and the problems it confronts, Kingdon finds that problems contain a “perceptual, interpretive element”, in that values influence bureau-member decisions.¹² The inherent conflicts that arise from disparate value systems within an agency can create a relational power discord, according to Baratz, which disrupts the prioritization of bureau imperatives.¹³

However, the primary origin of a bureau’s culture emanates from what Wilson refers to as a bureaus “organizational mission”. The bureau mission can be understood as a universal consensus among members regarding the bureaus tasks and goals, and acting collectively to achieve objectives, and sharing a common ideological sense of direction. This form of culture can evolve into a set of patterned and enduring ways of behaving, passed on from one bureaucratic generation to the next, creating a culture that can quickly become pervasively entrenched and difficult to change.

Maintaining or shifting cultural momentum can have incalculable impact on long term bureau

behavior. James Lee Witt's tenure at FEMA during the early 1990's saw a dramatic change in bureau behavior due to new internal communication policies that fostered a shift in bureau culture. The agency was struggling to fulfill its mission, crippled by a bloated bureaucracy, and denigrated by both the public it meant to serve and the legislators tasked with overseeing its functioning. By reassessing the agency's existing commitments and aligning them with a reevaluation of its core competencies, Witt was able to implement new communication policies (both inside the bureau, and with external actors such as law enforcement agencies and schools, and with the community the agency served) which changed the bureau's culture and improved its efficiency, and reinvigorated the morale of its members. Kaufman has found that these efforts to cultivate voluntary conformity to change will enhance collective esprit de corps.¹⁴ Further, Khademian has discovered that devolving responsibility for the implementation of these changes, and allowing street level bureaucrats to "exercise independent judgment", also improves efficiency.¹⁵ The profound impact that this change in culture demonstrated could not have been duplicated by any external influence, or by any branch of government.

Conclusion

On balance, the quintessential behavioral characteristic of a bureau is its culture. Bureaus must develop cultures that are conducive to achieving ascertainable goals. Creating a culture that is amenable to accomplishing these goals involves the following: The installment of strong and motivated leadership, imbued with a clear understanding of the bureau's mission and direction; adequate resources, financial and political, to achieve those goals; personnel suitable to their posts, and who comport ideologically to the bureau's mission; and an organizational structure designed to effectively delegate authority within the bureau. Without the existence of these

requisite criteria, a bureau will encounter difficulty acquiring the culture necessary to create its own unique identity, and will ultimately fail to behave in a way that will ensure its stability, administrative longevity, and to win its policy objectives.

Stage 2 Individual Case Study

Introduction

In this chapter's policy context segment, both the external and internal factors that influence bureau behavior were meticulously delineated, demonstrating how responsive bureaus can be to forces of change. Internally, bureaus policy creation is subject to the designs of leadership, compelled by the motivations of the Bureau's mission and susceptible to the vagaries of internal regulatory regimes. From an external vantage, bureaus are receptive to the pressures of domestic centers of power, and often yield to the will of Congress, which exercises legislative oversight of Bureau operation, and with the judicial branch which interprets the constitutionality of its regulatory promulgations. It must also abide by the directives of the president, who appoints the Bureau chief executive staff, who in turn shape the mission and culture of the agency. However, as this case study will attempt to show, bureaus can also react and craft policy, formal or informal, in direct response to the appeals of foreign actors. The primary and secondary case study under observation is especially illuminating in that it explores the response of bureaus, one federal agency and one state agency, to foreign pressure to stay the execution of a Mexican national sentenced to die in a Texas prison (in the primary) and a Virginia prison (in the cross case study). The outcomes illustrate, in each respective case, how the levers of international

influence can be used to affect Bureau action on death penalty policy. This chapter's central thesis is that foreign actors in opposition to the death penalty can exert pressure and enlist the aid of bureaucratic power to articulate the need for policy change.

Historical Case Account

Javier Suarez Medina, a Mexican national who held dual American and Mexican citizenship since age three, was nineteen years old when he was sentenced to death in Texas for the 1998 killing of Larry Catania, age forty three, an undercover narcotics officer in Dallas Texas.¹⁶ Medina was arrested on December 13, 1998 following an undercover drug buy that left two dead and several wounded in a fierce firefight. According to trial testimony, officer Catania was seated in his car; prepared to purchase what he believed to be \$4000 in cocaine.¹⁷ Medina approached the vehicle, tossed a bag of white powdery substance that appeared to be cocaine (later laboratory tests proved it was fake) onto the seat next to Catania. Immediately afterwards, Medina is reported to have pulled a semiautomatic machine gun from under his coat and shot officer Catania in his abdomen, chest and arms, killing him instantly.¹⁸ Another plainclothes officer observing the drug buy from a remote vehicle fired on Medina hitting him twice, killing one of Medina's cohorts and wounding another. Due to his severe injuries, and unable to escape, he was apprehended quickly treated at a local hospital released and then arrested.¹⁹

During his initial questioning Medina admitted his involvement, but professed that he did not know Catania was an undercover agent claiming "I thought he was just a regular drug dealer", adding "he didn't have no sign for me to know he was a cop".²⁰ By the same token Dallas law enforcement would later argue, when confronted with the fact that they never offered Medina, a

Mexican national, the rights he was entitled to under the Vienna Convention to notification of consular involvement, that Medina had provided them with no clear indication that he was a Mexican citizen. Lori Ordiway, Dallas County attorney involved in Medina's case said "the record is very unclear and the record is contradictory. At one point, when Medina was giving a taped confession, he said he was born in Mexico. Then during the course of his trial he testified that he was born in El Paso Texas".²¹

The overwhelming evidence (coupled with his confession produced at trial) left little doubt in the minds of the Texas jury as to Medina's guilt in the murder, and convicted him after only a brief period of deliberation. However, to sentence Medina to death the jury must unanimously find after the sentencing phase of the trial that he posed a continuing threat and "future danger" to society, the legal rule in Texas at the time of the trial.²² By most accounts and in an objective review of court documents Medina presented a strong defense on the basis of mitigation, which would reduce the aggravating circumstances necessary to justify death sentence.²³ Medina's prior criminal history was sparse, with only two arrests for minor property crimes for which he was never convicted. Medina had never been charged with a violent crime, and during the sentencing phase his defense team produced 15 witnesses who testified to his positive character traits, who claimed his recent actions were stunning and uncharacteristic.²⁴ The evidence compiled and presented by Medina's defense weighed heavily in favor of mitigation, and sparing him from the death penalty.

At the conclusion of the sentencing phase, the prosecution presented a surprise witness, Michael Mesley, who claimed to have recognized Medina in local TV coverage as the man who,

two years previously, had robbed and shot both he and his wife in the face with a shotgun, leaving his wife with an enduring disfigurement.²⁵ Mesley's testimony was undermined when he claimed, in response to defense questions, that Medina had slightly different appearance in the years prior (no glasses and a beard) casting doubt on the accuracy of Mesley's recollection.²⁶ Furthermore, and without ample time to collect rebuttal information on this new witness (the defense's objection to his late production were overruled by the court), the defense discovered that Medina was working at a Burger King restaurant (a fast food restaurant) at the time of the robbery, and had presented a time stamped employment record to substantiate his alibi.²⁷ The prosecution dismissed this evidence, and asserted without proof that someone else may have clocked Medina out (notwithstanding later questioning of Burger King management that rigid procedures were in place to prevent that from occurring).²⁸ The jury accepted the testimony of Mesley as truthful and found Medina a future danger to society and sentenced him to death. Noteworthy is the fact that in all states save Texas unadjudicated crimes for which the defendant had never been charged or convicted are inadmissible as evidence in ordinary trials and deemed highly unreliable and ultimately prejudicial in capital cases.²⁹

In postconviction proceedings, one of Medina's grounds for appeal was that Dallas law enforcement neglected to inform him of his consular rights and thus violating the Vienna Convention.³⁰ This allegation of treaty violation, and the concomitant request for a stay, was roundly repudiated by Lori Ordiway, appellate counsel of Dallas County. "You can't have it both ways" Ordiway asserted "only in the last week before execution does he raises violation of Vienna Convention claim. He had 13 years. He was convicted in 1989. He is alleging he became aware of this sometime right after trial or during trial. It's a way for him to delay his rightful

sentence."³¹ Ordiway, in disputing Medina's position as one foreseen or anticipated by the drafters of the Vienna Convention, remarked that "he was educated here in the US, he reads and writes and speaks the English language. And essentially, even if he had been from Mexico, he's not the kind of candidate contemplated by the Vienna Convention as someone in a foreign land and doesn't understand the laws and procedures and needs assistance from his own country's government".³² Ordiway makes plain her two prong argument that treaties cannot impinge upon the sovereignty of Texas judicial administration, and even if the convention was applicable Medina's circumstances would not render him eligible.

Attorneys for Medina were unrelenting in their zeal to pursue any legal avenue for recourse under the Vienna Convention. Medina's attorney filed habeas corpus appeals within the Texas Court of Criminal Appeals, and petitioned the Texas Board of Pardons and Parole's seeking a stay of execution or a commutation of his death sentence to life without parole as well as filing for a stay with Supreme Court.³³ In addition, Mexico and 13 other countries (Argentina, Brazil, Chile, Colombia, El Salvador, Guatemala, Honduras, Paraguay, Poland, Spain, Venezuela, Uruguay, Paraguay) filed amicus curiae briefs on behalf of Medina, all seeking a stay of execution.³⁴ Sandra Babcock, attorney for Medina and death penalty expert says "the number of countries is unprecedented, it's the highest I'm aware of", when commenting on the number of foreign states actively intervening legally and diplomatically on Medina's behalf.³⁵ The United Nations issued an open appeal to the United States to issue a stay pending further re-examination of Medina's case, with Mary Robinson, UN High Commissioner for human rights pleading with the Secretary of State Colin Powell to review Medina's case.³⁶ Mexican president Vicente Fox actively attempted to intervene on Medina's behalf negotiating with both Texas Gov. Rick Perry

and U.S. President George W. Bush. "Mexico has requested the suspension of the execution. I hope in the coming days we can talk personally about this urgent issue, which has aroused deep concern in Mexico," Fox penned in a personal letter to Gov. Perry.³⁷

Despite an array of forces on Medina's behalf, some of which produced signs of concession on the part of death penalty opponents (discussed in the following analysis) Medina's limited time to prevail on the issue of treaty violation soon ran out. His appeals for commutation or stay of execution were denied by the state courts, the governor and the board of pardons and parole's, and any intervention on the part of foreign actors on federal bureaus being insufficient to gain Medina a stay of execution. On August 24, 2002, Javier Medina was executed by lethal injection.³⁸ In a final statement Medina apologized to the Catania family, present in the death chamber to witness his execution. "I sincerely ask in your heart to forgive". Several minutes after uttering "Viva Mexico", Medina was pronounced dead by a prison doctor.³⁹

The following day Mexican President Fox cancelled a trip to Texas to meet U.S. President Bush to discuss strengthening U.S. - Mexico economic and diplomatic ties. Rodolfo Alonso, Pres. Fox's spokesman, said in an interview with a Mexican journalist "the president of the republic has made a decision to cancel his business trip that would've taken him through four cities of the state of Texas. This decision is an unequivocal sign of our rejection of the execution of the Mexican national Javier Suarez Medina."⁴⁰

Stage 3 Trace Process Analysis

The dependent variable under examination in this chapter's case analysis are bureaucratic policies regarding the death penalty, in particular focusing on the U.S. Department of State, the federal agency charged with the mandate to conduct diplomatic relations with foreign nations. In relation to the foreign national challenges to the death penalty, the Department of State becomes involved if international treaties are invoked by foreign nationals or foreign states in order to challenge capital punishment policies. The Vienna Convention provision that all accused of a crime in a foreign country be provided with access to consular services presents a unique challenge to the State Department which is required to persuade other countries to abide by Vienna Convention obligations while the U.S. continuously flouts these obligations by executing nationals whose Vienna Convention rights were violated.

The dependent variable this case study concerns itself with, Bureau policy on the death penalty, will be analyzed to determine what factors may influence Bureau policy. Independent variables that may act as intervening factors are comprised of internal factors such as Bureau leadership, mission or culture, and domestic external factors such as judicial or legislative pressure, and finally foreign actors involvement such as direct appeals to the State Department by foreign diplomats, heads of state and international organizations. The dependent variable and independent variables will be used to construct three testable hypotheses as follows; 1. Bureau policy on the death penalty is shaped by internal factors, 2. Bureau policy is shaped by domestic external factors, and 3. Bureau policy is shaped by foreign actions.

Hypothesis 1. Bureau policy is shaped by internal factors

As the Bureau policy discussion previously outlined, Bureau policies can be largely shaped by internal factors such as Bureau leadership and culture. These endogenous forces can determine how bureaus respond to situations in which they are involved in a death penalty case. As noted, these internal factors are themselves subject to influence and potential manipulation by external factors. However, in this segment CPO's will be examined to ascertain whether a bureau's internal mechanisms alone can independently exert influence over the policymakers who have actual authority to impact the process, and if those forces impacted that Medina case outcome.

CPO's

As the culture of leadership at the U.S. Department of State is oriented around a mission, engaging in diplomatic relations with foreign states that is largely detached from issues of domestic law enforcement, and is rarely involved in advocating positions regarding domestic issues that arouse the ire of a foreign country, it must employ a delicate triangulating maneuver, especially in death penalty cases to not be seen to either infringing upon a United States criminal justice prerogative (quite beyond the scope of its official purview) or unduly provoke a nation state. This creates a precarious balancing act making gaining insight into the inner machinations

of Bureau culture and leadership preferences much more difficult. In addition, Bureau actors are notoriously reticent to publicize internal deliberations, making access to documents that elucidate influence or expound upon policy processes incredibly difficult. However, if we examine the known preferences of its leadership and particular policies they may have historically supported, information can be gleaned that provides some illumination, and inferences can be accurately drawn.

At the leadership level Secretary of State Colin Powell was a proponent of capital punishment and had publicly advocated for the death penalty during his tenure in interviews prior to assuming this post.⁴¹ He served in the military as General and Commander of Forces in the first Iraq war and was a vocal supporter of military forms of capital punishment. In addition George W. Bush who appointed Powell was also a steadfast supporter of the death penalty as his record as Texas Governor amply provides.⁴² His appointment to other posts that did preside over death penalty cases (e.g. Attorney General John Ashcroft in the execution of Timothy McVeigh) were selected in part for their unwavering conviction that the death penalty was an effective punishment. However, both Powell and Bush were fervent states rights advocates who would eschew intervening in state dispensation of justice on behalf of the federal Bureau as an encroachment upon the sovereign rights of the state to adjudicate criminal acts and impede punishment under its own laws.⁴³ Absent documentary evidence to the contrary (the historical record regarding these deliberations remains confidential, so policy discussions within the Bureau are obscured and unavailable), it can be safely inferred that there was no internal force at work to impact Medina's case in any outcome determinative sense.

Therefore, irrespective of Bureau culture or personal preferences the bureau would be unequipped and unmotivated to act independently to insinuate its authority into the dispute. It can therefore be concluded that internal factors based upon Bureau actors preferences or mission orientation were not likely to have been contributing factors influencing the outcome of the Medina case.

Hypothesis 2 External Domestic Factors Influenced Death Penalty Policy

As the policy segment earlier noted external domestic factors can exert influences on a Bureau in any number of ways; Congress controls funding and approves appointments by the executive, the president shapes the Bureau culture by exercising appointment powers and the judiciary interprets a bureaus actions in light of constitutional conformity, and can overturn a Bureau's regulatory actions as a usurpation of power and a violation of the law. This hypothesis will test the assertion that a Bureau's policy balance in reference to the death penalty can be influenced by domestic external factors such as the judiciary, executive and legislative branches of government, and in particular whether evidence exists to support or rebut the contention that external influence impacted the Medina case.

CPO's for the Judiciary

The State Department would find little encouragement or relief in either the precedential edicts of prior court decisions regarding State Department involvement in domestic policies or State Department advocacy on behalf of a foreign actor. The courts have never adjudicated the powers of the State Department regarding their ability to engage in influencing domestic policy, but have only held that the legal arguments upon which foreign actors oppose the death penalty are without merit.⁴⁴ Furthermore, there is no record or documentation (either in court documents such as legal briefs or memoranda of law, personal entreaties by the judiciary, or journal articles suggesting the possibility) that would support the hypothesis that any member of the judiciary attempted to exert influence over the bureaucratic decision making process that resulted in State Department action on Medina's behalf. Therefore it can be concluded that the federal judiciary cannot, as constrained by both its own precedent and its limited powers of influence, compel the Bureau to intercede.

CPO's for the Executive

The Secretary of State, a cabinet level Bureau appointment, serves his post at the pleasure of the President, who could demand his resignation if he refuses to comply with the edicts of the office of the chief executive.⁴⁵ Given this tenuous circumstance, the President possesses a greater degree of leverage than the other two branches in terms of external influence on the Bureau. No

communication between Bush and Powell are recorded or available making the presence of any influence impossible to determine conclusively. Inferential assumptions can be drawn that demonstrate a pattern of reticence on the part of both to interfere in the administration of state justice as stated above, but absent any tangible evidence it must be concluded that the Executive branch played no role in effecting policy considerations undertaken by the Department of State in its choice to intervene on Medina's part to ask for reconsideration of his case.

CPO's for the Legislative Branch

As with any broadly representative legislative body, the U.S. Congress contains a widely diverse group of often disparate voices who share variously divergent opinions on both substance and practice. However, as a body they must act in concert to be in majority agreement to wield sufficient influence on the other branches of government or form dramatic action on a particular issue. In the issue at hand I can find no evidence to support a conclusion regarding whether Congress acted in any way to compel the Bureau to act on behalf of Medina in his appeal to the State Department. It can be safely concluded that Congress did not impact Bureau behavior in the Medina case.

CPO's for Foreign Actors Influencing Death Penalty Policies

In following the chapter's policy analysis segment, federal bureaus such as the State Department are subject to influences both external and internal that contribute powerful forces which can shape policy formulations. Earlier trace process analysis has effectively excluded the influence of both external domestic factors and internal Bureau factors in falsifying each respective hypothesis. The final hypothesis addresses the possibility that foreign external factors could exert influence on a Bureau and thereby shape policy by inducing action.

It may seem counterintuitive that a foreign actor could succeed in influencing U.S. Democratic Bureau behavior when fellow U.S. actors had failed. However, as noted earlier in this chapter the U.S. Department of State may be by its very nature responsive to the demands of foreign powers with which it seeks to elicit diplomatic reciprocation on other issues important to the ship of state. Viewed in this perspective a foreign actor possesses more leverage in extracting political concessions for this particular diplomatically oriented Bureau than other domestic agencies. Using the levers of diplomacy, foreign governments can have a potential advantage over the State Department, and in exchange for political reciprocity can issue demands that would otherwise be rebutted by another Bureau. In the Medina case an array of foreign forces were aligned to exert pressure on the State Department to intervene on behalf of the Mexican national.

Mexican president Vincente Fox, both through his foreign secretary and on his own behalf petitioned Secretary of State Colin Powell directly to intervene on Medina's behalf. Fox had long opposed Medina's execution based on what he called an "illegal" punishment in violation of international law, and Fox had earlier threatened to cancel a trip to the state of Texas in the United States for trade negotiations and a five city tour of the state.⁴⁶

Mary Robinson, UN High Commissioner of Human Rights, also called upon Powell to comply with the Vienna Convention and international human rights standards and uphold safeguards that preserve the rights of foreign nationals facing the death penalty.⁴⁷ Robinson, along with Fox reiterated the position to Powell that Medina had not received proper advice from foreign consular representatives that would have prevented a capital sentence and asked Powell to intervene.⁴⁸ Amnesty International also petitioned Powell stating that unless the execution is halted the United States will once again lose credibility as a nation that respects its binding human rights obligations.⁴⁹ Although Powell ultimately declined to intercede on Mexico's behalf personally, the State Department did indeed respond to the pressure from both the Mexican government and the international community at large.

In a press conference State Department spokesman Philip Reeker conceded that "we think and believe strongly that the need to provide consular notification is a very important issue. It has implications for reciprocal situations, obviously".⁵⁰ Shortly thereafter the State Department sent a formal request to the Texas Board of Pardons and Parole's, the only agency with the power to pardon Medina, to impress upon them on Mexico's behalf the importance of U.S. relations with Mexico and the consequences of not following the Vienna Convention.⁵¹ Bob Taft, legal advisor to the Department of State, said in pertinent part that "the governor of Mexico has written the department about this case to express its concern that Mr. Suarez was not advised at the time of

his arrest of his right to have a consular official notified of his detention. The Department of State places great importance on her consular notification obligations, the reciprocal observation of which serves to protect all Americans who travel or live abroad. The information we have received from Texas authorities indicates that there was a failure to comply with the consular notification obligation of Article 36 (1) of the Vienna convention... In view of the above facts the Department of State will convey to the government Mexico on behalf of the U.S. State Department deepest regrets over the failure of consular notification in this case... We respectfully request that in the course of its careful consideration of this petition the board to give specific attention to the failure of authorities to provide Mr. Suarez with consular notification pursuant to article 36 of the Vienna convention. We further request that the board also give specific consideration to the representations made by the government of Mexico on Mr. Suarez is behalf."⁵² These actions on behalf of Mexico demonstrate that foreign influence was placed upon a domestic Bureau, and the U.S. Department of State responded affirmatively to this pressure by changing its policy regarding its intervention into state affairs. This action was inconsistent with its mandate to only engage in foreign diplomacy and eschew domestic policy intervention. The personal policy preferences of both the Secretary and the President that appointed him, the majority will of Congress, and with Supreme Court precedent that disallows intrusion in domestic policies by a diplomat of the Department of State or the impingement of a sovereign states right to adjudicate crimes based upon foreign or international law, all combine to suggest that the Department of State could only have issued its recommendation to Texas authorities under the diplomatic pressure exerted by Mexico .

These two CPO's and evidence that countervailing preferences were defeated by the bureau actions strongly suggest that foreign pressure exerted on the State Department resulted in an attempt to insert itself into a death penalty dispute, and an internal change of bureau policy toward the death penalty and the circumstances in which it would intervene.

Stage 4 Elite Interviews

The elite interviews are intentionally designed to either bolster the inferential assumptions in the conclusions reached through meticulous and deliberate trace process analysis or refute these same assertions by offering contradictory evidence that would buttress a contrary conclusion. Elite interviews in this chapter on foreign influence on bureau power are drawn from various sources both in government and from those attorneys who actually participated in the death penalty litigation. On balance, the interviews strongly support the hypothesis that foreign intervention on behalf of Medina greatly moved the State Department to take the extraordinary steps of enlisting itself as an advocate for the government of Mexico and Medina by writing a strongly worded letter to impress upon the Texas Board of Pardons and Parole's its full authority as an organ of state to implore the state agency to consider the international ramifications in executing Medina.

Lori Ordiway, Chief Dallas prosecutor, was reluctant to offer her perspective on the case. "Unfortunately I have no insight or significant recollection to offer", Ordiway stated.⁵³ However, Sandra Babcock the lead counsel for Medina's defense was explicit in her finding that international processes applied by the Mexican government and international organizations such

as Amnesty International were instrumental in coercing the State Department to act on Medina's behalf. "I guess the short answer to your question is that there was a great deal of international pressure to stop Javier's execution, but none of it was successful in persuading the Supreme Court to grant a stay (or in persuading the Texas governor to grant a reprieve). I authored an amicus brief on behalf of several foreign governments in support of Javier's Supreme Court appeals. The Mexican government did pressure the State Department to intercede. I believe the State Department legal advisor sent a letter to the Texas Board of Pardons and Parole's as well as the Texas governor requesting that they grant clemency."⁵⁴

The elite interviews, although arguably limited, further strengthen the inferential assumptions and the trace process analysis conclusion, that the U.S. State Department was compelled to intervene on behalf of the Mexican Government, which applied diplomatic pressure to attempt to secure a stay of Medina's execution.

Stage 5 Comparative Cross Case Analysis

The comparative cross case analysis segment of this chapter will consist of a companion case which is fact similar in both the legal issues raised by the case, identical jurisdictions, and similar participants which are in both cases outcome determinative. Both cases arise in Texas, and each defendant raised the issue of consular notification in his respective attempt to seek a stay of execution. Both defendants' requests were duly denied by both the Texas Board of Pardons and Parole's, and in both cases it was Governor Rick Perry who issued equally dismissive responses to both men's appeal. In addition, each man was represented by attorney Sandra Babcock, a death

penalty scholar and preeminent capital punishment practitioner whose legal argument invoked Vienna Convention violations which were dismissed by the U.S. Supreme Court in both men's appeals.

The case of Humberto Leal, a Mexican national sentenced to death in Texas, will illustrate the striking parallels between cases, and highlight the increasingly progressive stance that the U.S. State Department (along with other co-equal branches of government) have taken to enforce more stridently the Vienna Convention rights of Mexican nationals, and demonstrate the heightened sensitivity the State Department has been operating under since the Medina execution, which occurred a mere seven years prior to the Leal final adjudication regarding death penalty punishment. This cross case analysis will further support the conclusion of the trace process analysis and elite interviews, and the chapter's primary assertion that bureaus are receptive to the influence of foreign actors and are increasingly willing to intercede on their behalf.

On May 20 in 1994, Humberto Leal was attending a raucous party in San Antonio Texas. Andrea Saucedo, a 16-year-old girl who, according to witnesses statements, was partially clothed and intoxicated and surrounded by a group of men who were alternately engaging her in sexual intercourse.⁵⁵ At one point in the evening Leal asserted to several present that he was acquainted with Saucedo's family and would escort her home. Shortly thereafter Leal's brother arrived at the scene of the party, frantically claiming that Humberto had stated that he had murdered a girl, and was covered in blood.⁵⁶ An immediate search was organized by the revelers, who quickly

discovered her nude and bludgeoned body onto nearby roadside.⁵⁷ Saucedo, according to medical testimony given at trial, had suffered several stunning blows while standing, was manually strangled while supine, vaginally raped with a broken piece of lumber roughly sixteen inches long, and a fatal contusion delivered to her corner of the right eye with an asphalt block with a weight estimated at approximately forty pounds.⁵⁸ Upon questioning Leal was noted by law enforcement officers to have cuts and abrasions on his body.⁵⁹ After a thorough search of his house, a bloody shirt belonging to Saucedo was located along with bloodstains in Leal's automobile. Leal was thereafter arrested for Saucedo's murder.⁶⁰

Leal was a Mexican national, living illegally in the United States since the age of two years old. Upon his arrest, he was never informed of his right to consular advice and counsel as provided by the Vienna Convention.⁶¹ Leal's trial for capital murder proceeded and the overwhelming physical and circumstantial evidence resulted in the jury returning a conviction in July of 1995, and sent subsequently sentencing Leal to death. This conviction was summarily affirmed by the Texas Court of Criminal Appeals in February 1998, and all further appeals in both state and federal venues were likewise disposed of in favor of the state.⁶² Leal's final death sentence, with all legal avenues of appeal exhausted, was scheduled for July 2, 2011, sixteen years after his initial conviction.

As Leal's execution date approached, the same organs of Mexican state (the president and the foreign affairs ministry) as well as the international community were poised to exert all manner of force on every conceivable governmental entity that could potentially proffer relief, including

the U.S. Department of State.⁶³ President Obama issued a direct appeal to officials in Texas, primarily Texas governor Rick Perry and the Texas Board of Pardons and Parole's giving stern admonishment that Leal's execution would violate international law and cause "irreparable harm" to U.S. interests abroad, in particular placing Americans living overseas in a precarious legal predicament and would effectively route our credibility as human rights advocates by flouting the same Vienna Convention rules that the United States has invoked in the past to protect its citizens.⁶⁴ Obama, under pressure from the Mexican government and international organizations, also directed the Solicitor General to file an appeal with the Supreme Court to stay the execution based on pending legislation introduced into Congress by Senator Patrick Leahy.⁶⁵ The Consular Notification Compliance Act would empower federal courts to conduct a judicial review of cases involving foreign nationals not apprised of their consular notification rights, and determine if it prejudices the disposition of the national's case.⁶⁶ The Supreme Court rejected this argument in Leal's case, refusing to adjudicate the dispute based solely on proposed legislation, with the court split five to four, the majority opinion stating that "our task is to rule on what the law is not what it might eventually be".⁶⁷

The disparate forces further aligned to exert pressure on the State Department, most notably Secretary of State Hillary Clinton. As with Medina, Leal supporters and the Mexican government orchestrated a coordinated campaign to move the State Department to engage in political and diplomatic maneuvering to appease international rancor over Leal's execution. On June 28, 2011 Clinton wrote to Texas officials that "the U.S. is best positioned to demand that foreign governments respect to consular rights with respect to U.S. citizens abroad when we comply with the same obligations for foreign nationals in the United States."⁶⁸

Sandra Babcock, Leal's attorney, points to the 2004 ICJ decision that found Leal's conviction violated the Vienna Convention, and ordered the United States to review his sentence, and stated that "the fact is that if Mr. Leal had received the consular assistance he was entitled to, he never would have been convicted, let alone sentenced to death."⁶⁹

However, irrespective of the State Department's intervention Leal was executed on July 7, 2011.⁷⁰ Secretary Clinton stated that she was "deeply disappointed in the Supreme Court and the state of Texas refusal to issue a stay in accordance with ICJ rulings".⁷¹ Regarding Mexican involvement in Leal's case, State Department spokeswoman Victoria Nuland said "it's important that our partners overseas know that the U.S. government executive branch was not comfortable with what happened in this case".⁷² She stated further that the "secretary is making clear to her counterparts, whether they are in Mexico or anywhere else, that we seek to remedy the situation and we seek to remedy it as quickly as we possibly can" she also added that that included expanding passage of the legislation through Congress to achieve that end.⁷³

Conclusion

Governmental bureaucracies formulate and craft policies based upon both external and internal influences. Internally, factors such as mission orientation and leadership contribute to policy formation. Externally, influential actors can exert pressure on bureaus to conform their policymaking behavior to serve their respective interests, and have been defined in this chapter as originating either domestically or from a foreign power. The hypotheses in this chapter tested the ability of both internal and external actors to influence policymaking at the U.S. Department of State regarding how death penalty policies were implemented against foreign nationals sentenced to death. The trace process analysis segment of the Medina case study provides strong and persuasive evidence that the U.S. State Department was compelled to act on behalf of the interests of the Mexican government to further its diplomatic mission, and foster diplomatic ties conducive to international reciprocity. The elite interviews with attorneys directly involved in the Medina case further support the inferential assumptions tested in the case study, and the cross case comparative analysis involving Humberto Leal further reinforces conclusions drawn by the primary case study analysis. It can therefore be concluded with a strong degree of certainty, based upon an exhaustive case study analysis, that foreign governments through diplomatic negotiation can influence the policymaking behavior of U.S. bureaus with respect to capital punishment policies.

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 The President, by and with the advice and consent of the Senate,
 shall appoint a representative of the United States to the United
 Nations who shall have the rank and status of Ambassador
 Extraordinary and Plenipotentiary and shall hold office at the
 pleasure of the President.
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Chapter 7

Foreign Consul Influence on Death Penalty Policies

Stage 1 Policy Context

Introduction

“Sovereignty and the laws, are nothing but the some of the smallest portions of the personal liberty of each individual, they represent the general will, which is the aggregate of particular wills. Who has ever willingly given other men the authority to kill him?. The death penalty is not a rights, that the war of a nation against a citizen.”¹

Cesare Beccaria, 1764

Wielding the legal power to dispense death, Texas has been waging Beccaria’s war against not only its own citizens, but citizens of other states, primarily Mexico. And it's been a very dirty war. Texas prosecutors have routinely engaged in misconduct during death penalty trials, withholding exculpatory evidence, employing racially divisive tactics to rig capital juries, and aggressively seeking the death penalty for mentally retarded defendants (until the Supreme Court banned this practice, at which point Texas appellate attorneys reversed course arguing that the same defendants were now not mentally retarded²). Texas law enforcement officials have been complicit in this war and have abducted Mexican nationals secretly moving them across the border, and coercing confessions in blatant violation of international law.³ But the prosecution of

this brazen war has not gone unnoticed by the international community, which has decried its illegality and taken steps to intercede. Using the Vienna Convention on consular rights, Mexico has rushed to the defense of its citizens facing death in Texas, arguing Texas judges and prosecutors must give deference to international laws over domestic laws which allow the state of Mexico to provide assistance to its citizens, and when that law is violated that consequences must ensue.

The Vienna Convention, a treaty which guarantees foreigners charged with a crime the right to contact a consular representative from their home country to provide legal and language assistance, is routinely disregarded by Texas law enforcement officials pursuing a confession from a Mexican citizen, and regularly dismissed by prosecutors as nonbinding and unenforceable on Texas criminal laws of procedure.⁴ Mexico, its citizens and the country itself, invokes the Vienna Convention in death penalty cases in two ways, at trial to provide counsel to its citizens, and during postconviction processes to argue its violation should constitute reversible error committed on the part of the state of Texas. Both tactics have been successful, indicating that Mexico, by pressing the Vienna Convention, can secure policy concessions in death penalty cases in Texas. This chapter will discuss in the policy context segment how the Vienna Convention was adopted and ratified by the United States, how it has been used by Mexico to free citizens facing imminent death, and the consequences of Texas' continued dismissal of the Vienna Convention as a binding form of international law. The case study segment contained within this chapter will examine two pivotal Texas cases that illustrate how the Vienna Convention has been used in the past, conduct a trace process analysis to examine critical pieces of evidence comprising CPO's and create causal linkages to ascertain the relationship between

these events and how their resolution resulted in the creation of policy outcomes. Elite interviews will be conducted and used to reaffirm or rebut inferential assertions made in the case study analysis, and a cross case comparative analysis will look for commonality among cases. This chapter will conclude by reevaluating the success of tactics employed by the Mexican government as illustrated in the case study and draw conclusions about the ability to replicate successes and reconcile failures, and to draw conclusions about future policy considerations.

The Vienna Convention

The Vienna Convention (Conference on Consular Relations) was created by the United Nations on April 24, 1963. Ninety two nations participated in the conference that drafted a treaty defining consular rights, obligations and duties to be extended to all nations who became signatories to the treaty.⁵ The culmination of these broad-based negotiations on consular rights among nations was unprecedented in history, and created a comprehensive agreement that provided detailed guidelines to nations in regard to diplomatic negotiation. The United States delayed ratifying the Vienna Convention until 1969, where the United States Senate unanimously ratified both the Vienna Convention and the optional protocol concerning the compulsory settlement of disputes. The delay was largely the product of a reticent Nixon administration which perceived the Vienna convention as inferior to many bilateral treaties already in force, which Nixon considered much more rigorous in their standards and more conducive to diplomatic reproachment.⁶

Article 36 of the Vienna Convention mandates that all foreign nationals who are detained on foreign soil be apprised "without delay" by law enforcement officials of their right under the Vienna Convention to confer and consult with representatives of their home country through their foreign consulate to ensure adequate representation. This particular article of the Vienna Convention was the subject of much heated debate during the convention, and created what is debatably the most critical article in the convention. The debate revolved around the issue of the receiving states duties as defined by the convention in a consular relationship. A prominent issue, a source of contentious dissension among negotiating states, was whether a home country must be notified of the arrest of one of its citizens without regard to the citizen's desires. The United States pointedly asserted that "no country could disregard its obligation in certain circumstances to inform consuls of the sending State of the arrest of its nationals." It is this very requirement of Article 36 of the Vienna Convention that the state of Texas continues to blatantly flout, its law enforcement officials refusing to comply with the plain language of the conventions requirements, and its prosecutors disregard as harmless error. The dispute among nations was ultimately mediated, and resolved through compromise. Article 36, as ratified by the United States Senate, requires that the receiving state is obligated to inform any foreign national detained within the United States of their rights to communicate with a consular representative without delay.

Under Article 36 (1)(b) of the Vienna Convention, the requirements of the detaining state are bifurcated. Firstly, states must inform of foreign detainee without delay that they have a right to confer with a consular representative, and secondly the detaining state must facilitate and allow communication between the foreign states and the detainee. This provision enables those who

have been charged with a crime who are foreign nationals, detained in a country in which they may not speak the native language, may be unfamiliar with laws of criminal procedure that offer safeguards and protections to those who've been charged, and who may be the subject to coercion and intimidation at the hands of law enforcement officials, receive counsel from representatives of their country who seek to enable their citizen to avail themselves of all lawful protections, and shield them from potential abuses. The United States has historically been a steadfast advocate for international adherence to the binding effect of all articles of the Vienna Convention as enforceable against any signatory nation who may breach any particular provision.⁷ In addition to U.S. ratification of the Vienna Convention without reservations, the U.S. further conceded jurisdiction to the International Court of Justice to adjudicate any disputes between nations related to the Vienna Convention.⁸ Although the United States resists the imposition of Vienna Convention provisions in regard to criminal case adjudications domestically, it has strenuously invoked Article 36 in the past to forcefully defend the rights of its own citizens when they have been held abroad, and have called upon the ICJ to render rulings in its favor.⁹

During the Iranian hostage crisis in 1979, when the United States Embassy was besieged and Americans held hostage, the United States vociferously insisted the ICJ issue its strongest judgment in condemning Iran as a violator of international law.¹⁰ In subsequent Texas death penalty cases when the Vienna Convention has been invoked against the United States, and the shoe has been placed on the proverbial other foot, the United States has placed itself in the awkward position of arguing the shoe no longer fits.¹¹

However, the Supremacy Clause contained within the United States Constitution provides that the Vienna Convention is lawfully binding on all states in the U.S., including Texas. Article

6, section 2 of the U.S. Constitution states in pertinent part that "the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." And although Texas, and its Governor Rick Perry, has adamantly denied the applicability of either federal, foreign, or international law to the Texas criminal judicial process, courts are increasingly recognizing the authority of the Vienna Convention in both trial level rulings and appellate court findings.¹² In the following policy segment this chapter will consider a precedential line of cases that has begun to establish judicial precedent that both enabling the Mexican Consulate to provide assistance in insinuating itself into the Texas judicial process and offering consul intervention and thus providing adequate representation to Mexican nationals accused of capital murder, and the burgeoning awareness among judicial appellate courts reviewing Vienna Convention violations that the Vienna Convention accords relief to Mexican nationals whose rights under international law have been blatantly violated.

In the United States in 1992, in the state of Virginia, Angel Breard, a citizen of both Paraguay and Argentina was arrested for rape and murder. Breard's conviction and subsequent death sentence were all but a foregone conclusion given the overwhelming abundance of DNA evidence coupled with Breard's unabashed confession to the crime.¹³ Breard was never informed of his rights to consular representation under the Vienna Convention, and only became aware of the Conventions requirements after he understood that Virginia law enforcement officials had violated his rights.¹⁴ Breard then petitioned a federal district court in the Eastern District of Virginia in a habeas corpus petition claiming that his rights under the Vienna Convention had

been violated. The court declined to rule in Breard's favor citing the "procedural default" rule that precludes raising any issues not raised in previous proceedings.¹⁵ This ruling by the district court was appealed to the Fourth Circuit federal court of appeals, and Breard was again denied relief under the Vienna Convention, and the Fourth Circuit reaffirmed the holding of the lower District Court.¹⁶ Incensed by this ruling Paraguay took up Breard's cause, and brought suit in the ICJ alleging that Breard's conviction was the result of Virginia authorities neglecting to inform Breard of his rights under Article 36, in clear violation of the Vienna Convention.¹⁷ The court concurred with Paraguay and Breard, and in response to his imminent execution rendered a judgment that demanded that the U.S. "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the decision in these proceedings."¹⁸ With Breard's execution pending, the United States Supreme Court accepted a petition for certiorari to address the issue of Vienna Convention violations. In a six to three vote the United States Supreme Court ruled that although the Vienna Convention may under certain unstated circumstances provide an "individual the right to consular assistance following arrest" that that right did not constitute a violation that rose to the level of reversible error, and that "neither the text with a history of the Vienna Convention clearly provides a foreign national with a private right of action in the United States courts to set aside a criminal conviction and sentence for violation of consular notification provisions."¹⁹ The court further held that Breard failed to prove that this violation of the Vienna Convention committed by Virginia law enforcement officials in any way created a material disadvantage or in any way prejudiced Breard in his trial or postconviction proceedings.²⁰ This ruling was not unanimous and three U.S. Supreme Court justices did dissent arguing they be allowed more time to consider the full ramifications of foreign venues holdings and its relation to

Supreme Court rulings.²¹ However, with the Supreme Court unwilling to intervene, and the ICJ without authority to stay the execution, Angel Breard was executed according to schedule.²²

In 1999 the ICJ again attempted to stay an execution, this time in the state of Arizona, finding that law enforcement officials they failed to inform the LaGrand brothers of their rights under the Vienna Convention to contact the German Consulate.²³ The LaGrand brothers, German nationals, were convicted nearly twenty years before for killing the employee of a bank during a robbery. With the pending execution looming, again the ICJ received a petition from Germany alleging that the United States had violated the LaGrand's rights under the Vienna Convention to confer with German consul.²⁴ The United States Supreme Court in taking up the LaGrand case reiterated its previously stated position that a defendant's failure to raise Vienna convention claims that the trial court level created an immovable legal impediment to raising the claim in postconviction proceedings.²⁵ Brushing aside the stay of execution issued by the ICJ, the Supreme Court duly authorized the execution of the LaGrand's to proceed. Both brothers were executed.

However, Germany persisted in seeking recourse through the ICJ. In subsequent proceedings the United States conceded its violation of the Vienna Convention and offered an olive branch of sorts to the state of Germany in offering a formal apology.²⁶ However this formal apology was qualified with a succinctly stated reservation, opining that the Vienna Convention could not impinge upon the administration of municipal laws, and that the sovereign right of states to administer justice, and mete out punishment to those who would violated the laws of their sovereign state where an inviolable right of those states in which crimes have been committed.²⁷ Germany was strident its disapproval and disagreement, forcefully arguing that the Vienna Convention does in fact create binding obligations on individual states within the U.S., and that

the U.S. was in clear violation of the Vienna Convention.²⁸ The ICJ came down on the side of Germany inveighing against the United States that there "apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the convention."²⁹ The United States responded, and it's courts have found that in order for Vienna Convention violations to be reviewable defendants must prove that they were prejudiced by the neglect of law enforcement officials to inform them of their Vienna convention rights.

In subsequent cases Mexican nationals have sought to rely upon the preceding line of cases, and expand upon the previous holdings of the ICJ, invoking the Vienna Convention violations by Texas law enforcement officials, to fashion a persuasive argument in appealing to the U.S. Supreme Court to find merit in the arguments proffered by Mexican nationals that the procedural default rule in reference to Article 36 claims was patently unfair, and that the Vienna Convention treaty was in fact the law of the land and applicable to the states. In *Torres v Oklahoma*, Osbaldo Torres was not informed of his rights under the Vienna Convention to confer with consul, and was sentenced to death in the state of Oklahoma for murdering two people in a burglary in Oklahoma City.³⁰ In *Torres*, although the Supreme Court declined certiorari and refused to hear the case, certain Justices on the court made abundantly clear their amenability to arguments that Article 36 preclusion under claims of procedural default, in that defendants failed to raise, or even be aware of, Vienna Convention violations were legally untenable.³¹ Justice Stevens and Breyer both voiced concerns in a concurring and dissenting opinion respectively, that the "procedural default rule to Article 36 claims is not only in direct violation of the Vienna

Convention but is also manifestly unfair,” and that Mexico's arguments regarding Article 36 were "substantial".³² Torres became one of fifty four Mexican nationals included in a suit filed by Mexico against the United States before the ICJ averring persistent disregard by the United States of Vienna Convention violations.³³ The United States disagreed, arguing that it had comported itself with the ICJ demands stated in the LaGrand case, and that it had conducted reviews of all cases in which alleged violations of the Vienna Convention had occurred, and further complained that the ICJ lacked the authority to impose mandatory procedural requirements upon state courts, and that the United States in its voluntary compliance to the rigorous strictures of Article 36 were only permissive and unenforceable.³⁴ The ICJ handed Mexico a hard-fought victory when it issued a stay on all scheduled executions for Mexican nationals, to be enforced before any judgment by the ICJ was rendered on the issue at bar. The United States accepted the ICJ's order of stay, and later proved to honor this commitment.³⁵

On March 31, 2004 the ICJ arrive at a conclusion, finding that the United States had committed violations of the Vienna convention, and had flagrantly denied foreign nationals detained on American soil the opportunity to confer with foreign consul, by neglecting to notify Mexican consul of a nationals detention, by not allowing their Consulate to coordinate legal representation, and by not allowing a review of their cases.³⁶ The court ordered that reparations for these violations be duly carried out and that "review and reconsideration" by the U.S. of all fifty four death sentences be undertaken immediately.

Subsequent to the ruling by the ICJ President Bush ordered all courts in begin a fresh review of all Mexican nationals convicted and sentenced to death who were not advised of their rights under the Vienna Convention.³⁷ However, the prevailing sentiment in the state of Texas continued to embrace a federalist approach of judicial isolationism. The current Texas Governor Rick Perry perfectly exemplifies the distain that many Texans have for what they view as foreign intrusion into their state sovereignty, when he says that the International Court of Justice "does not have jurisdiction in Texas".³⁸

Although the ongoing dispute continues over issues of federalism, which create a putative legal shield encapsulating Texas death penalty policy, protecting it from encroachment of international influence, at the appellate court level Article 36 arguments inadvertently expose a tacit concession in policy on behalf of death penalty advocates, which all point an emphatic finger at trial court involvement. The procedural full rule, if anything, indicates that the focus of Vienna Convention invocation must occur before sentencing ever occurs. The policy segment thus far has focused on issues of judicial maneuvering at the appellate court level, which although profound progress has been accomplished, and persuasive legal arguments have seen a burgeoning resurgence in popularity and are being met with increasingly receptive embraces, is still not as effective as proactive trial level involvement of Consular officials. The following case study analysis shifts the focus from Mexican involvement postconviction to Mexican involvement pre-conviction pretrial trial phase. And although the successes are developing at a glacial pace in appellate courts in the United States, successes of the Mexican consulate in intervening early in the trial phase after a Mexican national has been detained have proved spectacularly successful.

Stage 2 Case Study Analysis

Introduction

As the preceding policy context segment amply illustrates, the Texas judicial system still operates from a position of entrenched federalism, and eagerly resists any attempt by either federal agencies within the United States or foreign governments and organizations from outside the U.S. to encroach upon their judicial sovereignty. However, courts have demonstrated willingness, and in the Texas executive as well as in bureaucratic agencies, a degree of receptivity to the necessity of Vienna Convention compliance. This gradual acquiescence to international judicial consensus is slowly eroding the recalcitrance within the Texas judicial community to continue to disregard the requirements of international law, but still presents a formidable barrier to protecting the rights of Mexican nationals convicted of capital crimes in the state of Texas. This chapter's case analysis will examine Mexican consulate intervention in a manner that circumvents issues of federalism, and demonstrates how the Mexican Consulate can exert pressure directly at the trial court level in Texas, and intervene before judicial review becomes a necessity, thus eliminating the issue of federalism. The two cases under scrutiny in this chapter both involve Mexican nationals charged with crimes in Texas in which the Mexican Consulate intervened prior to trial and where participation was ultimately outcome determinative. This chapter will closely examine the history and involvement of the Mexican consulate at the trial level in, and theorize that the government of Mexico can directly impact the

outcome of the Texas death penalty trial by strategically investing resources in Texas to aid in the defense of the Mexican national, and thus informally affect death penalty policy in the state.

The United States and Mexico, joined by a 1500 mile contiguous border buttressed on both sides by the Pacific Ocean and the Gulf of Mexico, share many similar cultural, social and economic ties. International cooperation between the two countries has been commonplace on issues of economic interest, culminating in many multilateral and bilateral agreements, such as NAFTA.³⁹ The United States and Mexico have also joined efforts in combating the international scourge of human trafficking and the drug trade. However, the United States and Mexico widely diverge on the issue of capital punishment. This contentious disagreement reaches a boiling point when Mexican nationals are charged with capital offenses in face the ultimate penalty of death in the United States. Mexico, which long ago abolished the death penalty, has made strident efforts to protect its nationals in the United States who have been accused of crimes that carry a death sentence. In Texas, Mexico faces its most stalwart opponent, a state that has executed more Mexican nationals than any other in the United States, and has often stated publicly its intent to continue this policy unabated.

For its part, Mexico has mounted a counter offensive to what it views as a judicial onslaught determined to disregard international law and execute its citizens irrespective of international constraints. Mexico has invested prodigious amounts of both money and manpower to intervene in the defense of its nationals, and provide the most zealous representation to ensure that all Mexican nationals are ably represented.⁴⁰ The Mexican government, through its consulate and

legal defense programs, has proved crucial in intervening on behalf of Mexican nationals facing death penalty trials in both drawing attention to Vienna Convention violations committed by the United States, and providing invaluable assistance to Mexican nationals during trial. In furtherance of these goals the Mexican government has taken a number of steps. Beginning in the early 1980s, as a result of increased executions of Mexican nationals in Texas, the Mexican government began to devote a large amount of resources to expanding the Mexican Foreign Ministry's ability to extend protection to Mexican nationals charged with crimes in Texas.⁴¹ In 1982 the Mexican government enacted the governing law of the Mexican Foreign Service, which requires Mexican consular officials to assist Mexicans who were detained in a foreign nation, and provide them with their full assistance. The law further requires consular officials to actively intervene on behalf of any Mexican national whose detention violates international law.⁴² In 1986 the Mexican Foreign Ministry founded the Program of Legal Consultation and Defense, sending Mexican consular officials to law schools in the United States to better equip them to assist attorneys defending Mexican nationals charged with capital crimes. Mexico further established the Mexican Capital Legal Assistance Program, expressly designed to improve the ability of defense attorneys representing Mexican nationals in death penalty trials, and increase the efficacy of Mexican legal defense teams.⁴³ This concerted, coordinated effort on the part of Mexico to forcefully insinuate itself into the Texas judicial process, and aggressively defend all nationals accused of capital crimes, has forced the same trial level policy concessions witnessed at the appellate court levels in recent times, but has had dramatically tangible results. The following case study analysis will examine two cases of Mexican nationals charged with capital offenses in Texas, and will analyze critical process observations in an attempt to isolate variables and explain causal connections and inferential assumptions.

Individual case history

Ricardo Aldape Guerra, an undocumented Mexican national who had been residing in a Hispanic neighborhood in Houston Texas for only two months, became involved in an altercation on July 13, 1982 that would forever change his life.⁴⁴ At approximately 10 PM that evening officer James Harris of the Houston Police Department had been informed by a pedestrian named George Brown that a speeding black Buick had almost run over him and his dog a few moments earlier.⁴⁵ Minutes later officer Harris approaches a stalled black Buick with a red vinyl top at a nearby intersection. Shortly thereafter, Harris ordered the occupants of the vehicle, Guerra and passenger Roberto Carrasco Angel to exit the vehicle. As Guerra and Angel approach Harris upon exiting the vehicle, one of the subjects fires three rounds from a 9 mm pistol into Officer Harris, two of which struck Officer Harris in the face, fatally wounding him. Guerra and Angel attempted to flee the scene on foot. In the process of escape, Jose Armijo and his two children approached the scene of the shooting. During his frantic attempt to reverse his car to avoid the scene of the crime, a shot was fired from the northern side of the street fatally striking Armijo in the head. An hour and a half later at approximately 11:30 PM, officers Mike Edwards and Larry Trepagnier cautiously approached a house in search of the fugitives, shining flashlights into the house windows. A firefight erupts immediately. Trepagnier, although wounded five times, pursues Angel with the aid of several other officers ultimately shooting him dead. Officers quickly recover officer Harris' service revolver stuffed into the front pants of Angel. Also recovered from under Angel's body was a 9 mm pistol which ballistics tests later

confirmed fired the fatal round into Armijo. Guerra was found hiding in a nearby trailer. Although Guerra was unarmed, a .45 caliber pistol was discovered wrapped in a bandanna nearby. Guerra was arrested and taken into custody. The events that transpired after Guerra's arrest would be the subject of contentious debate throughout his trial and post trial proceedings.

After Guerra's arrest that evening police, enraged that a fellow officer was killed and one wounded grievously, engaged in what was later reported as mistreatment and intimidation of witnesses, the use of improper identification procedures in police lineups, and misuse of witnesses statements and testimony, in an effort to secure an arrest.⁴⁶ According to the U.S. District Court for the Southern District of Texas, the arrest and prosecution of Guerra was plagued with rampant police and prosecutorial misconduct. Police misconduct in the case began early, when several witnesses (many minors among them) were rounded up and taken to the police station and held for extraordinary lengths of time.⁴⁷ Many of the witnesses did not speak English, and had great difficulty communicating with police officers. According to court documents, one female witness testified that an officer threatened to take her infant daughter into custody if she refused to cooperate.⁴⁸ Other witnesses testified that police officers raided their homes, forced them barefoot into their yards, and threatened them at gunpoint. Witnesses were further determined by the court to be subjects of police coercion, and their testimonies manipulated to suit the prosecution's conclusions that Guerra was the killer of Officer Harris.⁴⁹

Child witnesses were encouraged by police to identify Guerra as the shooter. José Armijo Junior, age ten years old and the surviving child whose father was killed while reversing his car during the shootout, was the prosecution's star witness who identified Guerra as the killer.

However at trial during cross-examination, the child admitted that he also gave a sworn statement the night of the shooting that he could not identify the shooter. Further evidence of police misconduct discovered by the District Court involved improper identification procedures in police lineups.⁵⁰ Several improper identification tactics used cited by the court include allowing witnesses to view Guerra in handcuffs before seeing him in the lineup, allowing witnesses to discuss suspect identification before and during the lineup, allowing lineup identification to change after witnesses were informed that Angel (who several witnesses earlier identified as the shooter) was dead.⁵¹

The court further found that police officers and prosecutors neglected to record statements by witnesses that contradicted their theory of the case, to fully investigate competing theories and fully vet witness testimony that presented a competing view of the facts of the case.⁵² In addition the court determined that prosecutors were aware and had been fully apprised of the facts and circumstances surrounding the coercive and manipulative tactics used to extract false testimony from witnesses who were subject to police intimidation, and presented this testimony to the court with full knowledge that it was in fact false. In Judge Hoyt's written opinion for the United States District Court granting Guerra's petition for relief, he excoriated the practices of both the Houston Police Department and the Harris County District Attorney's Office for employing deplorable tactics that were patently illegal. In pertinent part Judge Hoyt concludes that:

"the police officers and prosecutors actions ascribed in these findings were intentional, were done in bad faith, and are outrageous. These men and women, sworn to uphold the law, abandon their charge and became merchants of chaos it is these types of flags festooned police and law and order prosecutors who bring cases of this nature, giving the public the unwarranted notion that the justice system has failed when a conviction is not obtained or a conviction is reversed.

There misconduct was designed and calculated to obtain a conviction and another "notch in their guns" despite the overwhelming evidence that Carrasco was the killer and a lack of evidence pointing to Guerra."⁵³

On April 15, 1997, Guerra had been notified that after Judge Hoyt had remanded the case back to the trial level prosecutors had determined not to retry Guerra on murder charges. The following day officers from the Immigration and Naturalization Service transported Guerra to the Texas-Mexico border and released him. Hundreds of Mexican supporters lined the bridge connecting Brownsville, Texas and Matamoros, Mexico, greeting Guerra as a triumphant hero. "I am very happy to be out, yet at the same time I'm angry that I have been robbed of 15 years of my life", Guerra remarked to a reporter conducting interview two days after his release.⁵⁴ "I'm happy to be with my family but I know that the executions are going on in Huntsville", Guerra said, referring to the city that houses the Texas death chamber.

The jubilant supporters who received Guerra at the edge of the Mexican border signify the ideological chasm that separates Mexico from its neighbor to the north. In Mexico, the execution of its nationals for crimes purportedly committed in Texas strikes a resonant chord for a number of reasons. As a largely Catholic nation, Mexico's views of the death penalty comport with that of the Vatican; a barbarous act that in its finality lacks compassion. It further reinforces a dominant perception among many Mexicans that America's imperialistic aggression continues to be imposed upon Mexican people, whether they reside in Mexico or immigrate to Texas.

Stage 3 Trace Process Analysis

Following a recital of the facts of the Guerra case, the third stage of the case analysis involves

constructing an analytical model based on trace processing, to examine the impact of all variables under consideration, and to construct an analysis of any intervening variables that may exert an influential impact on the dependant variable in the model. In the Guerra case, in which this chapter seeks to measure the ability of the Mexican consulate to influence judicial opinion and thereby create death penalty policy from the bench, the models dependant variable will be Judge Hoyt's ruling that the death penalty trial (and the violations of law perpetrated by law enforcement and prosecutorial staff) of Ricardo Guerra was unlawful and should be reversed.

Judge Hoyt's ruling was an indictment of the Texas system of law enforcement and judicial administration, and revealed a systemic pattern of police and prosecutorial misconduct that shook the very foundations of Texas jurisprudence. Judge Hoyt's opinion in the Guerra case, under the doctrine of stare decisis, creates new judicial precedent and in effect new judicial policy in Texas in regards to all death penalty cases that involve Mexican nationals. Judge Hoyt's judicial findings may have been influenced by a number of factors, and this chapter will consider the possible hypothetical variables that could explain Judge Hoyt's behavior, and eliminate those factors which the analysis disproves. Causal process observations (CPO) will then be organized (drawn from statements, legal documents, etc.), categorized according to relevancy and then applied to each individual variable to create inferential assumptions which will establish causal relationships between variables, and link the judge's ruling to the potential causes.

As Judge Hoyt's ruling itself represents policy creation in Texas, that action will represent the solitary variable under observation in this chapter. A host of independent or intervening variables

will be examined to test their ability to impact Judge Hoyt's ruling. These independent variables will include Judge Hoyt's adherence to precedent is a controlling or contribute in factor in his decision-making process. It will also include judge Hoyt's inclination to allow his personal policy preferences to prevail over other motivating considerations, and his proclivity to allow these preferences to overwhelm his decision-making process. Finally, the independent variable that represents the Mexican consulate's ability to influence, through various methodologies, Judge Hoyt's reasoning in arriving at his final judicial conclusion. These three independent variables, when deconstructed and assembled into a testable hypothetical model, create the following falsifiable hypotheses;

Hypothesis 1 Hoyt's ruling was not the result of prior precedent

Hypothesis 2 Hoyt's ruling was not the result of personal preferences

Hypothesis 3 Hoyts ruling was not the result of Mexican Consular influence

Hypothesis 1 Hoyt's ruling was not the result of prior precedent

Hypothesis one, which undertakes a trenchant examination of the weight Judge Hoyt accords earlier precedent when issuing his ruling in Guerra's case, endeavors to assemble all of the relevant causal process observations to effectively test the impact of prior precedent in the outcome of the case. Close scrutiny will be paid to the precedential authority invoked by judge Hoyt in rendering his opinion, and if any deviation occurred to what extent this disregard of previous authority becomes outcome determinative. Judge Hoyt's use of precedent, and whether

that usage is wholly consistent with judicial standards of review, will be largely evaluated upon its subsequent treatment by higher appellate courts. If higher courts except Judge Hoyt's application of statutory and procedural authority, this will create the strong inferential assumption that the precedent he relies upon in his ruling is valid, and of fully appropriate use. For illustrative purposes, previous rulings germane, fact similar, and involving relevant legal issues that Judge Hoyt has rendered will be used to draw comparative analysis and illustrate any edifying parallels that may shed additional light on Judge Hoyt's decision-making processes.

In Judge Hoyt's federal district court judicial opinion, in which he issued an amended order on application for writ of habeas corpus, he addressed five separate challenges raised by Guerra, in which Guerra contends that he was denied a fair and impartial trial. Guerra alleges his due process rights were violated through intimidation of witnesses, the improper use of identification procedures, the prosecution's refusal to disclose exculpatory evidence to the defense, the use of false and misleading evidence, and prosecutorial error. In his written opinion, Hoyt methodically addresses each of Guerra's assertions raised in his petition, beginning with a painstaking recitation of the facts of Guerra's case as established by the trial court record. When addressing the issue of pretrial intimidation of witnesses, Hoyt's conclusion is succinct. "It is clear to this court that the mood and motivation underlying the police officer's conduct arising out of this case was to convict Guerra for the death of Ofc. Harris even if the facts did not warrant that result. The court finds and holds that the police officers and prosecutors intimidated witnesses in effort to suppress evidence favorable and material to Guerra's defense."⁵⁵ Hoyt's conclusion is firmly bolstered by supporting precedent, citing *Fulford v. Maggio*,⁵⁶ in which the Fifth Circuit Court of Appeals held that intimidation by witnesses at the hands of police constitutes interference which

may be legally imputed to the state prosecution.

When addressing improper identification procedures, Judge Hoyt lends a lengthy discourse to the subject of the Supreme Court's established legal standard used to determine the admissibility of suspect identification gained through processes violative of due process rights. Judge Hoyt weighs four factors, outlined in *Neil v. Biggers*⁵⁷ a Supreme Court case that held that the witnesses opportunity to view the accused, the witnesses degree of attention, the accuracy of the witnesses prior description in a level of certainty demonstrated by the confrontation and the time between the confrontation in the crime are all relevant factors that must be considered. In his opinion Judge Hoyt pointed to a number of improperly suggestive tactics employed by police prior to the lineup, such as allowing witnesses to view Guerra in handcuffs or with a bag covering his hands immediately prior to the lineup, or allowing witnesses to discuss the identity of the perpetrator before viewing the suspects in the lineup. In his conclusion Hoyt finds that "the state has the burden of proving, beyond a reasonable doubt, that the intentional act of causing to be admitted tainted unreliable and perjured testimony, identifying Guerra as the shooter was harmless. The state has offered no evidence to contradict this point and has failed to discharge its duty."⁵⁸ Hoyt's finding on this point is further buttressed by Supreme Court authority citing *California v Chapman*.⁵⁹ In addressing the contention that the prosecution failed to disclose exculpatory evidence, Hoyt again provides an exhaustive discussion of the applicable legal standard established by the Supreme Court in *Brady v. Maryland* which found that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."⁶⁰ Hoyt once again culls through both the trial court record and witnesses statements to find a record replete with either contradictory statements made by

key witnesses that cast doubt on witness credibility, or witnesses who identified other suspects as the shooter, as well as forensic evidence that strongly indicates that it was physically impossible for Guerra (based upon body positioning and ballistics tests) to have been the shooter.

Hoyt further finds that the prosecution's willful refusal to disclose this exculpatory evidence and its suppression from trial violates due process. "The court concludes that, but for the conduct of the police officers and the prosecutors, either Guerra would not have been charged with this offense with the trial would've resulted in acquittal."⁶¹ Hoyt rests his conclusion on Bagley 473 US 682, a solid legal foundation with which to provide Guerra relief.⁶² After mounting a virtually unassailable indictment of the practices and procedures of both the police and prosecution and Guerra's case, invoking strong precedential authority to support his unequivocal conclusions, Hoyt finalizes his opinion by stating that "the police officers and prosecutors actions described in these findings were intentional, were done in bad faith, and are outrageous."⁶³

In issuing his opinion judge Hoyt ordered Guerra to be released by the Texas Department of Criminal Justice, or to retry Guerra for the murder within thirty days. The state of Texas appealed Hoyt's judgment, and on July 30, 1996 the Fifth Circuit Court of Federal Appeals rendered its decision. In a short 14 page opinion, the Fifth Circuit conducted a review of Hoyt's order, ruling and decision, and citing much of the same precedent utilized by Hoyt unanimously affirmed his decision.⁶⁴ In its opinion the court found that "based on our review of the record, there are sufficient legally relevant, non-clearly erroneous findings of fact to warrant habeas relief."⁶⁵ The appellate court goes on to agree with each conclusion Hoyt made in his opinion, stating "as the District Court noted, Garcia's testimony is consistent with the physical evidence

that Carrasco, rather than Guerra shot Officer Harris. Accordingly, we cannot conclude that the court clearly averted by finding that Garcia told the truth at the evidentiary hearing".⁶⁶ The Fifth Circuit Court of Appeals affirmation of Judge Hoyt's opinion in the Guerra case disproves any notion that Hoyt did not follow case precedent in issuing his ruling. All causal process observations create a strong inferential assumption that Judge Hoyt strictly adhered to precedent when authoring his opinion and arriving at his conclusion. The trace process analysis hypothesis therefore cannot be falsified.

Hypothesis 2 Hoyt's ruling was not the result of personal preferences

Recalling previous chapters that discuss different judicial policymaking frameworks that judges on the bench will employ to arrive at decisions regarding rulings in cases, this chapter will once again attempt to discern personal policy preference bias using statements made by Judge Hoyt to determine if his judicial policymaking behavior is anyway colored or influenced by either attitudinal or strategic influences. As earlier chapters have painstakingly explored opportunities in which judges have discretion to insert policy preferences into their rulings under the guise of precedential compliance, this chapter will evaluate Judge Hoyt's behavior, in both this case and others upon which he's ruled, to create a comprehensive policy preference context upon which to draw inferential assumptions regarding motivations that may compel Judge Hoyt's policymaking decisions. Causal process observations will be assiduously amassed, to establish causal connections between any expression of personal preference and its impact on the dependent variable, i.e. Judge Hoyt's ruling. It will be further considered whether, if personal policy preferences are seemingly apparent, whether these preferences were contained or if they

subordinated the interests of following precedent, or if they prove to be outcome determinative in Hoyt's ruling. All intervening variables which may disprove Judge Hoyt's adherence to personal preferences above precedent will be rigorously tested and applied to the dependent variable to determine influence.

Upon being appointed to the bench by former U.S. president Ronald Reagan on November 24, 1987, Judge Kenneth Hoyt has rarely given interviews or press conferences to espouse personal views about cases, or personal preference inclinations regarding legal or public policy. This reticence to proffer private positions on policy, of course, is a common professional trait among the judiciary to preserve the perception of objectivity, as noted in the earlier policy segment on judicial policymaking. As noted in earlier chapters, absent clear indicia of overt bias, one can draw inferential assumptions about a particular Judge's motivation based upon a number of factors, including the disavowal of a previous position, issuing edicts irrespective of higher court precedent, or flouting procedural guidelines in an effort to countervail controlling authority.

In errant judge's behavior can often be detected by reviewing cases in which his decisions were subsequently overturned, or by considering popular perceptions of that judge's potential bias by practitioners operating within his court. This information can be gleaned through a studious review of Judge Hoyt's record to determine whether personal preferences played any significant role in the judge's ruling in the Guerra case. In choosing relevant cases upon which to explore the possibility of personal preferences insinuating themselves into Judge Hoyt's decision-making process, it would be prudent to consider cases both fact-similar in nature, but also dealing with similar legal issues. There are two prominent cases we will examine, both involving

murder convictions in which the conviction prompted a petition to Judge Hoyt seeking a writ of habeas corpus based upon improper judicial, police and prosecutorial practices. In both cases Hoyt ultimately sided with the petitioner, finding abuses that he considered tantamount to due process violations. In both cases Hoyt was overturned by the Fifth Circuit Court of Appeals.

The Miller Case

On February 2, 1982, Donald Miller and two accomplices armed with handguns and a shotgun robbed two furniture salesmen at gunpoint while making a delivery in suburban Houston, Texas.⁶⁷ The two victims were bound and gagged, taken to an open area in nearby Lake Houston and shot repeatedly in the in the head and killed.⁶⁸ Donald Miller's accomplices, after being arrested, eagerly turned on Miller offering their testimony in exchange for leniency. Both of Miller's accomplices received lighter sentences, while Miller was sentenced to death. Miller's conviction and death sentence was affirmed by the Texas Court of Criminal Appeals in 1987.⁶⁹

In 2004, Judge Hoyt ruled that the prosecution knowingly used unreliable witnesses who had given inconsistent statements regarding who exactly among the three was the ringleader in the robbery, and previously had suppressed statements from other witnesses that may have been deemed by jurors as exculpatory. Although Hoyt concedes that the evidence is insufficient to necessitate complete exoneration, Hoyt contends that it would be sufficient in dissuading a jury to sentence Miller to death.⁷⁰ Again citing Brady, Hoyt relies upon the same legal precedent in an ostensibly fact-similar case, and ordered that Miller be retried within six months. The Fifth Circuit Court of Appeals disagreed, and in November 2005 reinstated Miller's death penalty sentence, invoking the felony murder rule in Texas which provides that any participant in the murder would be eligible for the death penalty.⁷¹ The Fifth Circuit's ruling in the Miller case points not to Hoyt's flagrant disregard of precedent or the imposition of personal preference, but

rather a fundamental disagreement about the scope of pertinent law, in its interpretation of the Brady standard in ascertaining materiality. Judge Hoyt determined that withholding exculpatory evidence was a violation of due process under Brady in that it had a material effect on the outcome, and that jurors may have reached a different decision in sentencing. As his decision rests upon a firm legal foundation there is no evidence in his decision that would suggest personal preference bias.

The Buntion Case

During a routine traffic stop on June 27, 1990, Carl Wayne Buntion, a former Texas prisoner with eleven felony convictions, exits his vehicle and shoots Houston police officer James Irby in the four times with a .357 Magnum handgun, killing him instantly.⁷² On trial and facing the death penalty in 1991, Buntion was tried in the courtroom of Texas State District Court Judge William Harmon. During the trial Judge Harmon was recorded to have remarked to Buntion that he was "doing God's work" in ensuring Buntion's imminent execution.⁷³ Harmon was also witnessed bullying Buntion's attorneys, as well as conducting private meetings with the prosecution without defense counsel present. Judge Harmon also openly laughed at Buntion's character witnesses during trial, and declared appeals court judges "idiots" when they insisted that mitigating factors be considered in Buntion's sentencing phase.⁷⁴ Buntion was ultimately convicted and sentenced to death.

Thereafter Buntion petitioned Judge Hoyt, arguing that Judge Harmon's bias prevented him from receiving a fair trial. Judge Hoyt agreed, writing that "Judge Harmon decided that Buntion was guilty and should die" before his trial even began.⁷⁵ Finding that judge Harmon had a

"displayed a curious pattern of engaging in behavior that would prejudice Buntion's Constitutional rights," Hoyt ruled that his due process rights had been violated.⁷⁶ Again the Fifth Circuit Court of Appeals disagreed with Judge Hoyt and reaffirmed Buntion's death sentence. While condemning many of Judge Harmon's actions as "revealing lapses in... judicial temperament", those actions only constituted "general impertinence" and did not provide the "evidentiary support needed for an actual bias allegation".⁷⁷ And although Judge Harmon's behavior was lamentable it did not "not demonstrate actual bias under established Supreme Court precedent such that this court can hold that the state court decision was unreasonable".⁷⁸ However, the Texas state commission on judicial conduct found Judge Harmon's behavior during trial more than simply lamentable, publicly reprimanding Harmon for his poor judicial conduct.⁷⁹

Again this case centers on Hoyt's interpretation of the law, and does not suggest a break with precedent, but his subtle differentiation in its application. This case illustrates a finely graded continuum upon which the impact of bias is subjectively weighed. Although it could be argued that personal preference felt by Judge Hoyt imperceptibly colored the calculus employed to assess weights, there is no indication in the record that would suggest that Hoyt tipped the scales of justice with a finger of favoritism for the defendant. In fact, his position on Judge Harmon's improper behavior is further corroborated by the condemnation of the Texas Judicial Conduct Board, and the Fifth Circuit's opinion which itself found Judge Harmon's behavior deplorable. However, the disagreement between Judge Hoyt in the Fifth Circuit Court of Appeals revolves around the extent of the impact of that behavior, a shaded subtlety of the law as difficult to measure as the personal preferences that may help shape it. These causal process observations, when considered in their totality, provide strong evidence to confirm the second hypothesis, Judge Hoyt's ruling was not the result of personal preferences.

Hypothesis 3 Hoyt's ruling was not the result of Mexican Consular influence

Hypothesis three will consider the myriad contributions the Mexican consulate made in the defense of Ricardo Guerra, and assess the impact these contributions had or failed to have on Judge Hoyt's ruling. Although it must be acknowledged that many of the contributions the Mexican consulate offered in defense of Guerra were largely indirect, and involve mainly financial support and legal consultation, this chapter will attempt to determine if those contributions had any salient impact on the judge's decision. Causal process observations will be methodically organized and examined to establish causal relationships between the Mexican consulate's involvement and the final outcome, creating inferential assumptions regarding the effect of Mexican consulate activities and test these assertions using trace process analysis. The entire panoply of efforts on the part of the Mexican consulate will not be recounted in their entirety, as a full recitation of each activity of the consulate would be superfluous, however those activities which had a profoundly appreciable impact will be closely analyzed to gauge impact.

Admittedly, delineating a clear and direct causal connection between Mexican consular involvement in Guerra's case and Judge Hoyt's ruling is a difficult undertaking. In his written opinion, Judge Hoyt makes no mention of the Mexican consulate, or the aid they provided to Guerra's counsel as a factor in his decision. However, certain inferential assumptions regarding their importance can be made, and thoroughly tested to determine what influential impact contributions made by the consulate ultimately had in the final outcome of Guerra's case. Causal process observations will be enumerated, and then assessed to ascertain their impact on Judge Hoyt's ruling.

It is abundantly clear from the historical record that before the Guerra case Mexican consular involvement in the cases in Texas where a Mexican national was charged with capital murder was limited in scope and disorganized in nature.⁸⁰ As the policy preceding segment discussed, public outcry by Mexican citizens in response to Texas executions prompted the government of Mexico to enact laws endowing certain legal agencies to provide resources and direct intervention to Mexicans charged with murder in Texas, as well as providing unmistakable guidance to consular officials regarding their duties to citizens charged with crimes abroad under the Vienna Convention. The effectiveness of this massive investment of Mexican resources in the defense of its nationals was first tested in the Guerra case.

After Guerra's conviction in 1982, Mexican consular officers established a close alliance with attorneys representing Guerra, and began providing money to his family that would allow them to travel to Texas to visit him.⁸¹ During Guerra's pursuit of postconviction relief in the early 90s, consular officials collected important witness affidavits from crucial witnesses residing in Mexico, providing this evidence to Guerra's attorneys.⁸² Additionally, the consulate financed trips to Mexico for Guerra's attorneys to uncover newly unearthed evidence. In 1992, the Mexican consulate was successful in listing the pro bono aid of Vinson and Elkins, a prominent Houston law firm. The recruitment of Vinson and Elkins was a key victory for the Mexican consulate. After spending over \$2.5 million in legal expenses, Scott Atlas attorney, for Vinson and Elkins, filed a successful writ for habeas corpus with Judge Hoyts court.⁸³ As Mr. Atlas himself noted "without the Mexican consul's involvement, I have no doubt that he would never have been released".⁸⁴

These causal process observations, on balance and weighed in their entirety, strongly supports the inferential assumption that while Judge Hoyt's opinion did not rest on the actions of the Mexican consulate, Judge Hoyt's ruling which ultimately freed Guerra could not have occurred without the involvement of the consular office. It can be concluded, therefore that the impact of the Mexican consulate involvement in the Guerra case, albeit indirect and circuitous, was instrumental in moving the court to grant his release and left an indelible imprint that can be easily traced in the historical record. The hypothesis that Judge Hoyt's ruling was not affected by Mexican consulate involvement has been falsified.

Stage 4 Elite Interviews

Interviews were conducted with participants directly involved with the proceedings in the Guerra case. These elite interviews add a further dimension of internal validity to the trace process analysis theoretical model, and create a personalized contextual framework through which we can view causal process observations, and which can be used to either strengthen or rebut inferential assumptions, and confirm or reject proven hypotheses. Richard Bax, the Harris County District Attorney who prosecuted Guerra at the trial court level, confirms that the Mexican consulate was not involved in providing Guerra assistance during trial, stating that "the Mexican consulate's involvement in the case came several years after Mr. Guerra's conviction at a time which I was no longer a prosecutor".⁸⁵ As the policy segment above notes, early consular involvement is absolutely critical in increasing the success in safeguarding Mexicans rights under the Vienna Convention, and providing recourse for due process abuses by police and prosecutors. Although Guerra was unable to avail himself of consular support in the trial stage,

as later interviews will attest the assistance of the Mexican consulate would become invaluable in later postconviction proceedings. Stanley Schneider, a Texas criminal defense attorney who acted as co-counsel with Scott Atlas in their pro bono application to Judge Hoyt's court seeking relief through a writ of habeas corpus, was unambiguous in his statement regarding consular involvement. "The Mexican government was very involved in getting his defense in operation in 1992 as he was about to be executed. Without the government's (assistance) neither Scott Atlas or I would've been involved. Ricardo would not have been released from prison."⁸⁶ Stephen B. Bright, president and senior counsel of the Southern Center for Human Rights located in Atlanta Georgia, and an attorney who submitted an amicus brief to the Federal District Court in the Southern District of Texas on Guerra's behalf in support of his application for habeas corpus relief, said "it is impossible to know exactly how much the consulate helped in the defense, but it is my opinion that the consulate has been very effective in assisting Guerra and others facing the death penalty in the United States."⁸⁷ This clear statement of the Mexican consulate's indispensable involvement in securing Guerra's eventual release, further bolsters the inferential assumption that the Mexican consulate's contribution was entirely significant, and without their assistance Guerra ultimately would have been executed.

Judge Kenneth Hoyt, the federal district court judge who granted Guerra relief from his death sentence readily acknowledges that "there was no direct contact between the consulate's office and myself."⁸⁸ However Judge Hoyt was aware of the consulate's involvement with Guerra's family and the assistance they provided to his attorneys. Judge Hoyt states that he is aware that "the consulate was involved with Aldalpe Guerra's family," and that "the consulate was involved with the attorneys representing Aldalpe Guerra, particularly Scott J. Atlas."⁸⁹ Although Judge Hoyt does not say that his ruling in the Guerra case can be directly attributed to the

Mexican consulate, given the totality of their contribution to the defenses motion which ultimately Judge Hoyt ruled to be meritorious, the inferential assumption is further strengthened, adding additional proof to the overall hypothesis that the Mexican consulates involvement is instrumental in securing release of Mexican nationals whose Vienna Convention and due process rights have been violated by Texas officials seeking the death penalty against Mexicans.

Stage 5 Cross Case Comparative Analysis

On November 17 of 1985, forty six year-old John Kilheffer offered two hitchhikers a ride outside of Brownsville Texas. It was a fatal mistake. The two men Mr. Kilheffer invited into his Chevrolet Blazer were Irineo Tristan Montoya and Juan Fernando Villavicencio, both Mexican nationals living in Texas. According to an oral confession purportedly given to police by Montoya (who could not read or speak English);

"The Gringo, stopped near a resaca that is behind the Park, Juan 'El Piolin' then got off the Blazer and walked over behind the Blazer and took a leak (piss) . . . When 'Piolin' came back he opened the drivers (sic) side door where the Gtingo (sic) sat and he took the black knife and started piking (sic) the Gringo with the knife, so the Gringo would move, . . . I then grabbed the Gringo, by the neck and went with him to the back seat. 'El Piolin,' , . . . started to stab the gringo with the kinife (sic) . . . But he was cutting him all over on the legs and body, but the Gringo kept fighting us. I than (sic) took out a gun that I had with me but I did not have any bullets inside as the gun did not work. I then begin (sic) to hit the Gringo with the gun, . . . 'El Piolin' then drove tp (sic) the river levee near the Rio Grande River by Southmost Area where we drove to some

torronjaes (Grapefruit trees) where we stoped (sic) in the trees and took out the Gringo, who was all bloody (sic), he was still alive when we dragged the Gringo to some trees, . . . After we finished robbing the Gringo of a gold chain with a gold cross that he wore on his neck, a gold ring that he wore on one of his fingers, we took off his pants Blue Jeans, and a pair of Tennis shoes I don't remember the color.

"Anyway we wanted to rob him so we took his wallet and 'El Piolin' threw the pants away, we got back into the Gringo's Blazer . . . he took out the money that was inside the man's wallet. I believe it was around \$80 American Dollars. We then drove over to 'El Piolin's' house where he parked the Gringos Blazer in the alley that is on 12th Street next to a garage that I do not know the name off (sic).⁹⁰

It was this preceding portion of a four page signed confession by Montoya, taken without the presence of counsel or the notification of Mexican Consular representation, that was eventually used as the foundation for his arrest and subsequent conviction for felony murder. Although Montoya never confessed to the actual murder, it was acknowledged by police and prosecutors he was simply an accomplice. However, under the Texas felony murder rule an accomplice to a murder committed during the commission of a felony crime is as culpable under the law as the murderer himself, and is subject to the same criminal penalties, i.e. the death penalty.⁹¹ The person widely acknowledged by both police and prosecutors as the actual murder, Villavicencio, avoided a death sentence by agreeing to testify against Montoya in exchange for life in prison.⁹²

Following his interrogation, Montoya signed the four-page confession written in English with the understanding that the document simply authorized his deportation back to Mexico.

Following a brief trial Montoya was convicted of capital murder and sentenced to death. His conviction was later upheld by the Texas Court of Criminal Appeals, which noted that although there was abundant evidence to suggest the Tristan was not the actual murderer, his presence at the scene of the crime as an accomplice and his participation in the robbery were sufficient to justify a sentence of death under Texas law.⁹³ The notable absence of any consular representation throughout Montoya's interrogation, pretrial hearings, murder trial and postconviction proceedings would later prove ominously portentous regarding Montoya's ability to obtain any relief for improprieties committed throughout the course of his prosecution.

Subsequent to Montoya's post conviction appellate review, there was a flurry of activity preceding Montoya's execution by both Montoya's attorneys and the Mexican government.⁹⁴ Attorneys for Montoya petitioned the U.S. State Department seeking disclosure of any Article 36 advisories provided to the Mexican Consulate to determine whether Montoya's rights under the Vienna Convention had been violated. Mexico also lodged complaints with the State Department alleging treaty violations. No Article 36 advisories were ever produced by the State Department, the Mexican government never received a reply in response to its Vienna Convention complaint, and Ward Tisdale of the Texas Attorney General's office dismissed all challenges to Montoya's conviction based upon Vienna Convention violations by remarking that even if "you were not given a chance to contact your Consulate, that does not override your conviction." ⁹⁵

This response to the Montoya case buttressed the widely held perception among those in the Texas judiciary, as well as the U.S. State Department, that Vienna Convention violations reside within the diplomatic purview of the State Department, and should not be the subject of judicial

litigation, was further reinforced by the State Department holding that the Texas courts were not the appropriate venue to address Article 36 violations.⁹⁶ However, as Montoya exhausted successive appeals at both the state and federal level in an attempt to gain relief, Mexico continued its fervent diplomatic push on the U.S. State Department, protesting Article 36 violations in not providing Montoya the requisite consular assistance. In the face of unrelenting pressure, the U.S. State Department ultimately conceded, questioning the Texas Attorney General's office as to the validity of Mexico's claims that Montoya's rights had been violated. Alberto Gonzales, Texas Attorney General (and later U.S. Atty. Gen. under George W. Bush), wrote to the State Department asserting that "since the state of Texas is not a signatory to the Vienna Convention on Consular Relations, we believe it is inappropriate to ask Texas to determine whether a breach... occurred in connection with the arrest and conviction of a Mexican national."⁹⁷ This brazen statement of disregard by the highest Texas law enforcement official in the state, is potentially emblematic not only of the low esteem in which international law is held in general, but more specifically this unmitigated riposte of the Texas Atty. Gen. represents the inevitable result of a death penalty policy articulated without a challenge mounted by the Mexican Consulate in defense of its national. Shortly after Atty. Gen. Gonzales⁹⁸ issued his reply to the U.S. State Department, the United States Supreme Court unceremoniously declined Montoya's final appeal beseeching the court to address treaty violations under the Vienna Convention, dismissing the petition for certiorari without comment.⁹⁹

Montoya was executed by the state of Texas on June 18, 1997.¹⁰⁰ On the day following the execution a spokesperson for Gov. George W. Bush issued a statement attempting to placate Mexicans both at home and abroad living in the United States that Montoya had been accorded

all constitutional procedural safeguards in his trial and postconviction appeals, and his execution was in perfect comportment with Texas criminal laws.¹⁰¹ The issue of Vienna Convention violations was never addressed, and no apology was offered for what many Mexicans considered blatant violations of international law. The response by Mexican nationals was swift and unmistakable; angry Mexican protesters forced a border shutdown, a raucous parade of Mexican citizens ushered Montoya's casket through a funeral procession, and American citizens held in Mexican prisons were quickly removed from the general population as fears for their lives in the face of mounting violence forced prison guards to place them in isolation.¹⁰²

Conclusion

The Montoya case, which preceded the Guerra case by several years, illustrates the dire consequences that result from a lack of early consular intervention on behalf of Mexican nationals charged with capital crimes in Texas. Similar coercive and deceptive interrogation tactics, when employed by the police in the Guerra case were met with direct judicial challenge supported by the Mexican Consulate and ultimately proved successful in securing Guerra's release. Absent consular intervention, Montoya was unfortunately unable to enjoy the quality of consular assistance that led to the Guerra exoneration, and suffered a much different fate at the hands of the Texas judicial system unconstrained by the influence of foreign representation. In the Montoya case many Mexican citizens deplored the ineffectiveness of the Mexican

government to intervene on Montoya's behalf. Sergio Agueyo, a Mexican human rights activist, disparaged the insufficient contribution of the Mexican Consulate in its attempts to protect Mexican nationals charged in the United States by confining their involvement to sending "protests and sends formal notes, but my feeling is that they have not made the defense of Mexicans their main priority... (Because) they are so worried about United States investment in Mexico that they don't want to antagonize the United States government."¹⁰³ In the interim years that separate Montoya's execution and the Guerra case, Mexico responded to this pointed criticism by increasing investment and resources to funding the improvement of Mexican national's defense in opposition specifically to Texas death penalty policies. The Guerra case, an illuminating companion to Montoya, demonstrates that the efficacy of Mexico's consular defense has in fact been much improved. These improvements to consular defense further the central thesis of this chapter, that timely consular intervention on behalf of Mexican nationals can be entirely outcome determinative in a capital punishment trial, or postconviction proceedings, in which aggressive involvement by the Mexican consular office can mean the difference between life and death.

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- ¹ Beccaria, Cesare, "On Crimes and Punishments", Aaron Thomas translation, *University of Toronto Press*, (2008).
- ² *Atkins v Virginia*, 536 U.S. 304, (2002).
- ³ *United States v Alvarez-Machain*, 9th Circuit United States Federal court of Appeals Court of Appeals, No. 90-50549, (1990).
- ⁴ *Medellín v. Cockrell*, Civ. Action No. H-01-4078 (SD Tex., June 26, 2003).
- ⁵ The full text of the Vienna Convention is archived on the United Nations website, and accessible at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf
- ⁶ Dalton, Robert, "The Vienna Convention on the Law of Treaties: Consequences for the United States, Proceedings of the Annual Meeting", *American Society of International Law*, 78 (1984): 276-284.
- ⁷ Sampson, Elizabeth, "Revisiting Miranda After Avena", *Fordham International Law Journal* 49 (2005): 1068-1072.
- ⁸ *Ibid.* 1069-1075.
- ⁹ See the ICJ Judgment on the Iran Hostage Crisis, in which the U.S. appealed to the ICJ to uphold Vienna Convention laws regarding consular notification, cited as *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports (1980), p. 3, and archived here <http://www.icj-cij.org/docket/files/64/6291.pdf>
- ¹⁰ *Ibid* 5
- ¹¹ See *Medellin v. Texas*, 552 U.S. 491, (2008).
- ¹² Graczyk, Michael, "Texas Gov. Rick Perry defends Mexican man's execution", *Associated Press*, archived at http://www.elpasotimes.com/ci_18440124?source=pkg
- ¹³ Richardson, Henry, "The Execution of Angel Breard by the United States, Violating the Order of the International Court of Justice", *Temple International & Comparative Law Journal*, 12(1998): 121.
- ¹⁴ Bradley, Curtis, "Breard, Our Dualist Constitution, and the Internationalist Conception", *Stanford Law Review*, 51 (1999): 529.
- ¹⁵ *Breard v. Netherland*, 949 F. Supp. 1255, (1996).
- ¹⁶ *Breard v. Pruett*, 134 F.3d 615, (1998).
- ¹⁷ *Paraguay v U.S.*, ICJ Case Concerning the Vienna Convention on Consular Relations, Oct 9, (1998), archived on the ICJ website here <http://www.icj-cij.org/docket/files/99/13106.pdf>
- ¹⁸ *Ibid.* Sec 5.5.
- ¹⁹ *Breard v. Greene*, 523 U.S. 571, (1998), at p. 580.
- ²⁰ *Ibid.* 580.
- ²¹ Justices Stevens and Breyer both offered dissenting opinions. Stevens stated that "no compelling reason for refusing to follow the procedures that we have adopted for the orderly disposition of noncapital cases. Indeed, the international aspects of this case provide an additional reason for adhering to our established Rules and procedures. I would therefore grant the applications for a stay, and I respectfully dissent from the decision to act hastily rather than with the deliberation that is appropriate in a case of this character." And Breyer opined in his dissent that "... the international aspects of the case have provided us with the advantage of additional briefing even in the short time available. More time would likely mean additional briefing and argument, perhaps, for example, on the potential relevance of proceedings in an international forum." Both arguments offered in dissent of the majority indicate that international pressure is factored into the judicial calculus.
- ²² <http://news.bbc.co.uk/2/hi/americas/78178.stm>
- ²³ Fitzpatrick, Joan, "Consular Rights and the Death Penalty After LaGrand, Proceedings of the Annual Meeting", *American Society of International Law*, 96 (2002): 309-319.
- ²⁴ *Germany v. United States of America*, International Court of Justice, (2001): 104.
- ²⁵ *Germany v United States*, 526 U.S. 111, (1999), opinion archived here <http://supreme.justia.com/cases/federal/us/526/111/>

²⁶ See *Mexico v United States*, International Court of Justice, Counter-Memorial of the United States, in which the U.S. states in its opening Statement of Facts on page 2 that “The case results from the failure of competent authorities of the United States to inform 54 Mexican nationals without delay of their right to have a Mexican consular post notified of their arrest and detention following their arrest”, and further on page 5 that “In the wake of *LaGrand* we have succeeded in providing a more effective means to reconsider cases where consular notification has not occurred.”

²⁷ *Ibid.* 5

²⁸ Fitzpatrick, Joan, “The Unreality of International Law in the United States and the *LaGrand* Case”, 27 *Yale J. Int’l L.* 427, (2002).

²⁹ *Germany v United States*, ICJ Judgment issued in Press Release 2001/16, June 27, (2001), and archived here <http://www.icj-cij.org/docket/index.php?pr=355&code=gus&p1=3&p2=3&p3=6&case=104&k=04>

³⁰ *Torres v Oklahoma*, 2005 OK CR 17, (2004), archived here

<http://www.debevoise.com/publications/pdf/Torres.pdf>

³¹ *Torres v Oklahoma*, 538 U.S. 928, (2003).

³² See Justice Breyer’s dissenting opinion in *Torres v Mullin*, 124 S. Ct. 562, (2003), archived here

http://www.internationaljusticeproject.org/nationalsOTorres_opinion.cfm

³³ *Mexico v United States*, also known the *Avena* Case, was brought before the ICJ in 2008. The Application Instituting Proceedings, cited as 2008 ICJ General List No. 139, is archived here <http://www.icj-cij.org/docket/files/139/14582.pdf>

³⁴ Counter Memorial by the United States in the Case Concerning *Avena*, filed with the ICJ November 3, (2003), is archived here <http://www.icj-cij.org/docket/files/128/10837.pdf>

³⁵ President Bush’s Determination Regarding the U.S. Response to the *Avena* Decision, February 28, (2005), archived here <http://www.state.gov/s/l/2005/87181.htm>

³⁶ Case Concerning *Avena* and Other Mexican Nationals (*Mexico v. United States of America*) (*Avena*), 2004 ICJ 128 (Mar. 31).

³⁷ *Supra* at note 35.

³⁸ “No Justice in Rights Denied”, *Los Angeles Times*, April 3rd, (2004), archived here

<http://articles.latimes.com/2004/apr/03/opinion/ed-court3>

³⁹ NAFTA, or the North American Free Trade Agreement, came into force in 1994 creating the largest trading bloc in the world (in terms of GDP) by joining America, Canada, and Mexico in a trilateral trade agreement.

⁴⁰ Fleishman, Michael, “Reciprocity Unmasked: The Role of the Mexican Government in Defence of its Foreign Nationals in United States Death Penalty Cases”, *Arizona Journal of International and Comparative Law* 20 (2003):306.

⁴¹ *Ibid.* 393-394.

⁴² *Ibid.* 365-368.

⁴³ Kuykendall, Gregory, “Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client”, *Hofstra Law Review*, 36(2008):989.

⁴⁴ *Texas v Adalpe Guerra*, Cause No. 359,805, 248th Judicial District Harris County, Texas, (1982).

⁴⁵ For a comprehensive account of the facts compiled from court documents, also see Ricardo Ampudia, “Mexicans on Death Row”, *Arte Publico Press*, (2010).

⁴⁶ *Guerra v Collins*, 916 F. Supp. 620, (1995).

⁴⁷ *Ibid.* 672.

⁴⁸ *Ibid.* 629.

⁴⁹ *Ibid.* 631.

⁵⁰ *Ibid.* 636.

⁵¹ *Ibid.* 636.

⁵² *Ibid.* 637-642.

⁵³ *Ibid.* 643-644.

⁵⁴ Rubac, Gloria, “Ricardo Adalpe Guerra Free at Last, Workers”, *World News Service*, May 1. (1997), archived here <http://www.workers.org/ww/1997/aldape0501.html>

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- ⁵⁵ Guerra supra at note 45, 631-632.
- ⁵⁶ Fulford v Maggio, 692 F. 2d. 354, (1982).
- ⁵⁷ Neil v Biggers, 409 U.S. 188, (1972).
- ⁵⁸ Guerra supra note 45, 636
- ⁵⁹ California v Chapman, 386 U.S. 18, (1967).
- ⁶⁰ Brady v Maryland, 373 U.S. 83, (1963), at p. 87.
- ⁶¹ Guerra supra note 45, 641.
- ⁶² U.S. v Bagley 473 U.S. 682, (1985).
- ⁶³ Guerra supra note 45, 643.
- ⁶⁴ Guerra v Johnson, 90 F. 3d. 1075, (1996).
- ⁶⁵ Ibid. 1085.
- ⁶⁶ Ibid. 1089.
- ⁶⁷ Texas Attorney General Statement of Facts in the Miller Case, February 20, (2007), archived here <https://www.oag.state.tx.us/oagnews/release.php?id=1926>
- ⁶⁸ Findings of facts during trial are also recounted in Miller v State, 741 S.W. 2d 382, (1987).
- ⁶⁹ Ibid. 382-385.
- ⁷⁰ Miller v. Johnson, H-99-0405, (S.D. Tex. 2 February 2004).
- ⁷¹ Miller v Dretke, 404 F. 3d 908, (2005).
- ⁷² Buntion v Dretke, Civil Action No. H-04-CV-1328, S.D. Texas, Houston Division, April 28, (2006).
- ⁷³ Tuma, Shawn, "Law in Texas Literature; Texas Justice- Judge Roy Bean Style", *Review Litigation*, 16 (2002):551.
- ⁷⁴ Buntion supra note 71, 11-15.
- ⁷⁵ Ibid. 42.
- ⁷⁶ Ibid. 44.
- ⁷⁷ Buntion v Quarterman, Case No. 06-70024, US 5th Circuit Court of Appeals, April 11, (2008), at p. 13, and archived here <http://www.ca5.uscourts.gov/opinions/pub/06/06-70024-CV0.wpd.pdf>
- ⁷⁸ Ibid. 17.
- ⁷⁹ Supra note 72.
- ⁸⁰ Supra note 39, 371.
- ⁸¹ Ibid. 371.
- ⁸² Ibid. 371.
- ⁸³ Ibid. 372.
- ⁸⁴ Ibid. 372.
- ⁸⁵ Record on file with author.
- ⁸⁶ Record on file with author.
- ⁸⁷ Record on file with author.
- ⁸⁸ Record on file with author.
- ⁸⁹ Record on file with author.
- ⁹⁰ Both the recorded confession of Montoya and selected excerpts from witness testimony during trial examination are republished in the appellate court opinion from the Texas Court of Criminal Appeals, Montoya v Texas, 810 S.W. 2d. 160, (1989).
- ⁹¹ Texas Penal Code Sec 7.02.
- ⁹² Supra note 39, 377.
- ⁹³ Supra note 89.
- ⁹⁴ Activity on Montoya's behalf was also undertaken by Non-Governmental Agencies, most notably Amnesty International, which filed an open letter to Governor Bush asking for compliance with applicable Vienna Convention laws, and requesting Montoya's execution be halted. This letter is cited as AI Index: AMR 51/34/97, and is archived here <http://www.amnesty.org/en/library/asset/AMR51/034/1997/es/e9f02f8c-f240-412d-804c-7b2e80c01975/amr510341997en.pdf>
- ⁹⁵ "U.S. Mexico Clash Over Death Penalty", *The Victoria Advocate*, December 29, (1997).
- ⁹⁶ Supra note 39, 378.
- ⁹⁷ Dwyer, Susan, "Torture's Advocate", *International Socialist Review*, 39 (2005).

⁹⁸ The Atlantic Magazine has compiled an exhaustive compendium of notes by A.G. Gonzalez that were prepared for Bush's review regarding death penalty cases put before Bush during his tenure as Texas Governor. These notes suggest that Gonzalez invested little time in reviewing cases for Bush's consideration, as most were incredibly skeletal in nature, and oversimplified. These notes are archived here <http://www.theatlantic.com/past/docs/issues/2003/07/berlow.htm>

⁹⁹ *Montoya v Johnson*, 517 US 1133, (1996).

¹⁰⁰ Dillon, Sam, "Mexico Reacts Bitterly to the Execution of one of its Citizens in Texas", *New York Times*, June 20, (1997).

¹⁰¹ Espinoza, Noel, "Demonstrators Lose the Battle, Anger Follows News of Execution", *The Brownsville Herald*, June 19, (1997).

¹⁰² *Supra* note 39, 380.

¹⁰³ *Ibid.* 378.

Chapter 8

U.S. Death Penalty Policy and International Litigation

"No institution of government can now afford to ignore the rest of the world."¹

U.S. Supreme Court Justice Sandra Day O'Connor

Stage 1 Policy Context

Introduction

From the country's humble beginning as a colonial outpost of the British Empire, through its formative years as a nascent nation embattled with the European powers, to its ascendancy as a world power engaged in diplomatic detente during the Cold War, the United States has experienced in its several hundred years of existence a tumultuous history in its relations with foreign nations. Throughout its storied history, the United States has been most emphatic in its opposition to perceived interference by foreign nations in its domestic policies. Before the United States declared its independence, the early rebellion against the British Empire was ignited by what was widely perceived to be an unfair tax levied by a foreign sovereign (British royalists who disagreed with this characterization did so at their own peril). The United States Civil War itself was largely an ideological division over the extent to which the federal government could impose its rule upon a sovereign states right to create its own domestic laws regarding slavery, holding the conviction that the U.S. Constitution provided them protection

from the encroachment of any outside power, be it federal or international. This deeply ingrained resistance to the imposition of outside authority upon a states domestic policymaking has carried through to the present day, and the conflict between states who are attempting to execute a foreign national and those countries who are attempting to intervene on behalf of one of their citizens, is entirely emblematic of a widening divide between increasingly isolationist United States pitting itself against a quickly coalescing international consensus against the death penalty. This chapter will begin in its policy segment by exploring U.S. resistance to international interference, and closely examine the historical roots of U.S. exceptionalism. It will further examine the evolution of death penalty policies globally, in the divisions in policy that arose between the United States and European countries specifically, and consider the factors that created this ideological divergence between countries who share many similar policy approaches. This chapter will discuss how the death penalty as a criminal justice policy has been rejected by a vast majority of nations as a human rights violation, and will enumerate and discuss the various instruments of international law regarding the death penalty, and how these instruments have been effectively used to challenge the United States in its attempts to execute foreign nationals. The policy segment of this chapter will conclude by assessing how a growing international consensus has had a discernible impact upon the perception of death penalty policies, and consider waning support for death penalty policies domestically. The case study analysis segment of this chapter will methodically examine two cases in which Mexican nationals in the state of Texas facing the death penalty invoked international law in their effort to seek reprieve, appealing their cases to international courts and tribunals, and will consider the U.S. response to their findings. On balance, this chapter aims to lend intense scrutiny to the ability of foreign nations to hold U.S. states accountable for death penalty policies that involve

their citizens, the avenues of recourse available to these nations, the authority of international tribunals to wield power over state domestic policies, and ultimately a foreign nations power to influence the policies of U.S. states, namely Texas.

United States Death Penalty Divergence

From a historical perspective, in the late 18th and early 19th century the United States and Europe were both gradually embarking upon parallel paths to death penalty abolition that followed the same policy trajectory until the mid-1960s.² After World War II, the Allied powers saw a spike in the number of executions related to crimes against humanity and other war crimes such as those prosecuted during the Nuremberg trials. Following this surge in execution for wartime related crimes across the United States and Europe, many European nations began to abolish death penalty statutes. However, opposition among majorities of the population still favored the use of executions, but political elites in Europe prevailed politically over majority sentiment and abolition began to occur either de facto or de jure.³

In the United States in the early 1960's a de facto abolition on the death penalty seemed imminently poised to become de jure. From the years 1966 to 1969 only one execution occurred in the United States. Although many states still retained death penalty statutes that enabled prosecutors to seek capital punishment sentences against certain offenders, pursuit of the ultimate punishment under the law had been largely abandoned in practice. The interest among the public in executing citizens had begun to wane.⁴ This would all change when the Supreme Court issued its ruling in *Furman v Georgia*,⁵ where the court found that the procedural processes used in Georgia death penalty trials were inherently flawed and unconstitutional. The reaction to the Furman decision among states, whose statutes had been effectively declared invalid and

unconstitutional, was unequivocal. Many southern states, perceiving this as a federal usurpation of states' rights in the adjudication and administration of their judicial system, activated their state legislatures to revise existing death penalty statutes to conform to the Furman decision.⁶ Several years later Supreme Court in *Gregg v Georgia* ruled that state modification to earlier death penalty statutes now created compliance with the Constitution, and allowed executions to resume unimpeded.⁷ This decision create a revival in the interest of the death penalty among members of the public as an instrument of criminal punishment, and especially politicians seeking to gain political advantage in harnessing the anger some felt over what they perceived to be federal encroachment upon state sovereignty, and in interference in state domestic policies. Politicians would further seek to capitalize on death penalty policy by exploiting fears of the general population. These political tactics would help to further solidify support for the death penalty, and create a philosophical foundation upon which to reject international interference with domestic death penalty policies.

United States Resistance to International Interference

As noted above, the United States has exhibited a high degree of recalcitrance to the idea of allowing any impingement upon its sovereign right to exercise domestic policymaking by external actors, and most vociferously rejects any attempt by foreign nations to interfere in the local administration of states criminal judicial system. This is particularly true in cases involving the death penalty, where foreign nations seek to insinuate themselves in the judicial process on behalf of a national facing the death penalty. Johnny Holmes, Dist. Atty. for Harris County Texas, exemplified this common distain for perceived intrusion into Texas death penalty policies

during an interview when he said "when one of the national television news programs was pushing me about why we sent so many people to death row, I told the anchor that it's nobody's business but Texans I said, I don't give a flip how you all feel about it".⁸

This resistance to foreign influence can largely be drawn from fundamental tenets of U.S. exceptionalism, a closely held conviction among Americans that the United States is inherently unique in both its history and culture, and exempt from conventional international norms.⁹ In U.S. domestic death penalty policies, this brand of exceptionalism becomes clearly evident, with many proponents of capital punishment adhering to an antiquated notion of the death penalty as a rough hewn version of pioneer law that is a uniquely American product of Old Testament Christian ideology and old American West frontier justice.¹⁰ The death penalty has been frequently cast by politicians as an appeal to law and order constituents who still hold a deep-seated reverence for America's historical origins in the manifest destiny of Westward expansion, and the result of this political rhetoric has been to elevate the discussion of the death penalty as a dominant campaign issue. Converting the death penalty into a politically populist issue has galvanized resistance to policy change advocated by foreign countries, and has created an ideological chasm between the United States and its closest allies. The overtly democratic political structure of government in the United States, coupled with a politically ideological culture receptive to law and order demagoguery, has historically created a high degree of public support for capital punishment in the United States that has been until recently unassailable.¹¹

The direct-democracy approach of American political institutions differs profoundly from parliamentary style political structures most familiar to European countries, and it has served to create a political system in which populist issues such as the death penalty can be exploited for immediate political gain. Certain structural characteristics of American democracy greatly lend

themselves to populist leverage, whereas many European parliaments are structurally resistant to the occasionally misguided will of the electorate.¹² An example of institutionally embedded populism in the U.S. would include the campaign primary system in the United States used to nominate party candidates for elected office based upon direct voting in states among party constituents, or political caucuses in states such as Iowa. In European-style parliamentary systems candidates are nominated by parties themselves, insulating candidates from the necessity of appealing directly to constituencies promoting divisive issues such as the death penalty. Certain U.S. states also use direct voting mechanisms such as ballot measures, initiatives and referenda upon which voters can directly determine public policy positions.¹³ This institutional style of American democracy creates a heightened level of responsiveness among politicians to issues of importance among individual voters, but also conversely creates an opportunity for political exploitation of a divisive issue that among many constituents. Issues of crime and law order elicit a visceral response among many citizens that can be ripe for political machination.

The ubiquitous phrase "law and order" first originated in Barry Goldwater's campaign for U.S. president in 1964. Although Goldwater was unsuccessful in his bid for president, in 1966 Ronald Reagan took up the mantle of a conservative law and order platform and successfully ran for the governor of California. Espousing the view that the liberal civil rights movement had created racial discontent among minorities in that Lyndon B. Johnson's social reforms incentivized criminal behavior, self-professed conservative law and order politicians began emphasizing issues of crime, law enforcement and prison expansion as central elements of their campaign agendas. In his 1968 campaign for president, Richard Milhouse Nixon was the first successful presidential candidate for the Republican Party to tout a political platform in which

issues of law and order were a central plank.¹⁴ Law and order related themes have proven incredibly successful in generating voter antipathy toward liberals, who are widely portrayed by conservatives as weak issues of law enforcement and criminal justice, and mobilizing the conservative electorate to vote for candidates who present themselves as unyielding adversaries to wanton criminals bent on victimizing innocent citizens. In this context, the issue of the death penalty becomes a veritable lightning rod through which politicians hope to channel the charge of manufactured voter outrage against an opponent they attempt to cast as soft on crime in an election campaign.

The use of populist anger in service of scoring political points in a political campaign was on full display during the 1988 presidential campaign between Republican George H. W. Bush and Democrat Michael Dukakis. During the debate performance between the two candidates Michael Dukakis was later pilloried in the press and by pundits for his detached, calculated response to a question which posed whether his opposition to the death penalty would waiver if it were his own wife who were brutally raped and murdered. Candidates for the office of President of the United States, a position which has limited authority to intervene in state-level prosecutions where the vast majority of death sentences are rendered, share equal public scrutiny with other officials running to be elected to public office, such as judges prosecutors and attorneys general.¹⁵ The political populism of American direct democracy demands that each public policy maker incorporate public opinion into his personal judgment calculus when considering issues of capital punishment.

Furthermore, American populism isn't confined solely to the political arena, regarding implementation of death penalty policies. The presence of populist ideology also pervades the American judicial system. Judges and prosecutors (as discussed in earlier chapters), much like

U.S. politicians, are often elected officials who serve at the pleasure of the public, which can vote them out of office if their rulings are inconsistent with prevailing political ideology.

Although this creates an element of judicial accountability, it also creates the possibility of an indelible influence on a judge's decision making, oftentimes forcing the judge to rule irrespective of valid precedent and taking into account populist sentiment among voters in order to secure reelection.

In addition the United States widely employs the use of citizen grand juries, endowed with the authority to indict persons on criminal charges, as well as citizen juries who act as factfinders in both criminal trials and death penalty sentencing phases. The insertion of populist sentiment, either inadvertently or unabashedly, by citizens jurors who sit in judgment of those foreign nationals charged with capital offenses, is difficult to estimate but also equally difficult to entirely discount. In summary, U.S. political and judicial institutions are intrinsically organized to resist the imposition of foreign interference based upon the history of American exceptionalism.

Evolution of the Death Penalty Globally

As noted in the preceding policy segment, over the course of the previous fifty years a sharp divergence in attitudes toward the death penalty among the United States and Europe has taken place, with the United States essentially doubling down on death penalty policies and European

countries moving increasingly toward abolition. However, in recent years a growing global consensus has begun to coalesce around a “new dynamic “which seeks to transform the debate regarding the death penalty by moving it outside the sphere of domestic policy creation, and into the realm of international human rights.¹⁶

Proponents of this new international abolitionist movement assert that the gradual embrace of customary international norms will compel nations to discard criminal justice practices which are eschewed by the global community as cruel and inhuman. And although these abolitionist advocates would readily concede that the United States in particular has been comparatively intransigent in joining the abolitionist trend, progress on many other fronts has been the subject of rapid development. The modern narrative arc of international abolitionist history begins in 1948 when the Universal Declaration of Human Rights was first enacted, at which time only eight countries had abolished the death penalty for all crimes. By 1996 the number of abolitionist countries had increased to twenty six, not including nine states in the U.S. two in Australia, and in twenty four of the Mexican states.¹⁷ Many of these countries embarked upon a path to abolition that was marked by particular methodology.

Ancel observed a distinctive pattern emerging among nations working toward abolition, that would begin with reducing the number of crimes for which one could be potentially executed, followed by the widespread use of commutation of sentences, the abandonment of capital punishment prosecutions which would create de facto abolition, which would then ultimately lead to abolition de jure.¹⁸ It should be noted that many states within the U.S. have followed a parallel course in their progress to abolition. In 2007, New Jersey Governor Jon Corzine commuted all death sentences in the state, effectively abolishing capital punishment.¹⁹ The last person executed in New Jersey was in 1963. After the death penalty was reinstituted in New

Jersey (following the Supreme Court decision in Gregg), all persons sentenced to death either had their sentences reversed, or courts were unable to set execution dates. In New Mexico Gov. Bill Richardson signed a legislative enactment in 2009 making his state the 15th in the United States to abolish capital punishment.²⁰ New Mexico it only carried out one execution in the previous thirty years, and only had two inmates who resided on death row.

The global abolitionist movement in the last twenty years has been swift and ostensibly unrelenting. In 1988 only 52 of the 180 member states of the United Nations had completely abolish the death penalty. The number of abolitionist states over that period of time has doubled to 102 with 95 of those countries abolishing capital punishment for all crimes, and only 45 of these nations of executed anyone in the last 10 years, with 36 of these countries publicly announcing their intention to discontinue executions in the near future.²¹ Statistically, of those countries who hold membership in the United Nations, 71% have either abolished or intend to abolish capital punishment. The United States is not wholly immune to this global trend, and death sentences meted out from 1994 to 2008 dropped from 328 to 111 respectively in 2009 only 40 states in the US carried out a total of 52 executions, 24 in the state of Texas alone.²² This momentous shift in attitudes globally toward the death penalty can be attributed to a number of factors including increased democratization, globally making governing regimes more receptive to international human rights as expressed by international covenants and treaties that denounce capital punishment as violative of basic human rights, as well as the growing proactive involvement of international organizations such as Amnesty International that exert growing pressure and influence over the behavior of foreign governments. The United States has shown itself to be amenable to international condemnation, and has acknowledged the existence of

international norms. In banning the execution of mentally retarded persons and juveniles, (Atkins and Roper) the United States Supreme Court invoked "evolving standards of decency" in their ruling to ban these execution practices.²³ Although U.S. movement to respond to a global trend in death penalty abolition has occurred at a glacial pace, the direction toward abolition is clear and unmistakable.

Death Penalty as Human Rights Violation

Death penalty policies in the United States have become the subject of scrutiny among diplomats, international activists, and international judicial bodies, many of which have challenged U.S. domestic policies on capital punishment by asserting that international law prohibits the death penalty, that international law should be considered as controlling or guiding authority by U.S. judicial bodies in that international tribunal's decisions should be accorded due deference by American courts.²⁴ Over the course of the last twenty years many litigants have invoked international norms when addressing death penalty issues, citing them as pertinent to the practices and legality of US executions.²⁵ International empirical studies have found a global evolution in favor of death penalty abolition based upon the message of human rights, asserting that transnational laws provide safeguards internationally which protects people from cruel and inhumane punishments finding death penalty to be violative of international law.²⁶

The perceived intractability of the United States to concede its position on the death penalty and persistently resisting the chorus of civilized consensus among its nation peers has been widely viewed as a blatant flouting of international norms and an arrogant display of unilateralist disregard of international law. Countries which seek to challenge U.S. attempts to selectively

discern which international treaties it will deign to be bound by are further compounded when it also attempts to seek to enforce those very same treaties against other signatories, which other signatory nations would characterize as rank hypocrisy.²⁷

U.S. credibility has been undermined by its position in denouncing human rights violations of other nations, such as China, Iran and North Korea, who often invoke U.S. capital punishment statutes and practices as a rejoinder to accusations of human rights violations. On April 10, 2011 China's State Council Information Office released a report titled "Human Rights Record of the United States in 2010" in which the United States use of the death penalty was criticized as a human rights violation and which stated "the United States applies double standards".²⁸

Many countries, including Mexico, have moved beyond simply preparing reports that condemn the United States in its practice of capital punishment, but have brought litigation against the United States seeking to challenge the U.S. in international judicial forums invoking customary normative law as well as international treaties in attempts to pressure the U.S. to abandon prosecution of foreign nationals, to capitulate in seeking death for a particular national, and to mount a persuasive campaign to compel the U.S. and U.S. states to abolish capital punishment.

International Law Instruments

As the United States is seen increasingly throughout the world as prosecuting a 'war' by the judiciary in violation of international human rights against its own citizens by implementing death penalty policies widely understood as cruel, inhumane, and procedurally flawed, foreign states have attempted to interfere. When the U.S. stands between its own citizens and the

interests of the world community by refusing to uphold universally recognized human rights, foreign governments will intervene on behalf of citizens in an attempt to broker a solution using instruments of international law.²⁹ Foreign nations, as litigants, have wielded a number of international human rights laws and instruments in international judicial venues in defense of their citizens. This policy segment will contemplate the origins of international human rights law, discuss the primary documents which express the global community's collective understanding of the nature of fundamental human rights, and the international judicial forums within which human rights issues are adjudicated.

The United Nations, an international organization formed in 1945 and comprised of 193 member states, labors under the lofty mission of promoting and preserving international law, security and economic growth, and strives to ensure world peace. The UN Charter, signed into force on June 26, 1945 is the foundational document of the United Nations, and establishes the organizational structure as well as delineating rights and obligations of each member state. The charter itself explicitly enumerates the overarching objectives of the United Nations, and together with the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948 creates the fundamental foundation of all international human rights law. The International Court of Justice is the primary judicial organ of the United Nations, and adjudicates all disputes that arise between member states. The fifteen judges who preside over the court of the ICJ are appointed from different member nations each serving predetermined terms of limited duration. The breadth and scope of international authority recognized by the ICJ as valid precedent is outlined in Article 38 (1) of the statute of the International Court of Justice, includes international conventions, international custom, general principles of law recognized by civilized

nations, and judicial decisions of the most highly qualified jurists in respective member nations. Frequently countries appealed to the ICJ to adjudicate controversies that arise from breaches of treaties between signatory nations.³⁰ Treaties between nations, such as the Vienna Convention on Consular Relations, are often codifications of customary international law which once signed and ratified are binding upon all signatories.

The International Covenant on Civil and Political Rights which was entered into force March 23, 1976 and ratified by the United States on June 8, 1992 is the preeminent treaty on international human rights which the U.S. State Department has characterized as "the most complete and authoritative articulation of international human rights law that has emerged in the years following World War II."³¹ However, even the most comprehensive and authoritative treaties may include terms which one signatory may consider objectionable or politically untenable. The United States has frequently resorted to attaching reservations to certain treaties that may present future complications in the administration of domestic criminal justice policies and may be interpreted as a treaty breach. Upon ratifying the ICCPR the U.S. issued a specific reservation to Article 6 (5) which provided "sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out against pregnant women." The U.S. Senate, the institutional body empowered with the authority to ratify treaties, issued a reservation to Article 6 (5) to keep intact the U.S. right "subject to its constitutional constraints, to impose capital punishment on any person."³² This reservation was roundly criticized by many allies of the United States who are also signatories to the treaty. France lambasted the United States reservation as "incompatible with the object and purpose of the convention".³³ Sweden further voiced its displeasure stating that "all parties share a common

interest in the respect for the object and purpose of the treaty to which they have chosen to become parties".³⁴

These treaty reservations have proved to be not only controversial, but also inadmissible.³⁵ After the U.S. Senate ratified the ICCPR treaty with an explicit reservation purporting to allow continued executions of juveniles to proceed in the United States irrespective of treaty provisions, the Human Rights Committee subsequently ruled this reservation inadmissible.³⁶ This places the United States in a precarious international position in which it was ostensibly bound by international legal norms to discontinue its policy of executing juveniles, a practice still permitted at the time by state statutes and common law precedent.³⁷ The United States Supreme Court shortly thereafter, acknowledging international "evolving standards of decency" obliged international pressure to abandon state sanctioned execution of juveniles by ruling the practice unconstitutional.³⁸ Although the court majority premised its ruling upon U.S. constitutional grounds, concurring opinion among some justices recognized a growing global consensus. This recognition of international influence reinforces the notion that although the United States does not bend obsequiously to the dictates international law, it has begun to take note of its value.

Also listed as a source of valid and legitimate authority under Article 38 of the ICJ statutes is customary international law, which is comprised of two elements, the general practice of nations and what is "accepted as law".³⁹ Both elements must be satisfied in order for customary international law to be deemed to exist. It must be determined that both the majority of member states both follow this legal practice, and do so out of legal duty. Customary international law is binding upon member states, and legal sources that can be used to derive customary international law can include judicial decisions, treaties, resolutions, and other various legal memoranda. The

international consensus that had evolved concerning the execution of juveniles, had become manifest in both practice and principle among a large majority of member states, ultimately becoming recognized as international customary law.⁴⁰ Although customary international law is binding, nations who "persistently object" to the imposition of customary law may be exempt if this objection is consistent. However, under Article 53 of the Vienna Convention on the Law of Treaties, an international norm can be considered *jus cogens* if "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Once a norm is ruled as *jus cogens* no nation is permitted to deviate from this form of international law, even as a persistent objector.

In addition to the ICJ, there other regional judicial forums before which nations have petitioned on behalf of a foreign nationals facing death in the United States to mount an appeal to capital punishment policies as violations of international law. The Organization of American States (OAS) is an international organization created under the auspices of Article 52 of the UN Charter, that was created to sustain peace and justice, promotes solidarity ensure territorial integrity within member states (Article 1 of the OAS Charter entered into force 1951) and acknowledges that international laws govern the conduct of nation states that share membership in the OAS. Comprised of 35 member states, the OAS has incorporated a host of international instruments to safeguard the human rights of citizens of member states. As the UN has created a judicial organ responsible for monitoring and overseeing human rights violations and creating a forum through which disputes can be adjudicated, the OAS established the Inter-American Human Rights Commission on Human Rights as a parallel judicial body tasked with the

authority to review alleged human rights abuses by member states. Upon ratifying the OAS charter in 1951, the United States expressly recognized the authority of the commission.⁴¹

This chapter's policy segment analysis provides a broad sweeping overview of the amalgam of international legal and institutional frameworks through which foreign actors seek to enjoin the United States in its continued pursuit of executing foreign nationals in violation of international law, and illustrates the philosophical underpinnings that support the body of the continued resistance among American judicial and political institutions that these foreign actors meet when attempting to challenge the legality of death penalty domestic policies. In the following case study analysis we will examine cases which explode this theoretical framework into its observable constituent parts to understand how these policies operate in the real world. Trace process analysis methods will minutely examine all causal process observations creating inferential assumptions about causal factors to establish relationships among variables. Then in conducting interviews with elite participants involved in the case's adjudication inferential assumptions will be either bolstered or rebutted based upon elite testimony. Cross case analysis will be used to examine commonalities among fact similar cases to draw illustrations in different scenarios.

Stage 3 Case Study Analysis

Individual Case History

Juan Raul Garza was a man of stark contrasts. The proverbial self-made man, Garza was the son of migrant workers who immigrated to the United States from Mexico, and who later dropped out of high school and began a profitable construction business in South Texas.⁴² However, Garza's entrepreneurial spirit was too great to be confined by the limits of the law. Beginning in nearly 1980s until his arrest in 1992 Garza ran a sophisticated drug trafficking network that linked northern Mexican drug producers to American suppliers in the far-flung states of Texas, Louisiana and Michigan resulting in the sale of thousands of pounds of marijuana and netting Garza hundreds of thousands of dollars in profits.⁴³ Garza's illicit distribution chain was largely managed by family members or acquaintances from his former rough-and-tumble days in his old neighborhood.

Garza's supply line began in Oaxaca, Mexico where the marijuana was cultivated, then shipped by plane to the Mexican city of Matamoros on the northeast Mexico-Texas border, then smuggled overland into Brownsville, Texas by various drug couriers in Garza's employ.⁴⁴ Eventually the drug trafficking system was disrupted when Garza began to develop deep suspicions regarding the loyalty of his underlings, suspecting several of either stealing his money and drugs during shipment, or conspiring with narcotics officers to inform on Garza. Garza's suspicions ultimately lead to a string of murders in Texas as well as (prosecutors would allege during Garza's trial) Mexico. Garza would later be implicated in seven murders, three in Texas

and four in Mexico, in which he either ordered associates to carry out executions, or was himself the trigger man.⁴⁵

Garza's first target was the owner of an auto body shop named Gilberto Matos, who was a known associate of Erasmo de la Fuente, a drug dealer whom Garza suspected of supplying the police with information about his drug smuggling activities. Garza sent two of his subordinates, Manuel Flores and Israel Flores, to send a violent message to de la Fuente by gunning down Matos on the floor of his autobody shop where his body was discovered on April 3, 1990.⁴⁶ Evidently unsatisfied that de la Fuente received the message, a short five months later Garza provides Israel Florez and his cousin Jesus with guns, escorted them to a nightclub owned by de la Fuente where they lay in wait.⁴⁷ As de la Fuente exited the nightclub and entered his car he was shot twice through the car window and killed, his body being found on September 8, 1990 by police.

In January 1991, Garza suspected a third associate, a thirty five year old truck manager named Thomas Rumbo, of also informing police about Garza's drug operation. During a visit to Rumbo's house, Garza persuades a reluctant Rumbo to take a ride in Garza's pickup truck down a remote road in a rural part of the county. Garza shoots him five times, the fatal shot delivered to the back of Rumbo's head.⁴⁸ On February 6 1992, under investigation for his drug smuggling activities, and under a federal grand jury indictment for marijuana trafficking, Garza flees to Mexico after his Brownsville home was raided by U.S. customs agents in which 13 associates involved in Garza's smuggling operation were arrested. Exactly nine months later Garza is arrested in Mexico and expeditiously extradited to the United States on federal drug trafficking charges. Several months later on January 3, 1993 a new indictment is issued which charges Garza with money laundering, operation of a continuing criminal enterprise, possession of

marijuana with the intent to distribute, and three counts of homicide as a part of a continuing criminal enterprise. Under the Anti-Drug Abuse Act, codified in 21 USC 848E and commonly referred to as the "drug kingpin act" any person who intentionally kills another person while engaging in or working in the furtherance of a continuing criminal enterprise or engaging in major drug felony is eligible for the federal death penalty. Although the indictment did charge Garza with three murders in the United States, prosecutors would also introduce evidence of four murders in Mexico to bolster their case.⁴⁹ Garza was never charged or convicted for any of the murders in Mexico, and introduction of this evidence would later prove grounds for appeal. Mexico would also later assert that Garza's extradition would have never been authorized if they were informed that the federal government would seek his execution under a violation of the drug abuse act.⁵⁰

However, on January 7, 1993 the U.S. Attorney for the Southern District of Texas filed a notice of intention to seek the death penalty after receiving the approval from U.S. Attorney General William Barr.⁵¹ Garza's federal trial began on July 7, 1993. The prosecution was led by Mark Patterson and Jose Moreno, who presented evidence in the form of testimony from U.S. Customs agents, associates of Garza, family members of the victims, as well as forensic testimony from pathologists who conducted autopsies on the bodies.⁵² U.S. Customs agent Mark Reich testified that Garza earned millions of dollars by smuggling more than 7,000 pounds of marijuana from Mexico to Texas. Emilio Garza, Juan Garza's nephew, was called to testify on behalf of the prosecution, telling the court in his testimony that his uncle had killed Rumbo out of suspicion that he'd stolen marijuana. Garza's defense disputed the prosecutions characterization of Garza as a drug kingpin, with his attorney Philip Hilder attempting to

persuade jurors in his closing argument that Garza was not a "drug lord", and lived modestly in a mobile home on a simple two-acre plot of land.⁵³

On July 29, 1993 Garza was unanimously found guilty by the jury on all counts contained within the indictment, and Garza's sentencing hearing began on that very same day.⁵⁴ In the sentencing phase, before jurors are asked to make a determination on sentencing they must weigh both mitigating and aggravating factors in the case, and to impose a death sentence the jury must unanimously find at least one aggravating factor exists, otherwise a death sentence is unavailable. Conversely, the defense may provide evidence of mitigating factors that may place the crime in context, or might otherwise give jurors a valid rationale for offering leniency and sparing the defendant's life. During the sentencing phase the prosecution presented evidence to the jury of four unadjudicated murders committed in Mexico, for which Garza had never been charged or convicted. In a majority of U.S. states evidence of unadjudicated crimes, alleged to have been committed either in the US or foreign country, are ruled inadmissible during trial or penalty phases as being unreliable and unfairly prejudicial.⁵⁵ In Garza's case not only were the alleged crimes unadjudicated and committed in a foreign country, the testimony given to substantiate Garza's involvement was elicited from former associates of Garza, all of whom received reduced sentences in exchange for their cooperation with the prosecution.

The murders in Mexico of Fernando Garcia, Antonio Nieto Burnabe Sosa and Oscar Cantu were all purportedly proven by the prosecution by the introduction of testimony by Israel Flores and his cousin Jesus Flores, both former associates of Garza who had admitted to committing murders on the orders of Garza, and both received reduced prison sentences in exchange for their testimony.⁵⁶ The prosecution, aggressively pressing the jury to sentence Garza to death, insisted repeatedly that if Garza were not sentenced to die for the murders he could be released from

prison in 20 years, despite the federal sentencing guidelines which provide a sentence of life in prison without the possibility of parole.⁵⁷

During the sentencing phase Garza's defense offered the jury a host of mitigating factors, pointing to the fact that Garza did not actually physically commit two of the three murders for which he was convicted, and that much of the testimony that resulted in his conviction and subsequent sentence of death was taken from witnesses who were also participants to the crime and whose credibility had been compromised by the offer of a reduced sentence.⁵⁸ The defense also raised the issue of proportionality in sentencing, claiming that those who actually committed the murders were receiving much lighter sentences than Garza, based solely upon their cooperation which was richly rewarded with a reduced sentence. After several days of deliberation in which the jury had weighed both aggravating and mitigating factors, the jury recommended that Garza be sentenced to death. On August 10, 1993 Judge Filemon Vela concurred with the jury's recommendation and sentenced Juan Garza to death.⁵⁹

Postconviction Proceedings

Immediately following Garza's conviction, and subsequent death sentence, all avenues of postconviction relief were pursued through both federal court channels as well as international venues. On September 1, 1995 Garza's convictions and sentence were affirmed under direct appeal by the Fifth Circuit Court of Appeals.⁶⁰ Among the multiple challenges asserted by Garza's attorneys to prove judicial error, the most prominent statement of error related to the absence of a jury instruction related to a potential sentence of life without parole in the introduction of evidence during the sentencing phase regarding unadjudicated crimes committed

in Mexico were the most promising. The court found that none of the processes used by the prosecution during Garza's trial and sentencing phase constituted a violation of his due process rights, and affirmed the conviction and sentence.⁶¹ Garza then petitioned the court for a rehearing which was denied on December 15, 1995. Garza then petitioned the U.S. Supreme Court directly, which summarily denied a grant of certiorari on October 7, 1996.⁶²

After exhausting all available direct appeals, Garza began to seek relief through filing federal habeas corpus petitions, continuing to challenge the inclusion of evidence related to the unadjudicated murders in Mexico as a violation of his Fifth Amendment due process rights, as well as the courts failure to properly instruct the jury that Garza would not be released from prison in 20 years, as prosecutors repeatedly asserted, and that Garza would be eligible for a life sentence without the possibility of parole instead of a death sentence. Beginning on December 1, 1997, in a protracted sequence of motions and petitions to Federal U.S. District Courts, Circuit Courts of Appeal,⁶³ and the U.S. Supreme Court,⁶⁴ Garza's appeals were invariably met with unyielding opinion. All of Garza's motions to vacate were denied, permissions to appeal decisions declined, and petitions to the court refused.

In 1999 the Fifth Circuit Court of Appeals addressed Garza's argument that unadjudicated murders committed in Mexico are inadmissible in a due process violation by stating "the government is required to turn over to a defendant any exculpatory or impeachment evidence in the government's possession. Here, the government turned over to Garza every document it had received from Mexico, including the police reports, investigative reports, and certified translation of the autopsy reports. Garza was given express notice that the government intended to rely on the extraneous murders of sentencing, was provided full pretrial discovery of all evidence the government's possession, and was given the opportunity to cross-examine all witnesses presented

by the government sentencing. The government is under no obligation to conduct a defendant's investigation or to make a defendant's case for him."⁶⁵

With the possibility of obtaining a sympathetic ear from the federal bench seeming increasingly remote, on December 20, 1999 Garza filed a petition with the Inter-American Commission on Human Rights, charging that his trial and sentencing constituted a violation of the American Declaration of the Rights and Duties of Man, the Organization of American States Charter and international law.⁶⁶ Using a skeletal framework girded by international law invocations, Garza essentially repackaged arguments earlier made to federal courts, arguing that his death sentence violated articles of the American Declaration, in particular Articles I (right to life), XVIII (right to a fair trial), and XXVI (right to due process of law). As previously mentioned, as a member of the OAS the American Declaration has the force and authority of international law, a norm which the U.S. both authored and adopted. Each Article, in pertinent part, states; Article I, every human being has the right to life liberty and security of person,; Article XVIII., the right to a fair trial, every person may resort to the courts to ensure respect for his legal rights; and Article XXVI, the right to due process of law, every person accused of an offense has the right to be given impartial and public hearing and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel and unusual punishment. Garza argued before the commission that the trial court's flawed process of jury selection, improper instructions to the jury and the inclusion of unadjudicated evidence during the sentencing phase constituted violations of international human rights under the declaration.⁶⁷ The U.S. government and its participation in the judicial proceedings before the commission strenuously opposed Garza's contention that his rights have been violated under the

American Declaration, pointing to the extensive judicial review given to Garza it's postconviction proceedings in which no court had found any U.S. constitutional violations of due process challenges raised by Garza.⁶⁸

While the Commission deliberated its decision, on May 26, 2000 the United States District Court for the Southern District of Texas set Garza's execution date for August 5, 2000 at 6 AM.⁶⁹ On August 2 with 72 hours left on Garza's clock, for the first time in 12 years new Federal Guidelines for Presidential Clemency Procedures took effect.⁷⁰ That same day President Bill Clinton issued a reprieve to Garza resetting the execution date for December 12, 2000, providing him an opportunity to submit a petition for clemency under the newly implemented guidelines.⁷¹

One month later in September of 2000, Attorney General Janet Reno ordered the Justice Department to release an internal survey titled "A Report on the Federal Death Penalty System: a Statistical Survey" which outlined troubling disparities in the imposition of capital punishment.⁷² The report highlighted racial and regional discrepancies in the application of the death penalty in the federal system, finding that 85% of federal death row inmates were minorities, and that 42% of death penalty prosecutions arose from only 5% of the federal districts, with seven states (including Texas) comprising 65% of all federal death penalty sentences.⁷³ Shortly after the Department of Justice issued its report, on September 22, 2000 Garza sought to amend his original complaint before the Commission to include the racial and regional disparities outlined by the analysis of the Department of Justice. After the Commission concluded a hearing entertaining the merits of arguments proffered by both Garza's attorneys and attorneys from the U.S., on December 4, 2000 the Commission announced in an unpublished opinion that the United States had violated the fair trial and due process clauses the American Declaration during Garza's capital trial through the inclusion of unadjudicated crimes during Garza's sentencing

phase, and that his death sentence was arbitrary and capricious, and his execution would be a violation of his right to life.⁷⁴

With Garza's imminent execution looming one week ahead, the commission asked that the U.S. respond to which ruling within five days. Several days later on December 11, President Clinton issued Garza a second reprieve, rescheduling his execution for June 19, 2001 (beyond the expiration of his second term as president), stating that "the examination of possible racial and regional bias should be completed before the U.S. goes forward with an execution in a case that may implicate the very questions raised by the Justice Department's continuing study in this area there is no room for error".⁷⁵ Emboldened by ostensibly dramatic turn of events, in seeking to press a judicial advantage gained through the Commission, Garza again petitioned for habeas corpus relief in U.S. federal court. Invoking the findings of the commission, Garza again implores the court to rule that the unadjudicated crimes introduced during the penalty phase violated due process and to find the commission's rulings and authority as binding upon courts in the U.S.⁷⁶ The courts however were unmoved, and found Garza's appeal unfounded procedurally and substantively. The lower federal courts denied that they must honor the conclusions of the Inter-American Commission, and further assert that Garza's claims are procedurally inadequate in that his claim for relief is barred in having not been raised in his initial habeas corpus petition.⁷⁷ The U.S. Supreme Court, equally dismissive rejected Garza's petitions without comment.⁷⁸ The final option available to Garza rested with newly elected President Bush who refused to extend his execution date. In a White House press conference Bush spokesman Ari Fleischer stated that "the President found no grounds to grant clemency in this case".⁷⁹ On June 19, 2001 Garza was escorted to a holding cell next to the death chamber in the U.S. federal penitentiary in Terre Haute, Indiana. He was scheduled to become the second man to be executed

in the federal penal system since 1963, following Timothy McVeigh who was executed eight days earlier for the Oklahoma City bombings.⁸⁰

According to prison spokesman Jim Cross, Garza spent his remaining hours watching television and speaking with the prison chaplain.⁸¹ Garza's final meal consisted of a steak, French fries, onion rings, a few pieces of bread and a diet soda. Strapped onto a four-point medical gurney, Garza's last words were "I just want to say that I'm sorry, and I apologize for all the pain and grief that I have caused. I ask your forgiveness and God bless."⁸² Garza was pronounced dead at 7:09 AM. Although Garza asked that no members of his family be present to witness his execution, Karen Grunden a credentialed member of the media was present. "There was not really a point in time you could actually say he died. There was no final breath that we noticed at all."⁸³ As Garza lay dying, a number of death penalty opponents standing outside the Terre Haute prison began to sing "We Shall Overcome". After Garza's execution Greg Weircioch, Garza's appellate attorney said "today President Bush had the last word. But he will not have the final say on the death penalty. History will. Someday this precise savagery will end, but not today."⁸⁴

Trace Process Analysis

In the case study analysis component of this chapter we will deconstruct the Garza case, assembling individual events into its causal constituent parts, extract causal process observations and create inferential assumptions that link the events to establish causal connections. Inferential assumptions will form the basis for three separate hypotheses which seek to determine to a strong degree of certainty which factors played a dominant role in President Clinton's decision to

issue Garza a temporary reprieve. President Clinton's exercise of chief executive authority in granting Garza's reprieve is the policy action that forms the dependent variable under scrutiny in this case study analysis. Independent variables that may have impacted the president's decision will form the basis for this chapter's hypothesis, and include the Department of Justice report, Clinton's personal preferences regarding the death penalty, and the impact of international litigation. Each hypothesis will marshal relevant facts and seek to assert causal connections between these germane facts to support an inferential assumption that will either prove or rebut the saliency of the hypothesis. Therefore, the respective falsifiable hypotheses can be formulated as follows:

Hypothesis 1: The DOJ report had no impact on Clinton's decision to grant reprieve

Hypothesis 2: Personal preferences had no impact on Clinton's decision to grant reprieve

Hypothesis 3: International litigation had no impact on Clinton's decision to grant reprieve

Hypothesis 1, the DOJ report had no impact on Clinton's decision to grant reprieve

The Department of Justice Report released on September 12, 2000 entitled the Federal Death Penalty System: a Statistical Survey (1998-2000) was a groundbreaking study that confirmed the existence of racial and geographic disparities present in the implementation of the federal death penalty.⁸⁵ Based on the findings of the study, Attorney General Janet Reno determined that "more information is needed to better understand the many factors that affect how homicide

cases make their way into the federal system and, once in the federal system why they follow different paths. An even broader analysis must therefore be undertaken to determine if bias does in fact play any role in the federal death penalty system".⁸⁶ The study's unequivocal conclusions pointing to racial, socioeconomic and regional disparities in the implementation of death penalty policies at both the federal and state levels, and especially in the state of Texas in which Garza was convicted and sentenced, only affirmed long-held convictions maintained by death penalty practitioners and advocates. When speaking of particular states that illustrate regional disparities in death penalty sentencing Antonia Hernandez, former President and General Counsel of the Mexican American Legal Defense and Education Fund stated it succinctly by saying "it's like a game of Russian roulette: if you live in Texas, you get lethal injection, if you live in Massachusetts, you get life without parole."⁸⁷ The Department of Justice study on the federal death penalty system provided official vindication for death penalty opponents who had long decried the unbalanced and biased application of death penalty policies.

However, if the DOJ study offered vindication to death penalty opponents it created grave reservations among death penalty supporters. Conservative Republican and future Attorney General John Ashcroft, an avid proponent of capital punishment, was questioned about the DOJ report by Sen. Russ Feingold during his Senate confirmation hearings. When asked by Feingold if he would continue Atty. Gen. Reno's review of the death penalty system, Ashcroft replied "... I have absolutely no reason, in any respect, to think that we want to turn our backs on the capacity to elevate the integrity of our judicial system, especially in criminal matters, and most importantly in matters that are capital in nature."⁸⁸ In responding to written questions posed by Sen. Feingold Ashcroft elaborated on his Senate testimony by stating "I fully agree that the

Department of Justice should do everything necessary to eliminate any racial bias from the federal death penalty system."⁸⁹

From both sides of the political aisle an ostensible consensus had been reached; racial and geographic disparities in the implementation of death penalty policies presented a threat to the impartial administration of justice, and should be eliminated wherever found. Within the Clinton administration itself there was wide concurrence with this conclusion, based on the DOJ report, that troubling disparities did in fact exist in death penalty administration. "There is a question of whether the way the system is set up produces arbitrary and discriminatory results," opined Robert Litt a former deputy assistant attorney general serving in the Clinton Justice Department under Janet Reno.⁹⁰ Broad acceptance of the DOJ report's conclusions created a framework for the political climate within which President Clinton's decision on Garza's reprieve would occur.

On December 7, 2000, President Bill Clinton granted a reprieve to Garza and issued a statement through the White House Office of the Press Secretary that explicitly enunciated his reasoning. President Clinton argued that Garza's reprieve was necessary "to allow the Justice Department time to gather and properly analyze more information about the racial and geographic disparities in the federal death penalty system."⁹¹

In providing a contextual foundation for this decision President Clinton elaborated by stating that the "examination of possible racial and regional bias should be completed before the United States goes forward with an execution in a case that may implicate the very questions raised by the Justice Department's continuing study. In this area there is no room for error."⁹² This statement by the President, making specific reference to the DOJ report issues of racial and

geographic bias, provides irrefutable evidence that the report itself was a large contributing factor in President Clinton's decision.

Implicit in President Clinton's rationale is the subtle suggestion that Garza himself may have been the subject of a judicial process skewed by racial and regional bias uncovered by the report. Clinton also instructed Atty. Gen. Janet Reno to conduct an investigation and prepare a report "on the Justice Department's analysis of the racial and geographic disparities in federal death penalty prosecutions."⁹³ The President's order to the Atty. Gen.'s office to expand upon the report created by the DOJ creates an additional inferential assumption that President Clinton's issuance of a reprieve to Garza was largely motivated by the contents of the report. The combined statements of President Clinton offer soundproof evidence to refute the falsifiable hypothesis and therefore conclude that the report authored by the DOJ did influence President Clinton's decision to issue Garza a reprieve.

Hypothesis 2: Personal preferences did not impact Clinton's decision to grant reprieve

Personal policy preferences, as earlier chapters have outlined, can have a discernible impact on a policymaker's decision process. Personal convictions and opinions of policymakers can often become inextricably intertwined in the political process of policymaking, making the task of identifying precise motivations difficult. President Clinton's history regarding the death penalty throughout his life, from his law school career to his tenure as governor of Arkansas and two terms as U.S. president, has been punctuated by inconsistencies that can largely be correlated with political opportunity. This case study segment will scrutinize President Clinton's

actions regarding the death penalty in his legal and political career, to determine whether his stance on capital punishment is born of personal preference, respect for judicial precedent, or simply a product of political posturing.

Early in Bill Clinton's legal career it has been acknowledged that he and those close to him were adamantly opposed to capital punishment.⁹⁴ During his academic career at the University of Arkansas Law School, Clinton's wife Hillary (later an instrumental figure within his presidential administration, and future Secretary of State under the Obama administration) authored an appellate brief that spared a mentally retarded person from execution. Several years later as governor of Arkansas Bill Clinton again exhibited deep reticence over death penalty policies when he continually postponed scheduled executions for condemned prisoners in the state, a responsibility solely within the purview of the state executive, consequently creating a limited de facto moratorium through indefinite postponement of executions.⁹⁵ However, to evade conservative political pressure to speed up capital punishment processes Clinton enacted a procedural policy which automated the scheduling process. Clinton's aversion to embracing conservative law and order politics during his first term as governor of Arkansas would prove to have severe consequences. In his first bid for reelection Clinton was soundly defeated by a conservative Republican who challenged Clinton's sincerity in protecting the public from hardened criminals.⁹⁶ Clinton, releasing thirty-eight convicted murderers from Arkansas prisons during his first term, lived to regret this decision, while unfortunately one of his constituents did not. Having an Arkansas citizen murdered by convicted killer released from prison by Clinton served as a glaring example, used by his Republican opponent, to illustrate Clinton's purported leniency on criminals Arkansas. This was a political lesson indelibly seared into Clinton's

political consciousness. No longer did he view compassion for criminals and a commitment to rehabilitation as a political asset, but began to see endorsing leniency in the criminal justice system as a distinct liability. After winning his second term as governor Clinton began to adopt a more conservative perspective regarding the death penalty. "I can't say it's an inappropriate punishment for people who are multiple murders and who are deliberately doing it and who are judged to be sane and know what they're doing when they're doing it."⁹⁷ However, evidence does exist that even Clinton himself was still conflicted ideologically about the effectiveness of the death penalty. In interviews with the media Clinton averred that capital punishment could act as an effective deterrent to criminals bent on committing "clearly premeditated crimes", but later before a high school audience conceded that no empirical evidence existed that would support this conclusion.⁹⁸ This seeming contradiction illustrates a certain cognitive dissonance in Clinton's mind, in which political and ideological preferences are competing for dominance.

It would not take long for political preferences to prevail. During his 1992 presidential campaign Bill Clinton had fashioned himself as a tough Democratic candidate with a low tolerance for crime. In an attempt to assuage voters who may doubt the depth of his sincerity Clinton offered Ricky Ray Rector as proof of his toughness. During the presidential campaign, Clinton returned to Arkansas to preside over the execution of Rector who courts had earlier declared sufficiently competent to be executed. However, the court's ruling was highly contentious with many alleging that Rector, who upon being apprehended had attempted suicide by shooting himself in the head and suffering severe brain damage, lacked the mental acuity to appreciate the gravity of his crime and the nature of his sentence, and to execute him would be cruel and unusual and in violation of the Constitution.⁹⁹ Rector, seemingly oblivious to his impending execution or lacking the mental capacity to appreciate its significance, upon being led

to his execution asked his jailers to him save a slice of the pecan pie he ordered for his final meal.¹⁰⁰ After his execution, Rector burnished Clinton's death penalty bona fides and strengthened his image as an unyielding enforcer of capital punishment policies, and a vocal advocate for the efficacy of the death penalty.

After winning the White House Clinton would continue his support for capital punishment by signing legislation in 1994 expanding the death penalty making it applicable to 60 additional federal crimes, and then in 1996 by supporting a federal law that would reduce the number of federal habeas corpus writs that could be submitted for federal court review to one.¹⁰¹ However, as noted above, Clinton's strident support for capital punishment would begin to wane during his second term. After the DOJ report was issued, and Clinton was unable to seek reelection due to presidential term limits, the calculus involving ideological and political preferences begin to shift. No longer constrained by political considerations, Bill Clinton's ideological decision-making regarding capital punishment policies began to regain a more liberal hue. Absent any pressure by political opponents or constituents to conform to conservative law order policies to appease death penalty proponents, and unfettered by reelection concerns Bill Clinton's decision regarding the Garza reprieve would be contingent upon pressures exerted by those within his administration, as well as external organizations largely affiliated with Clinton's Democratic Party.

However, it should be noted that Garza's reprieve was issued during the presidential campaign of Clinton's vice president Al Gore. Gore, who Clinton endorsed in his presidential run against George W. Bush, may have conceivably suffered indirect political harm by his association with Clinton, should Clinton take dramatic steps to dismantle death penalty policies

during the campaign. Although no evidence exists to suggest this was a factor in Clinton's decision, it must be noted for its possibility.

Pressure from within Clinton's party and from organizations sympathetic to the Democratic Party cause were beginning to mount prior to Garza's execution. Pointing specifically to the DOJ report many death penalty opponents demanded that the racial and geographic disparities outlined in the report required not only a suspension of Garza's death penalty sentence but a reevaluation of all death penalty sentences. Death penalty abolitionists began to forcefully argue a moratorium on death penalty sentences be applied immediately. The Reverend Joseph Lowery, chairman of the Black Leadership Forum, an organization comprised of 26 civil rights organizations, said that "if that data is needed to evaluate Garza's case, it is needed for all death row defendants."¹⁰² Lowery, together with members of Citizens for a Moratorium on Federal Executions and the National Association for the Advancement of Colored People, met with Janet Reno to discuss Garza's case. Lowery pressed Atty. Gen. Reno telling her that he and those he represents "would like to see a presidential Executive Order putting a moratorium in place."¹⁰³ After Clinton issued the reprieve Lowery was pleased but not entirely satisfied saying "it's a good opening hymn, but it's not the sermon."¹⁰⁴

The ACLU also used Garza as a platform from which to espouse the necessity of a moratorium based on the DOJ report highlighting disparities in capital punishment implementation. Lida Rodriguez-Taseff, in ACLU spokeswoman cited the DOJ report to support her contention that "the government's own statistics show a pattern of racial and regional bias that may have contributed to one Garza's death sentence," and "even those who are in favor of the death penalty do not favor executing a person because of the color of his skin or because of where he lives or what country he came from."¹⁰⁵ International pressure from outside the United

States also began to mount. French Pres. Jacques Chirac spoke with the voice of the entire European Union (of which no nation members are permitted to carry out execution) when he implored President Clinton to stop Garza's execution.¹⁰⁶ The Department of Justice spokesman Myron Marlin said, in response to negotiations with civil rights leaders and organizations opposed to the death penalty, "we listen to what they had to say" about the moratorium and "we welcome their input on how to conduct further review of the federal death penalty system."¹⁰⁷

Conceding to the pressure within his own party and those political and ideological associations who share close affinity with Clinton's Democratic Party, Clinton postponed Garza's execution until June 2001, a date beyond the end of his presidency. After granting the reprieve Clinton remarked "I have not decided that the death penalty should not be imposed in this case, in which heinous crimes were proved. Nor have I decided to halt all executions in the federal system."¹⁰⁸ Clinton's decision seems to be premised upon a cold political calculation, one which appeases his core constituent base of liberal Democrats by delaying the execution for further review, but also minimizes a potential political casualty that could be accorded to his putative successor Al Gore.

Assuming a delicate moderate political posture is consistent with behavior that minimizes potential political risk in an effort to secure future political capital among a broad electoral constituency. This creates a strong inferential assumption that Clinton's personal preferences are subsumed by political reality. This proves the hypothesis true that personal preferences were not considered in President Clinton's decision to grant Garza reprieve.

Hypothesis 3: International litigation did not impact Clinton's decision to grant reprieve

After a thorough review of the historical record in the Garza case the only evidence extant that would suggest that international litigation played a pivotal or even contributory role in Clinton's issuance of Garza's reprieve is only speculative in nature. Garza's second reprieve was issued only days after the formal opinion was issued by the IHRC condemning Garza's trial and subsequent sentencing as violations of international law. There is no evidence, either in statements made by Clinton or those close to him during the decision-making process, which would support any inferential assumption that the IHRC decision was in any way outcome dispositive or influential in Clinton's decision-making process. Absent any evidence in the form of causal process observations, no analysis can proceed which would either bolster or refute the hypothesis that international litigation played any role in Clinton's decision. This analysis is further explored in the elite interview segment of this chapter, and will clarify any of lack of event evidence. It therefore must be concluded that international litigation played no apparent role in Clinton's decision, but lacking evidence does not discount the possibility that the IHRC decision played as much a role in Clinton's deliberation as that of Al Gore's presidential candidacy.

Stage 4 Elite Interviews

In the elite interview stage the causal process observations that underlie all inferential assertions made in each of the preceding hypotheses will be placed in the contextual perspective by individual participants involved in the Garza case to determine whether conclusions reached

in the case study analysis were accurate, or in the alternative will provide a trenchant refutation to the same conclusions. Participants were identified by their involvement in the Garza case across a wide spectrum of activities, but inquiries were confined to participants whose involvement was related directly to Garza's reprieve process. Attorneys were contacted who served in the Clinton Administration, as well as attorneys who represented Garza in his petition for reprieve to the Clinton administration. Each participant was asked whether in their opinion based upon their experience with the Garza case the IHRC decision in any way played a role in President Clinton's decision to grant reprieve. Of the members of Bill Clinton's staff, or high-ranking officials in the Department of Justice, most would not give a comment specifically on the Garza case, nor were they given to speculative consideration regarding President Clinton's decision-making process. Margaret Love, pardon attorney who served in the Clinton administration responded tersely when the question was put to her saying "sorry I do not know the answer to your question."¹⁰⁹ Richard Burr, Garza's attorney during the reprieve process stated "I do not know if the IHRC's opinion provided any motivation for President Clinton's second reprieve for Juan Garza. My perception at the time was that the DOJ report about racial disparities was the sole motivation, but that of course came from what the president said."¹¹⁰ Richard Dieter, prominent death penalty scholar and practitioner agreed with Mr. Burr's assessment stating "I concur with Dick Burr that the major factor in delaying Garza's execution was the concerns about racial disparities in the federal death penalty. The Justice Department had just come out with the numerical analysis of the federal death penalty that raised serious questions. Clinton did not think there was enough time to answer those questions before the scheduled execution date. Of course, it's impossible to know everything that may have influenced the decision to delay the execution. Remember that Garza would have been the first

federal execution in about 40 years. As it turned out, McVeigh was the first person executed, and Garza was second. To the extent that the IHRC decision raised the same concerns as the Justice Department was revealing, it may have added to the level of concern."¹¹¹ The elite interviews, although admittedly sparse, on balance confirm the hypothesis that President Clinton's decision was based solely upon the DOJ report. Although many elite participants to the event acknowledge the possibility that the IHRC decision, which in large measure reiterated many of the points made by the DOJ report, may have influenced the president's decision, but based on the president's own statements this possibility is unsupported by any substantive evidence. Therefore the elite interview satisfies the conclusions reached by the case study analysis, and provides further refutation to the inferential assumption that international litigation was a compelling factor considered by President Clinton in his granting of Garza's reprieve.

Stage 5 Comparative Cross Case Analysis

On June 24, 1993 at a park in Houston Texas Jose Ernesto Medellin, an 18-year-old Mexican national and seven fellow gang members were preparing to begin a gang initiation.¹¹² Raul Villareal, the new gang initiate, was hoping to earn membership in the gang by suffering a severe beating at the hands of his soon-to-be fellow gang members.¹¹³ Two teenage girls, Jennifer Ertman and Elizabeth Pena, inadvertently intruded upon Medellin's initiation while venturing across the park on their way home from a birthday party.¹¹⁴ They were quickly accosted by Medellin and his gang who seized the girls, forcing them to the ground and repeatedly raping them. After the rapes it was decided that both girls should be killed to prevent them from identifying their rapist. Medellin strangled his victim using her own shoelaces, while the other

girl was choked to death with her own nylon belt, which ultimately snapped due to the force applied by the killer.¹¹⁵ The assailants later gathered at a fellow gang members home and bragged to witnesses about the killings, then distributed the victim's personal effects.¹¹⁶ Medellín himself received Elizabeth Peña's ring notable for its embossed E as a gift for his girlfriend Esther.¹¹⁷ Witnesses who overheard Medellín's boasts later reported the crimes to police. Several days later the girl's bodies were recovered from the park, and Medellín was charged with murder.¹¹⁸

During his interrogation he provided a complete confession in a written statement detailing his involvement in the murders.¹¹⁹ Texas authorities never informed Medellín of his Vienna Convention rights to contact the Mexican consulate, and he was subsequently convicted and sentenced to death in 1997.¹²⁰ In his direct appeal to the Texas Court of Criminal Appeals, Medellín sought to assert reversible error by raising the issue of a Vienna Convention violation.¹²¹ The Court of Appeals dismissed this argument and upheld the sentence of the trial court. Medellín again raised the Vienna Convention violation in a habeas corpus petition filed with a Federal District court in Texas, which ruled that relief was unavailable because Medellín neglected to raise the issue at trial, and could not show that any prejudice at trial occurred as a result of his inability to contact the Mexican consulate.¹²²

The issue of the United States routinely flouting Vienna Convention requirements regarding consular notification culminated in an international lawsuit brought before the International Court of Justice (ICJ) by Mexico against the United States, in which Mexico claimed that the U.S. had willfully neglected to notify fifty-one Mexican citizens detained in the United States under criminal charges.¹²³ Medellín was among the fifty-one Mexican citizens named in the suit. In 2004 the ICJ issued a ruling in a case concerning Avena and Other Mexican Nationals finding

that the fifty-one Mexican nationals should be granted review and reconsideration of their convictions and sentences. This ruling was not the first time, as noted in chapters previously, that the ICJ had taken provisional measures against the United States for its failure to notify foreign nationals other consular rights under the Vienna Convention. On behalf of Breard,¹²⁴ the government of Paraguay prevailed of the United States in ICJ decision in 1998, and on application instituted proceedings before the ICJ in 1999 in the Republic of Germany, and was equally successful arguing on behalf of LaGrand¹²⁵ in their contention that the United States had flouted international law by refusing to provide advice on consular assistance.

On the strength of the ICJ decision in Avena, Medellin subsequently filed for a certificate of appealability to the Fifth Circuit Court of Appeals, which denied relief.¹²⁶ Thereafter Medellin petitioned the U.S. Supreme Court, which in 2005 granted a writ of certiorari agreeing to hear the case.¹²⁷ However, before oral arguments were scheduled to begin, President George W. Bush issued a memorandum to the Attorney General (presidential memorandum). In his memorandum President Bush stated unequivocally: "I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the case concerning Avena... By having state courts give effect to the decision in accordance with the general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." ¹²⁸

The United States Supreme Court disagreed. In a 6-3 decision the U.S. Supreme Court issued an opinion authored by Chief Justice (and Bush appointee) John G. Roberts, which found that without Congressional mandate or constitutional permission President Bush did not have the

authority to enforce decisions issued by the International Court of Justice, and that non-self executing treaties are not legally binding on states seeking to administer domestic laws.¹²⁹

In addressing Medellin's claims raised in his petition, Roberts finds in writing for the majority that international treaties are not binding upon U.S. domestic laws unless Congress passes statutory authority officially implementing the treaty or if the treaty itself is self-executing (establishes individual rights directly, not requiring a legislative enactment to make applicable to states).¹³⁰ The court found that none of the treaties upon which Medellin relies to be either self-executing or activated by appropriate legislation.¹³¹ The court further rejected Medellin's contention that the president's memorandum ordering that state courts recognize the ICJ's decision in *Avena* regarding the fifty-one Mexican citizens is binding on state courts. Writing for the Court, Roberts opines that all the president's authority resides within the Constitution and "must stem from either an act of Congress or from the Constitution itself."¹³² Although President Bush invoked the UN Charter in arguing it conferred upon him the authority to act, the court disagreed saying "the President has of array of political and diplomatic means available to enforce international obligations. Unilaterally converting a non-self-executing treaty into a self-executing one is not among them."¹³³ The court found that Medellin's argument that the president's memorandum constituted a legitimate exercise of executive authority, firmly rooted in Article 3 Section 2 of the U.S. Constitution to "take care that the laws be faithfully executed", was also misplaced. Finding that the ICJ decision in *Avena* was not domestic law, the Supreme Court easily dismissed Medellin's assertion stating that the "take care" clause relied upon by Medellin was inapplicable. As the Supreme Court refused to grant relief Gov. Rick Perry rejected calls from Mexican officials as well as politicians and diplomats in Washington DC

beseeking the Governor to spare Medellin's life and abide by international law.¹³⁴ On August 5, 2008 at 9:57 PM he was executed.¹³⁵

This case illustrates a sharp ideological departure for Bush, a staunch conservative and vehement supporter of the death penalty during his tenure as Texas governor as well as U.S. President. Based solely upon the language used in Bush's own memorandum, it is irrefutable that the ICJ decision alone was solely responsible for Bush's action in issuing the memorandum. The ICJ decision compelled Bush to assume the most aggressive posture available and lend the full weight and authority of his office in an attempt to impose the ICJ ruling on courts domestically. This dramatic deviation underscores the increased recognition accorded to ICJ decisions and their increasing impact on U.S. political and judicial institutions.

Conclusion

A comparative analysis of the Garza case with Medellin illustrates several important developments. In Garza, the ICJ decision was never openly invoked as authority upon which President Clinton based his decision to grant Garza reprieve. In Medellin the ICJ decision in Avena was the sole motivating factor impelling President Bush to take dramatic action. Although the ICJ's decision can be inferred to impact President Clinton's decision-making process, in Medellin the ICJ decision was brazenly cited in the memorandum itself issued by President Bush, making its impact on his decision irrefutable. A second important distinction that draws into sharp relief the insinuation of influence in Garza compared to the forceful intervention in Medellin is the comparative outcomes in each respective case. In Garza President Clinton would only commit to a short-term reprieve, whereas Bush attempted to impose the full force of the ICJ

decision upon local domestic courts. The final and most revealing distinction between the two cases are what each president was willing to risk in order to implement the ICJ ruling. Clinton at the end of his second term of President, and ineligible for reelection, risked virtually nothing in granting a reprieve to Garza in that the political stakes were incredibly low in the decision, and ultimately appeased his core constituency. For President Bush the political stakes were much greater in that he was not at the end of his second term and that his decision was contrary to his most core constituency, which is comprised largely of pro-capital punishment supporters. Simply put, President Bush was willing to risk in a bold strategic move a larger amount of political capital in order to attempt to enforce the ICJ decision. This case amply illustrates the progress the ICJ has made in its increased recognition as international judicial body invested with the authority to gain recognition among UN member states. It further illustrates the slow erosion of resistance U.S. political and judicial institutions continue to mount in opposition to incorporating international law as a dispositive element of the judicial process.

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- ¹ Keynote Address, *American Society of International Law*, 96 (2002): 348.
- ² Demleitner, Nora, "The Death Penalty in the United States: Following the European Lead?", *Oregon Law Review* 81 (2002):131.
- ³ Ibid. 134.
- ⁴ Ibid. 134.
- ⁵ *Furman v. Georgia*, 408 U.S. 238 (1972).
- ⁶ Demleitner supra note 2, 136.
- ⁷ *Gregg V Georgia*, 428 U.S. 153, (1976).
- ⁸ <http://www.historynet.com/lone-star-nation.htm>
- ⁹ Spiro, Peter, "The New Sovereignists: American Exceptionalism and its False Prophets", *Foreign Affairs*, 79 (2000): 6.
- ¹⁰ Steiker, Carol, "Capital Punishment and American Exceptionalism", *Oregon Law Review* 81 (2002): 97.
- ¹¹ Steiker at page 111.
- ¹² Steiker at page 112.
- ¹³ In the state of Michigan, the only state to enter the union as abolitionist, ballot initiatives have actually entrenched anti-death penalty sentiment with multiple initiatives and ballot measures being voted down by Michigan citizens most recently in 2004. The state of Oregon also abolished the death penalty in 1964 through popular ballot, but later reinstated the punishment in 1984.
- ¹⁴ Steiker supra note 10, 112.
- ¹⁵ Steiker supra note 10, 112.
- ¹⁶ Hood, Roger, "The Death Penalty; A Worldwide Perspective, Crime and Justice: a Review of Research", *Chicago University Press*, 38(2009): 5.
- ¹⁷ Ibid. 1-5
- ¹⁸ Ancel, Mark, as cited in Hood, at p. 3. Published in 1962, Ancel was commissioned by the United Nations to conduct a study of the death penalty.
- ¹⁹ http://www.usatoday.com/news/nation/2007-12-17-newjersey-deathpenalty_N.htm
- ²⁰ http://articles.cnn.com/2009-03-18/justice/new.mexico.death.penalty_1_penalty-trial-death-row-death-penalty-information-center?_s=PM:CRIME
- ²¹ Supra Hood at note 16, 5-10.
- ²² Supra Hood at note 16, 10.
- ²³ *Roper v. Simmons*, 543 U.S. 551 (2005).
- ²⁴ Rothenberg, Lawrence, "International Law, U.S. Sovereignty, and the Death Penalty", *Georgia Journal of International Law* 35 (2004):547.
- ²⁵ Fitzpatrick, Joan, "Relevance of Customary International Norms to the Death Penalty in the United States", *Georgia Journal of International and Comparative Law*, 25 (1995-1996):165.
- ²⁶ Truskett, John, "The Death Penalty, International law and Human Rights", *Tulsa Journal of international and comparative Law*, 11 (2004):557.
- ²⁷ U.S. attempts to manipulate the applicability of international law, indeed to control the meaning of certain terms used in international disputes, is not confined to death penalty policies. For an extensive discussion of selective applicability of international laws, namely the Genocide Convention, to achieve desired political aims by the U.S. (and thus earning the reputation for hypocrisy described in the above text) see Edward Herman, "The Politics of Genocide", *Monthly Review Press*, (2011).
- ²⁸ Full text of China's Report is archived and accessible here http://usa.chinadaily.com.cn/us/2011-04/11/content_12303177.htm
- ²⁹ Siracusa, Joseph, "Diplomacy, A Very Short Introduction", *Oxford University Press*, (2010): 115-116.
- ³⁰ It should be noted that the above instruments are the sources that create the foundation of international law, and international law being less hierarchical than U.S. domestic law, stringent comparisons regarding their operation should not always be undertaken.

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- ³¹ U.S. Dept. of State, Civil and Political Rights in the United States: Initial Report of the United States of America to the U.N. Human Rights Committee under the International Covenant on Civil and Political Rights, July, (1994), at p. i (Introduction).
- ³² Van Genugten, Willem, "The United States Reservations to the ICCPR, International Law Versus God's Own Constitution", *Kluwer Law International*, (1998).
- ³³ Ibid. 41-42.
- ³⁴ Full text of Sweden's objections to United states reservations to the ratification of the ICCPR at archived here http://eudo-citizenship.eu/InternationalDB/docs_c/SWE%20ICCPR%20Objections.pdf
- ³⁵ Human Rights Committee, General Comment No. 24, 15 HRLJ 464, (1994).
- ³⁶ However, the United States responded in an Observation delivered to the UN asserting that the Human Rights Committee "went too far" in dismissing its reservation, and finding that the Committee had no jurisdiction over U.S. domestic laws regarding capital punishment. The U.S. Observation is archived here <http://www.iilj.org/courses/documents/USandUKResponses.pdf>
- ³⁷ Hodgkinson, Peter, "Capital Punishment, Global Issues and Prospects", *Waterside Press*, (1996).
- ³⁸ *Roper v Simmons*, 543 U.S. 551, (2005).
- ³⁹ http://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin
- ⁴⁰ Levesque, Christian, "The International Covenant on Civil and Political Rights, A Primer for Raising a Defence Against the Juvenile Death Penalty in Federal Courts", *American University Law Review*, 50 (2001): 756.
- ⁴¹ The International Justice Project, A Working Paper, "The Inter-American Commission on Human Rights: How Can it be Utilized in a Capital Case?", archived here <http://www.internationaljusticeproject.org/pdfs/oas.pdf>
- ⁴² Office of Clark County Prosecuting Attorney, Indiana <http://www.clarkprosecutor.org/html/death/US/garza720.htm>
- ⁴³ *United States v Garza*, 63 F. 3d. 1342, (1995).
- ⁴⁴ Ibid. 1343.
- ⁴⁵ Ibid. 1344.
- ⁴⁶ Ibid. 1345.
- ⁴⁷ Ibid. 1345.
- ⁴⁸ Ibid. 1345.
- ⁴⁹ <http://www.capitalpunishmentincontext.org/cases/garza>
- ⁵⁰ <http://www.wsws.org/articles/2001/jun2001/exec-j19.shtml>
- ⁵¹ <http://www.capitalpunishmentincontext.org/cases/garza>
- ⁵² <http://www.capitalpunishmentincontext.org/cases/garza/trial>
- ⁵³ <http://www.capitalpunishmentincontext.org/cases/garza/trial>
- ⁵⁴ <http://www.capitalpunishmentincontext.org/cases/garza/trial>
- ⁵⁵ *State of Tennessee v Bobo*, 727 S.W. 2d. 945, (1987).
- ⁵⁶ *Supra Garza* at note 43, 1346.
- ⁵⁷ <http://www.capitalpunishmentincontext.org/cases/garza/posttrial>
- ⁵⁸ <http://www.capitalpunishmentincontext.org/cases/garza/posttrial>
- ⁵⁹ <http://www.capitalpunishmentincontext.org/cases/garza/trial>
- ⁶⁰ *Supra Garza* at note 43, 1342.
- ⁶¹ Ibid. Sec. 201.
- ⁶² *Garza v U.S.*, 117 S. Ct. 87, (1996).
- ⁶³ *Garza v Lappin*, 253 F. 3d. 918, (2001).
- ⁶⁴ *Garza v US*, 120 S. Ct. 502, (1999).
- ⁶⁵ *US v Garza*, 165 F. 3d. 313, 315, (1999).
- ⁶⁶ Garza's Human Rights Complaint submitted to the OAS is archived and accessible at <http://www.capitalpunishmentincontext.org/files/resources/garza/IACHR%20Complaint.pdf>
- ⁶⁷ Ibid. Garza OAS Complaint, Sec. 4.
- ⁶⁸ Reply of the US Government, Case Number 12-243, Juan Raul Garza, is archived and accessible at <http://www.capitalpunishmentincontext.org/files/resources/garza/Gov%20response%20to%20IACHR.pdf>
- ⁶⁹ http://www.bop.gov/news/press/press_releases/ipapr003.jsp

⁷⁰ <http://www.capitalpunishmentincontext.org/cases/garza/posttrial>

⁷¹ Department of Justice Press release from December 12, 2001, combined both the new Procedural guidelines and Garza's reprieve, and is archived and accessible here <http://www.capitalpunishmentincontext.org/files/resources/garza/Clinton%20Garza%20Clemency%20Grant.pdf>

⁷² The Report is archived on the DOJ's website, accessible here <http://www.justice.gov/dag/pubdoc/dpsurvey.html>

⁷³ DOJ Report, Table Set 1, Statistical Overview, archived online here http://www.justice.gov/dag/pubdoc/_table_set_i_corrected.pdf

⁷⁴ On April 4th 2001, a formal report was issued by the OAS Inter-American Commission on Human Rights regarding Garza's petition, cited as Report 52/01 Case 12-243, and is archived and accessible here <http://cidh.org/annualrep/2000eng/ChapterIII/Merits/USA12.243.htm>

⁷⁵ <http://www.nytimes.com/2000/12/08/us/clinton-again-delays-execution-of-a-murderer.html?ref=juanraulgarza>

⁷⁶ *Garza v Lappin*, 253 F. 3d 918, (2001).

⁷⁷ *Ibid.* Sec. 16.

⁷⁸ *Garza v Lappin*, 121 S. Ct. 2543, (2001).

⁷⁹ <http://edition.cnn.com/2001/LAW/06/19/garza.execution/>

⁸⁰ http://articles.cnn.com/2001-06-19/justice/garza.execution_1_federal-executions-juan-raul-garza-execution-date?_s=PM:LAW

⁸¹ <http://edition.cnn.com/2001/LAW/06/19/garza.execution/>

⁸² <http://edition.cnn.com/2001/LAW/06/19/garza.execution/>

⁸³ <http://edition.cnn.com/2001/LAW/06/19/garza.execution/>

⁸⁴ <http://www.clarkprosecutor.org/html/death/US/garza720.htm>

⁸⁵ *Supra* note 64, <http://www.justice.gov/dag/pubdoc/dpsurvey.html>

⁸⁶ Press Conference with Attorney General Reno and Deputy Attorney General Holder, Topic: The Death Penalty (Sept. 12, 2000).

⁸⁷ <http://www.aclu.org/capital-punishment/citing-race-and-regional-bias-latino-leaders-join-call-halt-federal-executions>

⁸⁸ Transcripts from the Senate Confirmation Hearing are archived here <http://edition.cnn.com/TRANSCRIPTS/010117/se.10.html>

⁸⁹ <http://abcnews.go.com/US/story?id=93145&page=2>

⁹⁰ Office of Clark County Prosecuting Attorney, Indiana <http://www.clarkprosecutor.org/html/death/US/garza720.htm>

⁹¹ Bill Clinton's Statement on the Decision to Stay the Execution of Juan Raul Garza, Dec. 7th, 2000, archived here <http://www.presidency.ucsb.edu/ws/index.php?pid=949#axzz1tVr9rFzw>

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Stephanopoulos, George, "All too Human, A Political Education", *Little, Brown and Company*, (1999).

⁹⁵ Nguyen, Alexander, "Bill Clinton's Death Penalty Waffle", *The American Prospect*, December, (2001).

⁹⁶ *Ibid.* Nguyen, archived at <http://prospect.org/article/bill-clintons-death-penalty-waffle>

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ Mansnerus, Laura, "Damaged Brain and the Death Penalty", *New York Times*, July 21, (2001).

¹⁰¹ See Bill Clinton's Statement on the Signing of the Anti-Terrorism and Effective Death Penalty Act of 1996 (S. 735), April 24th, 1996, archived at <http://www.presidency.ucsb.edu/ws/index.php?pid=52713#axzz1tVr9rFzw>

¹⁰² "Pressure Mounts After Execution Reprieve", *Lubbock Avalanche Journal*, December 9th, (2000), archived at http://lubbockonline.com/stories/120900/nat_120900043.shtml

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ <http://www.aclu.org/capital-punishment/citing-race-and-regional-bias-latino-leaders-join-call-halt-federal-executions>

¹⁰⁶ Riechmann, Deb, "Clinton Postpones Execution", *Associated Press*, December 9th (2000).

¹⁰⁷ Pressure Mounts *supra* note 98.

¹⁰⁸ See Clintons Statement *supra* note 83.

¹⁰⁹ Interview on file with author.

¹¹⁰ Interview on file with author.

¹¹¹ Interview on file with author.

¹¹² *Medellín v. State*, No. AP-71,997, slip op. (Tex. Crim. App. Mar. 19, 1997) (not designated for publication)

¹¹³ Texas Attorney General Statement of Facts regarding the Medellin case, posted online at <https://www.oag.state.tx.us/oagnews/release.php?id=2571>

¹¹⁴ Medellin's contestation of the facts as presented by the State of Texas can be found in the Applicant Brief in Ex Parte Medellin, No AP 75207, Trial Court Cause No 675430-B.

¹¹⁵ Culhane, Elizabeth, "In Accordance with General Principles of Comity, President Bush's Memorandum in Medellin v Dretke", *St Louis Law University Review Journal*, 51 (2007):815.

¹¹⁶ Texas AG Statement, *supra* note 105.

¹¹⁷ Texas AG, *supra* note 105 .

¹¹⁸ Texas AG, *supra* note 105.

¹¹⁹ Ex Parte Medellin, *supra* note 106.

¹²⁰ Medellin *supra* note 104.

¹²¹ Ex Parte Medellin, No 5019-01, Texas Court Of Criminal Appeals, October 3rd, (2001) (unpublished).

¹²² *Medellin v Cockrell*, H-01-4078, S.D. Texas, April 17th (2003).

¹²³ Case Concerning Avena and Other Mexican Nationals, 2004 ICJ No 28, March 31st, (2004).

¹²⁴ *Breard v Greene*, 523 U.S. 371, (1998).

¹²⁵ *Germany v United States*, 526 U.S. 111, (1999).

¹²⁶ *Medellin v Dretke*, 371 F. 3d 270, (2004).

¹²⁷ *Medellin v Dretke*, 123 S. Ct. 2088, (2005).

¹²⁸ Memorandum of President Bush, Feb. 28, (2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>

¹²⁹ *Medellin v Texas*, 552 U.S. 491, (2008).

¹³⁰ Medellin *supra* note 121, 495-510.

¹³¹ Medellin *supra* note 212, 510-512.

¹³² Medellin *supra* note 212, 514.

¹³³ Medellin *supra* note 121, 515.

¹³⁴ <http://www.chron.com/news/houston-texas/article/Execution-of-Houston-girls-killer-still-on-track-1788473.php>

¹³⁵ <http://www.chron.com/news/houston-texas/article/Medellin-executed-for-rape-murder-of-Houston-1770696.php>

Chapter 9

Extradition and U.S. Death Penalty Policies

“Arguing that the international court is empowered to impose the death penalty would fail because states would refuse to extradite criminals”¹

U.S.Ambassador David Scheffer

Stage 1 Policy Context

Introduction

Countries which oppose the death penalty, and have outlawed its use within their own borders, have effectively used extradition policies to export de facto capital punishment abolition to the shores of the United States. The process of extradition, where a foreign nation surrenders a fugitive accused of a crime to another country, is governed by a panoply of treaties, international law and domestic statutes. When the transfer of a fugitive involves the prospect of the death penalty many states will simply refuse extradition based upon either their interpretation of international legal obligations that prohibit the death penalty, or upon their own domestic laws.² If an abolitionist country possesses a fugitive accused of murdering a United States citizen, and

that country refuses to extradite that fugitive to the United States for a trial which may result in the death sentence, the United States is faced with a choice; allow the fugitive to escape justice by remaining in the host state, or remove the death penalty as a possible punishment.

Withholding fugitives from extradition to pro capital punishment states until securing a guarantee that the death penalty will be excluded from consideration presents a policy fait accompli to countries who continue to retain a death penalty policy. Pro capital punishment states can either choose to suspend the imposition of death penalty policies or indirectly allow the creation of jurisdictional safe havens where fugitives can escape justice by eluding law enforcement. In recent years the United States has consistently chosen to guarantee no death penalty in exchange for extradition, effectively creating a policy that is tantamount to de facto death penalty abolition. The policy segment of this chapter will explore the extradition history between the United States and other nations and examine seminal cases which have established extradition policy precedent, as well as pertinent extradition treaties which have helped shape both formal and informal extradition practices, and how those particular practices have evolved between United States and Mexico. The case study segment of this chapter will consider two prominent cases which illustrate how extradition practices have evolved to limit the use of the death penalty in United States, but also demonstrate U.S. willingness to circumvent extradition laws to achieve the aims of law enforcement.

History of Extradition

Because extradition policies are practiced by a large number of nations, each with their own respective rules governing the surrender of fugitives to requesting nations, there is a wide divergence among different countries as to the exact definition of extradition with many countries relying upon an amalgamation of extradition treaties, international law and domestic statutes to dictate how a particular extradition should occur.³ Under the United States Statutory Code, international extradition is defined as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory and within the territorial jurisdiction of the other which, being competent to try and punish them, demands the surrender"⁴. However, extraditions by their very nature entail the cooperation of foreign nations, which in large measure facilitate the surrender of the fugitive into the requesting countries jurisdiction.⁵ Acknowledging the integral involvement of states in possession of a fugitive in facilitating his surrender, some legal scholars have defined extradition as "the delivery of an individual, usually a fugitive from justice, by one nation state to another. This process may be based on explicit agreement between the states in the form of a treaty, or on reciprocity or comity."⁶ In practice, the extradition process in the United States will utilize statutory authority to initiate action by the U.S. State Department, the federal agency responsible for international diplomacy, which will liaise with foreign countries and negotiate extradition based upon international treaty arrangements. Foreign nations will respond to this diplomacy by activating local law enforcement and judicial authorities under power of their own domestic statutes to pursue the arrest of a suspect charged within the requesting country. Extradition, in practical

terms involves the invocation of international treaties and the enforcement of statutory laws to facilitate the arrest and the transfer between nations.⁷

The extradition practices between the United States and Mexico have a long and studied history. The Rio Grande River, the dividing line which creates the border between United States and Mexico, forms a flowing demarcation that has proved a bane for law enforcement officials on both sides and a boon for criminals attempting to evade both. Throughout the two countries history the border has lured fugitive slaves, cattle rustlers, drug traffickers, illegal immigrants and murderers to cross in the hope of obtaining freedom, easy money or avoiding the law.⁸ Law enforcement officials on both sides of the border have struggled to maintain law and order, and largely consider the porous US-Mexico border an impediment to this task. The evolution of extradition practices between United States and Mexico is largely a product of this tumultuous history between the two nations and their respective interests in securing their national borders.

The earliest extradition controversies that arose between the United States and Mexico were largely centered on perceived human rights abuses committed by the United States. Mexico having earned its independence in 1810 abolished slavery in 1829 and positioned itself as a beacon of freedom to run-away fugitive slaves from the American North.⁹ As fugitive slaves poured across the border into Mexico after escaping their American slave masters, the Mexican government refused to return slaves to America, as many Mexicans considered opposing the practice of slavery a humanitarian cause with the added benefit of resisting the burgeoning political and economic power of their neighbor to the north. Although the United States attempted to insert provisions into international treaties that addressed the capture of fugitive slaves, opposition to the slave trade prevented ratification and ultimately provisions were excluded that addressed the extradition of slaves. In spite of intense diplomatic negotiation in

which the United States encouraged Mexico to soften its stance on fugitive slave apprehension, in 1857 Mexico passed legislation that expressly prohibited the extradition of slaves to the United States and enshrined this enactment in the Mexican Constitution.¹⁰

Mexican resistance to slave extradition to the U.S. was based primarily on national and moral justifications, and avoided engaging in legalistic argumentation with the U.S., eschewing the arguments proffered by Britain and Canada in deciding against extradition of fugitive slaves to America. In 1861 the United States and Mexico concluded their first extradition treaty, that allowed for the extradition of fugitives to requesting state for twelve enumerated crimes, but provided that neither country was required to deliver one of its own citizens for extradition or to extradite for political crimes.¹¹ Article 6 of the Treaty made explicit mention of the prohibition on extradition of fugitive slaves, and established a precedent of humanitarian values in formation of extradition treaties between the United States and Mexico that would recur in the future.

In the late 1860s the focus of extradition between the United States and Mexico shifted from the controversial issue of slavery to organized criminal enterprises that focused on smuggling and cattle rustling.¹² Large gangs of outlaw cowboys were conducting raids of border towns, then quickly crossing the border and escaping into Mexican territories. Although permission from the Mexican government was required to pursue criminals into Mexico, U.S. law enforcement officers recognized widespread public opposition to such incursions and often conducted raids in Mexico in efforts to capture errant American criminals without first obtaining the Mexican government's consent.¹³ Mexico, embroiled in a revolutionary civil war and lacking a centralized government was unable mount a unified opposition to regular cross-border incursions. In 1899 another extradition treaty was concluded that essentially localized extradition authority delegating the power to extradite criminals to state executives, removing the involvement of the

U.S. Department of State and the Mexican Department of foreign affairs from the extradition process.¹⁴

The focus of extradition laws shifted again in the 1920s and 1930s when the United States sought to enforce newly enacted prohibitions against the importation of alcohol from Mexico.¹⁵ A wide range of covert activities among U.S. treasury agents, customs officials, law enforcement and consular officers in Mexico were conducted to stem the flow of alcohol to the North. U.S. officials declined to engage in diplomatic negotiations that may have resulted in permissive policies enabling cross-border activity, fearing negotiations may ultimately result in the imposition of restrictions by Mexico on U.S. government agents. In conducting investigations U.S. law enforcement and consular officials noted that the Mexican judicial and law enforcement agencies responsible for apprehending and surrendering fugitives in Mexico to U.S. government forces were rife with corruption and inadequate training and staffing. Much of these problems persist in the present day.¹⁶

Although Article IV of the United States-Mexico extradition treaty provided expressly that neither country would be "bound to deliver up its own citizens", in 1926 the U.S. Ambassador to Mexico pressed the Mexican Ministry of Foreign Affairs to reverse a perceived reluctance by Mexico to surrender its nationals accused of crimes committed in the United States. Mexican Ambassador Tellez assured the U.S. Secretary of State that Mexico was not operating under the "deliberate intention of refusing the extradition of Mexicans to the United States, simply because of their nationality."¹⁷ The United States provided reciprocal assurances communicated by Secretary of State Frank Kellogg that the U.S. State Department "in the future will be governed by the special circumstances in each case, in the same manner as your embassy states your government deals with the reversed situation."¹⁸ This trend of increased cooperation would

ultimately culminate in a bilateral treaty on extradition between the two countries signed fifty years later.

Broadly based on articles contained within the multilateral United Nations Model Treaty on Extradition, the United States and Mexico forged a bilateral treaty of extradition that was signed in Mexico City on May 4, 1978. On March 5, 1979 President Jimmy Carter referred the treaty to the United States Senate, and in a letter of submittal stated that "this treaty will make a significant contribution to international cooperation and law enforcement. I recommend that the Senate give early and favorable consideration to the treaty and give its advice and consent to ratification."¹⁹ Secretary of State Cyrus Vance submitted the extradition treaty to the Senate for ratification. Included in the treaty was an article that directly addressed capital punishment. Article 8 of the United States-Mexico Treaty on Extradition states that the treaty "permits refusal of extradition in capital cases unless assurances are received that the death penalty will not be imposed, or if imposed, will not be executed, for an offense not punishable by death in the country from which extradition is requested. A similar article has been included in most recent treaties." The extradition treaty was thereafter ratified by the Senate without reservations, and entered into force in 1978.

Article 8 of the Treaty would prove to be the basis for future extradition negotiations between the United States and Mexico in which the death penalty is raised as a possible punishment, and used as justification to refuse extradition of a fugitive. The U.S. Department of State officially recognized the existence of reservations among countries reticent to extradite in their foreign affairs manual stating that "though almost only all extradition treaties are silent on this ground, some states may demand assurances that the fugitive will not be sentenced to life in prison, or even that the sentence imposed will not exceed a specified term of years."²⁰

The extradition treaty between the U.S. and Mexico that permitted one states refusal to extradite a fugitive based upon opposition to the death penalty was not without precedent, and treaty reservations of this nature had been in use since 1872.²¹ In the late 19th century several European and South American signatories entered into bilateral extradition treaties which explicitly excused extradition should capital punishment be a possible sentence. In 1873 a treaty was formed between Portugal and Switzerland which provided no guarantee of extradition should the death penalty be pursued by the requesting state.²² In 1892 Portugal and England entered into a similar treaty which also allows the denial of extradition on the basis of potential capital punishment. Shortly thereafter in 1908 the United States also entered into a treaty with Portugal with the same restrictions on extradition, provisions which subsequently received ratification from the Senate and approval from President Theodore Roosevelt.²³ Later multilateral treaties on extradition proposed the United Nations and international conventions on extradition would use these earlier treaties as a conceptual foundation upon which to base articles allowing treaty signatories to decline extradition if the death penalty is raised as a possible punishment. Article 11 of the European Convention on Extradition in 1957 and Article 6 of the 1976 Extradition Treaty between Canada and the United States both allowed the requested country to refuse extradition if the requesting state declined to give assurance that the death penalty would be removed. Article 4 of the 1990 Model Treaty on Extradition taken under consideration by the Eighth UN Congress on the prevention of crime and the treatment of offenders expressly provides that "extradition may be refused any of the following circumstances. The offense for which the extradition is requested carries the death penalty under the law of the requesting state, unless that state gives assurance as the requested state considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out." The

extradition treaty between the United States and Mexico that allowed Mexico to refuse extradition to the United States if capital punishment was a possibility codified a common reservation present in many multilateral and bilateral treaties between individual countries and signatories to international conventions for over 100 years.²⁴ These international treaties on extradition would form the legal basis for challenges across North America and Europe that were mounted in judicial cases involving extradition in the death penalty that began in the early 1980s.

Current Extradition Policy

In two seminal death penalty extradition cases decided in Europe and Canada, extradition to the U.S. was blocked by courts using two separate and distinct lines of reasoning. In *Soering v. United Kingdom* the European Court of Human Rights found that Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits torture and inhumane treatment was violated by what it referred to as the "death row phenomenon", finding that the interminably long stays on death row in the abhorrent conditions suffered by death row prisoners constitute a human rights violation, and ordered extradition impermissible.²⁵ The Supreme Court of Canada in *United States v. Burns* denied extradition on separate grounds, focusing on the inevitability of error inherent in the United States justice system, arguing that the inadequacies of judicial administration that lead to false convictions was in conflict with the Canadian Constitution.²⁶ Both of these cases established a strong precedent against extradition based upon legal arguments never before addressed by courts in the United States. Each case would have a profound impact on how extraditions were perceived and practiced by both foreign countries and by the United States itself.

In 1985 Jens Soering, a German national living in the United States, together with his girlfriend murdered her parents in Virginia. Having fled to the United Kingdom to escape prosecution he was arrested in 1986 under an extradition warrant requested by Virginia authorities, a state in which the death penalty was still in active use. The European Court of Human Rights held that Soering's extradition, absent assurances that the death penalty would be removed as a potential punishment, would violate Article 3 of the European Convention on Human Rights. In its written opinion the court clearly enunciated its rationale stating that "the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offense, the applicants extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3."²⁷ In response to the court's ruling several days later the United States revised its previous position stating that "in the light of the applicable provisions of the 1972 extradition treaty, United States law would prohibit the applicant's prosecution in Virginia for the offense of capital murder."²⁸ Receiving sufficient assurances for the United States the court allowed the extradition of Soering to proceed. After pleading guilty to murder, Soering was sentenced to 99 years in prison.

Although some scholars have noted that the Soering case was decided by a court which contemplates the death penalty in the abstract, in that its decision has no ramification on its domestic system of criminal jurisprudence and its rulings have no consequence on criminal sentences within Europe, the court raised an argument never entertained in U.S. courts.²⁹ While U.S. domestic courts in death penalty cases largely concern themselves with legal issues of reversible error, such as racially discriminatory practices or judicial bias during trial, the

European Court rendered a decision based on the more abstruse principles of human rights law. The decision in *Soering* is an indictment of capital punishment as a practice inherently inconsistent with widely accepted human rights norms, which is in stark contrast to the legalistic arguments typically proffered in the United States to condemn the death penalty, which are centered largely on the fairness of the process, not whether the results of the process itself are a violation.

This legal argument circumvents the necessity of addressing procedural flaws within the U.S. judicial system, but attacks the very nature of capital punishment itself by denying extradition. This persuasive argument has found proponents on the U.S. Supreme Court. In *Knight v Florida*, Justices Breyer and Stevens in their dissent in a denial of certiorari in which the issue of death row incarceration as inhumane was raised cited *Soering* extensively in their argument that the death row phenomenon needed to be addressed by the high Court.³⁰ This provides a strong indication that the legal arguments presented in *Soering* have had a far-reaching impact on judicial policy and thought in the U.S.

In the *Burns* case the Supreme Court of Canada reversed a ten year precedent established in the *Kindler* case which accorded the Prime Minister the discretion to allow extradition to proceed lacking assurances that capital punishment would be stricken as a possible sentence.³¹ The court raised the inevitable prospect of error in the immutable finality of death sentence to bar the extradition of a man charged with capital murder to the United States. In its legal opinion the Supreme Court of Canada finds that "legal systems have to live with the possibility of error. The unique feature of capital punishment is that it puts beyond recall the possibility of correction. In recent years, aided by the advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances

of wrongful convictions for murder despite all the careful safeguards put in place for the protection of the innocent."³²

The legal argument that judicial systems that adjudicate guilt and assign punishments are inherently fallible and prone to occasional mistake, and that mistakes regarding the death penalty cannot be undone or corrected, has never been addressed by the U.S. Supreme Court. However as established in the previous chapter regarding public opinion in the death penalty, the work of lawyers such as Barry Scheck in exonerating men previously condemned to death has undermined the public's confidence in the death penalty, and has impeached the credibility of the justice system's ability to perform without fault.³³ The decision of the Supreme Court of Canada lends tremendous gravity to the argument that the death penalty cannot be implemented without the possibility of an error taking the life of an innocent citizen. This argument continues to resonate today, but has yet to be ruled upon by the U.S. Supreme Court. And although international case law and extradition treaties have created a broad skeletal framework which dictate broad policy practices, the procedural processes which govern extradition, and later become the subject of dispute argued in cases in drafted into articles of treaties, are at the ground level and are instrumental in negotiating the terms of extradition between the United States and Mexico.

Current Extradition Practice

According to an advisory document issued by the Texas Attorney General's office circulated to state prosecutors who may be seeking to extradite fugitives in Mexico, extradition "is always the preferred avenue. When an individual accused of a crime is extradited to the United States, he or she will be tried, and if convicted, sentenced in the jurisdiction where the crime was

committed."³⁴ However the Atty. Gen. warns "extradition of Mexican nationals to face trial in the United States has been the exception rather than the norm."³⁵ The Atty. Gen. further cautions "prosecutors who are reluctant to forgo domestic prosecution of domestic nationals should be aware that extradition is not a quicker, easier alternative in preparing for prosecution under Mexican law. An extradition request calls for equally thorough case preparation and requires the use of official diplomatic channels. A request of Mexico under the United States-Mexico extradition treaty must be approved by the United States Department of Justice and tendered by the Department of State."³⁶ Although the diplomatic negotiations between the United States and Mexico occur under the aegis of the 1978 bilateral extradition treaty, the legal mechanisms that govern the procedural processes largely occur in the jurisdiction where the crime was committed (the state requesting extradition) and in the jurisdiction where the fugitive resides (the state requested to extradite). Under Article 10 (2) of the US-Mexico Extradition Treaty formal extradition requests must be submitted through diplomatic contacts between nations and must provide evidentiary documentation in support of the extraditable charge.³⁷ Under Article 10 (6) of the Treaty evidentiary documents must be certified by the U.S. State Department as authentic, and endorsed by a U.S. consular officer.³⁸ Once the Ministry of Foreign Affairs in Mexico determines that the documents are in full comportment with Mexico's laws of international extradition, management of the extradition is transferred to the Mexican Attorney General. The Mexican Attorney General assigns the case to a district judge presiding over the jurisdiction in which the fugitive resides, who makes a determination on the issuance of an arrest warrant.³⁹ Evidence presented to the judge must meet a two prong test of sufficiency established by Mexico's Federal Code of Criminal Procedure, requiring that evidence demonstrate the satisfaction of all elements of the crime alleged and facts proving the "probable responsibility" of

the subject named in the extradition request in accordance with Article 3.⁴⁰ After the arrest is made the Mexican Constitution Article 20 guarantees the defendant the right to an extradition hearing in which she can be represented by counsel, and presented with an opportunity to rebut the charges that underlie extradition in an open judicial hearing. During the commencement of the hearing the defendant can raise several exceptions to challenge the extradition warrant, including that the extradition petition does not meet the requirements of the extradition treaty or that the suspect has been misidentified.⁴¹ At the conclusion of the hearing the judge can take up to five days to deliberate the merits of the extradition case and submit his judgment to the Ministry of Foreign Affairs.⁴² Should the judge decided extradition is warranted the defendant has an opportunity to challenge this decision through an “Amparo” demand, a judicial remedy found in Articles 103 and 107 of the Mexican Constitution that may provide relief to defendants, if it can be proven that the extradition violates either individual guarantees, national sovereignty or federal authority under the Constitution.⁴³

The Mexican Amparo system, designed primarily to protect human rights, is a judicial novelty unique to Mexican jurisprudence that has been noted by extradition scholars to result in long delays in extradition proceedings.⁴⁴ Warren cites the case of José Luis Del Toro to illustrate the ability of defendants to engage in protracted appellate processes to delay extradition. Using the Amparo appellate process, Del Toro filed separate appeals in three different Mexican courts delaying his extradition to the United States by twenty months. Although the Amparo process was deliberately designed to preserve human rights safeguards, it has been exploited by defendants facing extradition to create delays in the process and frustrate U.S. prosecutors seeking extradition. These myriad complications further exacerbate challenges posed to U.S. law

enforcement officials seeking to obtain custody of fugitives from Mexico for prosecution for crimes committed on U.S. soil.

Rising out of these complications in the extradition process are cultural conflicts between the United States and Mexico and perceived human rights violations, both of which further strengthen the resolve of Mexico to deny extradition to the United States and forcing U.S. capital punishment policymakers to concede and withdrawal capital punishment as a possible sentencing option. Cultural conflicts between Mexico, a predominantly Catholic nation vehemently opposed to the death penalty on religious grounds, and the United States contribute to the extant perception of U.S. cultural and socioeconomic insensitivity to their southern neighbor.⁴⁵ Vastly dissimilar legal and political institutions further aggravate cultural conflicts between the two nations and lead to interminable delays in extradition processing. These delays give further credence to the accusation that the extradition process itself leads to human rights violations.

U.S. citizens who are accused of crimes in the United States then flee to Mexico and become embroiled in protracted extradition processes may spend long months awaiting extradition, denying them habeas corpus relief preserved in U.S. law. Several defendants have been held without formal charges in Mexico for years pending formal extradition proceedings, treatment that would constitute a grievous constitutional rights violation of the United States.⁴⁶ The perpetual process of circular negotiation regarding extradition between Mexico and the United States creates a self reinforcing paradigm that often leads to impasse over entrenched ideological beliefs regarding use of the death penalty. This intransigence on the part of Mexico has foisted upon the United States an unpleasant policy choice; abandon extradition altogether or abandon the death penalty. As the following case study analysis will demonstrate, at the insistence of Mexican authorities the United States has repeatedly decided to abandon the death penalty.

Stage 2 Case Study Analysis

Historical Case Account

On September 25, 2007 in Carrollton, Texas according to court records Melanie Goodwin a 19-year-old sales representative for Redbull stopped at a Quick Trip convenience store on her way home from work at 1:42 AM.⁴⁷ Here she met Ernesto Reyes, a man investigators would later determine was completely unknown to Goodwin at the time, and who had been loitering in the vicinity of the Quick Trip for roughly an hour and a half.⁴⁸ A Quick Trip employee would later tell authorities that he witnessed them depart together in her car at approximately 1:44 AM. The precise events that transpired over the next several hours remain unknown. However at 3 AM Donovan Young, a friend of Reyes, would later testify that Reyes arrived at his apartment bloody and disheveled claiming that he had "killed someone".⁴⁹

According to Reyes himself, in a statement given during an interview with an international television station, Reyes had asked Goodwin for a ride, whereupon she propositioned him for drugs, asked for sex and then accused Reyes of rape. "I asked for a ride, and she said to me, "where are you going" and I told her, "to my friends house." And she said, yes".⁵⁰ After arriving at Young's house Young supplied them with drugs and while Reyes was seated in the rear of the vehicle Young began to accost her, according to Reyes. "I don't know how it happened, the fight, I didn't know if he was hitting her or messing with her. Then I started getting scared. You could see that she was not okay and then I asked, "what happened" and then when I said, "I want to leave," the guy pulled a gun on me, a black pistol. I'm not guilty, this guy is the one who killed her," Reyes asserted in the interview.⁵¹ According to testimony in the interview, later presented

as evidence in Reyes trial, it was Young who forced Reyes to dispose of Goodwin's body. "He said to me, "put gasoline on her," and I said to him, "no." And he told me laughing, laughing, "you do it, you do it." So I did it," Reyes asserted.⁵²

Young's testimony given in exchange for leniency by the court was in stark contrast to Reyes. According to Young, after Reyes woke him at three o'clock in the morning, Reyes asked Young to accompany him to the car in the parking lot belonging to Goodwin in which he had stored her body. Young would testify that he saw her partially clothed body in the back seat of a red Saturn. "I seen her eyes were open. I looked in the back seat. He said he killed someone. It looked like a dead person."⁵³ Young, testifying that he acted at the direction of Reyes, assisted Reyes in disposing of the body in Goodwin's car in a nearby apartment complex parking lot. According to Young's testimony Reyes explained Goodwin's untimely death by claiming that they were "messaging around like they were going to hook up", but while they were "having sex" in the backseat Goodwin's boyfriend called, at which point she informed Reyes that she would have to leave and go home.⁵⁴ Reyes insisted that he wanted to "finish sex" and Goodwin resisted.⁵⁵ When "he was finished" he attempted to leave whereupon he was confronted by Goodwin who stated she would file charges for rape.⁵⁶ Reyes told Young that he struck her in the face and while he was "trying to hold her" she "stopped moving".⁵⁷

According to medical testimony given at trial by Jeffrey Barnhart M.D., the coroner that performed Goodwin's autopsy, her death was the result of blunt force trauma. Barnard testified that the injuries sustained by Goodwin were "totally consistent with strangulation."⁵⁸ Chest injuries noted by Barnard also indicated the victim's chest was compressed prior to her death, most likely by the weight of a person mounted on top of her, applying pressure to the back and displaying injuries that were "more consistent with manual strangulation than anything else".⁵⁹

On September 25 at 11:30 AM Carrollton Texas police discovered Goodwin's charred remains in a ditch on Keller Springs Road. The following day on September 26, police located Goodwin's car on Dallas drive and issued an arrest warrant for Reyes, citing in the warrant affidavit evidence of a surveillance tape taken from a nearby business close to the location where Goodwin's body was discovered, that shows a man fitting Reyes description dragging Goodwin's body from her Saturn and setting it ablaze. On September 27 Young was taken into custody on charges of tampering with evidence. According to the arrest warrant affidavit Young implicates Reyes immediately by disclosing the details of his involvement in disposing of the body and relating Reyes incriminating statements regarding Goodwin's death. Shortly after learning that an arrest warrant had been issued for Goodwin's murder, Reyes fled to Mexico to elude Texas authorities.

According to Carrollton Texas police spokesman Sgt. John Singleton, a manhunt began that spanned Texas and Oklahoma, and also included Mexico.⁶⁰ Several locations where Reyes may have sought shelter from pursuing authorities were identified by police and placed under constant surveillance, in coordination with the Mexican law enforcement authorities who had issued a provisional arrest warrant for Reyes days earlier. "We didn't know exactly where he was, but we knew he would pop his head up somewhere," Singleton said.⁶¹ Reyes was arrested the following Tuesday at approximately 1 PM by Mexican law enforcement and U.S. marshals in Celaya, Mexico when leaving a relative's house. Although Reyes did not resist arrest he did attempted evasion by claiming to be someone else. "We positively confirm his identity... He is the right man," Sgt. Singleton asserted in a press conference.⁶²

On October 10, 2007 the Dallas County District Attorney's Office initiated the extradition process seeking Reyes' transfer back to Texas. After successfully negotiating Reyes extradition,

the Dallas County District Attorney announced on May 21, 2008 that authorities in Mexico had transferred custody of Reyes to the U.S. Marshals Service, who had rendered Reyes back to the police department of Carrollton Texas.⁶³ Reyes pled not guilty and stood trial; thereafter the jury took only three hours to deliver a unanimous verdict guilty. The jury sentenced Reyes to life in prison.

Stage 3 Trace Process Analysis

Trace process analysis is a comparatively straightforward qualitative process for determining whether extradition practices between the United States and foreign countries, in particular the state of Mexico, can impact the outcome of a death penalty case. As will be amply noted in the elite interview section following, there is universal consensus among all parties involved in the Reyes case that his punishment was reduced as a direct result of intervention by Mexican authorities who had taken Reyes into custody. No other potential variables which could have influenced policymaking decisions, such as following personal preferences or abiding by unpopular precedent, were even remotely evident in the Reyes case. One CPO alone provides ample proof of the influence Mexican officials who held Reyes in custody possessed and exercised in permitting his extradition.

The press release by criminal District Attorney Craig Watkins of Dallas County Texas was unequivocal in stating that "the crime that Mr. Reyes is charged with is punishable by the death

penalty, however, under the terms of the Mexico extradition treaty the country would not allow the return of anyone to the requesting country (in this case the United States) who would be facing the death penalty. Therefore, if convicted of capital murder by a jury, Reyes will automatically be sentenced to life in prison without the possibility of parole."⁶⁴ This statement, issued by law enforcement authorities charged with the task of bringing Reyes to justice and accorded the discretion to engage in policy negotiations with Mexico regarding Reyes' extradition, is strong evidence that the Mexican government through diplomatic negotiations directly impacted policymaking decisions regarding whether the death penalty would be implemented in the United States. The Dallas County District Attorney, in acquiescing to the demands of the Mexican government, tacitly allowed to the shaping of U.S. domestic death penalty policy.

The Reyes case is not unique in its novelty, and reducing sentences in exchange for removal of the death penalty, or indeed even removing a life sentence from the panoply of potential punishments as will be seen in the comparative case analysis, is commonplace among many jurisdictions in the United States. As the following case will illustrate, the success of diplomatic negotiations in permitting extradition has granted de facto bargaining authority to foreign nation's intent on leveraging power conferred by possession of escapees from justice, to convert this power into political capital to force policy concessions on issues such as the death penalty. As the comparative case study analysis will demonstrate, states are intent on broadening the scope of this power and further pressing the United States to concede and relent on domestic policies the international community considers flagrant violations of international law.

Stage 4 Elite Interviews

All the subjects interviewed in the elite interview stage of the case study analysis responded in unanimous assent, acknowledging the impact the Mexican government had on affecting the outcome of the Reyes case in his ultimate disposition. Interviews in the Reyes case involved both the prosecuting attorney for Dallas County Texas Andrea Handley, who was personally involved in Reyes extradition, as well as Daniel Clancy, defense attorney for Reyes. According to Clancy "the United States signed a treaty with Mexico in the 70's. The treaty was signed by Pres. Jimmy Carter. Basically, what it said was, the Mexican government would be happy to return " wanted fugitives" to U.S. soil, but only if there is an assurance, in writing, that they would not be put to death. That assurance was made in Ernesto's case by then prosecutor, Fred Burns. Ernesto Reyes may very well have benefited from that agreement. Because of the treaty, we never discussed the death penalty with the prosecutors. It was a moot point. They want Ernesto back in Dallas so he could stand trial for capital murder, and if it meant forgoing the death penalty, then so be it. While there was never any discussion with the prosecutors about the death penalty in Ernesto's case, I feel certain that if Ernesto had been arrested in this county, the Dallas County District Attorney's Office would've certainly entertained the death penalty as a punishment option, and most likely would've sought."⁶⁵

Andrea Handley, the Dallas County prosecuting attorney who handled Reyes' extradition, in her terse summation of the influence the Mexican government wields when they possess a fugitive wanted by the United States in shaping death penalty policy was unequivocal: "In exchange for the assistance of the Mexican government and extraditing Ernesto Reyes, we

agreed not to seek the death penalty. I would certainly say that qualified as a benefit or lighter treatment."⁶⁶ The elite interviews for the subject personally involved in the Reyes case make abundantly clear that the Mexican government has had an indelible impact on altering death penalty policy creation and implementation through diplomatic negotiation. In cases where the death penalty would most certainly be sought, the Mexican government has effectively leveraged its influence in conducting extradition negotiations to force policy concessions by U.S. law enforcement and legal institutions. As the following case demonstrates, the Mexican government has begun to widen its approach in diplomatic negotiations to include potential sentences less than death, namely life imprisonment, citing the inhumane conditions of U.S. prisons and that the interminable sentence of life is inherently inhumane. And the comparative case study analysis will show that this approach has been met with success.

Stage 5 Comparative Cross Case Analysis

As the preceding case study analysis and trace process analysis amply demonstrate, through forceful negotiations the Mexican government can use extradition proceedings as leverage to extract death penalty policy concessions from the United States. The cross case comparative analysis undertakes an examination of the case in which extradition from Mexico to the United States was an issue, but the death penalty itself was not considered objectionable by the Mexican government. This case study will consider the Osiel Cardenas-Guillen case, in which the suspect faced a maximum of life in prison, a punishment which the Mexican government considered disproportionate to the crime, and resolved to negotiate with the United States the terms of his extradition based upon a maximum sentence below a preordained minimum. This case explores

the possibility that Mexico, emboldened by its success in rapprochement on the death penalty using extradition as leverage, pursuing the same diplomatic strategies in attempting to reduce what it considers lengthy sentences for Mexican nationals. This case study seeks to prove that Mexico is attempting to expand its use of extradition negotiation to encompass crimes other than those requiring the death penalty under U.S. law.

Although the details of the Cardenas case are sparse, due to the fact that many of the court records remain under seal for the protection of certain confidential informants who participated in the investigation, along with undercover agents from the DEA, FBI and ICE, many facts can still be gleaned from available court records and press reports. Cardenas, a former auto mechanic from Matamoros, Mexico began his career in drug trafficking under the tutelage of Juan Garcia Abrego in the Mexican Gulf cartel.⁶⁷ After Garcia's arrest in 1995 a tumultuous power struggle ensued in which Cardenas was vying for control with a longtime friend, Salvador Gomez. Cardenas ultimately killed Gomez to wrest control of the cartel thus earning himself the nickname El Mata Amigos, or the friend killer.⁶⁸

According to an FBI report issued to the U.S. Attorney General's office on February 24, 2010 Cardenas was the chief of the Mexican Gulf cartel which was responsible for importing thousands of kilograms of cocaine and marijuana from Mexico into the United States.⁶⁹ Transit routes from Mexico into the United States created a distribution chain throughout the U.S., and from July 2000 to September 2001 roughly 2000 kilograms of cocaine linked to Cardenas was captured by U.S. law enforcement agencies, with ledgers of the illicit proceeds accounting for tens of millions of dollars being funneled back into Mexico through the same operation. Over the

course of the three-year investigation conducted by DEA, FBI, and ICE agents Cardenas was captured on March 14, 2003 following a six-month military operation which culminated in a gunfight between the Mexican military and Cardenas.⁷⁰

Following his capture and incarceration Cardenas was imprisoned in La Palma, a high-security Mexican penitentiary from which it is largely believed that Cardenas still orchestrated drug deals from his cell. Although Cardenas was originally indicted in 2000 in the Southern District of Texas for drug trafficking, conspiracy to launder money, and threatening to murder U.S. law enforcement agents, Cardenas was not extradited until January 2007. According to the U.S. Attorney General's office memo "at the time the United States formally requested the extradition of Osiel Cardenas, the United States provided a letter to the government of Mexico assuring them that the death penalty or life in prison would not be sought nor imposed in this case, and the giving of such assurances was an expressed official condition of the extradition."⁷¹ Judge Tagle, who found that Cardenas was responsible for "kidnappings, extortion, gun battles in the streets", followed the recommendation of U.S. attorneys and gave him the maximum of five years on each count, dismissing 17 charges, and ultimately sentencing him to serve twenty five years in federal prison.⁷² According to U.S. Attorney General José Angel Moreno, who prosecuted Cardenas and requested a reduced sentence, "the successful prosecution of Cardenas underscores the joint resolve of the United States and Mexico to pursue and prosecute the leadership of the drug trafficking cartels, dismantle their organizations and end the violence and corruption they have spawned."⁷³

Perceived willingness on the part of U.S. attorneys to engage in extradition negotiations and honor the requests of Mexican authorities has in fact contributed and facilitated increased cooperation among U.S. Mexican judicial and law enforcement agencies and has increased the

number of extraditions while the same time reducing the range of sentences. According to David Shirk, director of the University of San Diego Trans-border Institute, "in the last four years the number of extraditions from Mexico has practically doubled. Mexico has been extraditing people at a clip (and) the vast majority were Mexican nationals."⁷⁴ Further enhancing this cooperative environment in November 2005 the Mexican Supreme Court issued a ruling that enabled Mexican prisoners serving life sentences to be extradited to the United States discounting the possibility that punishment in the U.S. may be cruel and unusual and not oriented around rehabilitation of the prisoner.

In an acknowledgment of the impact Mexico wields using extradition treaties to reduce sentences, the state of Texas has attempted to preclude fugitives flight into the country of Mexico. Texas law enforcement, ordinarily concerned at the border with the flow of migrants north in the United States, has stepped up efforts to prevent fugitives from escaping into Mexico from Texas by setting up random vehicle checks on twenty five international bridges that cross over into Mexico from Texas According to Allison Castle, a spokeswoman for Gov. Rick Perry of Texas "we would hope it would be a deterrent for fugitives."⁷⁵ This indicates a willingness by Texas state officials to deter fugitives from seeking lighter sentencing treatment negotiated by the government of Mexico, and a tacit acknowledgment of concessions that have already been arranged as a result of these negotiations.

Conclusion

For over 150 years extradition treaties with the United States which govern the transfer of fugitives by one sovereign state to another have been shaped by domestic relations between nations, and have often become political flashpoints related to larger issues such as slavery, the illicit drug trade, and human rights abuses. Nations have long sought to exercise leverage and improve their political posture by using fugitives as pawns in a larger political game.

Policymakers in the United States and Texas in particular are historically imbued with a culture that values a staunchly conservative conception of law and order, and will go to extraordinary lengths to achieve what it perceives as judicial satisfaction, and at times is willing to sacrifice what it considers⁷⁶ to be a full measure of justice, and concede strongly ingrained policy convictions to achieve some semblance of judicial retribution. Recognizing that the overwhelming U.S. desire to achieve justice can bow to political will, states such as Mexico have willfully engaged in negotiations designed deliberately to flex diplomatic muscle against the political will of U.S. policymakers to force policy concessions on the death penalty. The case study analysis of Reyes establishes irrefutably the premise that states can use extradition negotiations to force death penalty policy outcomes for domestic murder cases in the United States, forcefully removing the death penalty as a viable option for U.S. policymakers. The comparative cross case analysis study demonstrates Mexico's success in expanding upon earlier policy concessions involving the death penalty by extending the scope of negotiations to include life sentences. In total, this chapter proves that policy concessions regarding the death penalty in the United States can be achieved through strident and persistent diplomatic negotiation using

tactical leverage to force policymakers to abandon practices no longer considered judicially tenable by the international community.

¹ A statement attributed to Ambassador Scheffer by William Schabas in his article "Indirect Abolition, Capital Punishments Role in Extradition Law and Practice", *Loyola International and Comparative Law Review*, 25 (2003):581. Scheffer's comment was made during negotiations to adopt the Rome Statute of the International Criminal Court, later ratified in 2002. Ironically, this statement was made by a U.S. representative in opposition to a punishment that America had grown accustomed to defending abroad.

² Zagaris, Bruce, "Mexico United States Extradition and Alternatives, From Fugitive Slaves to Drug Traffickers, 150 Years and Beyond the Rio Grande's Winding Courses", *American University International Law Review*, 12 (1997): 519, 551-576.

³ Cornewall, George, Lewis, "On Foreign Jurisdiction and the Extradition of Criminals", *Forgotten Books Reprint*, (2012)

⁴ 18 USC 3181.

⁵ Henning, Matthew, "Extradition Controversies: How Enthusiastic Prosecutions Can Lead to International Incidents", *British Columbia International and Comparative Law Review*, 22 (1999): 350-359.

⁶ Yarnold, Barbara, "International Fugitives: A New Role for the International Court of Justice", *Praeger Publishing*, (1991): 11.

⁷ Supra Zagaris at note 2, 551-576.

⁸ Ibid. 522-533.

⁹ Nadelmann, Ethan, "Cops Across Borders, The Internationalization of U.S. Criminal Law Enforcement", *Pennsylvania State Univ. Press*, (1993).

¹⁰ Ibid. 42.

¹¹ Supra Henning at note 5, 525.

¹² Ibid. 525.

¹³ Ibid. 525.

¹⁴ Ibid. 526.

¹⁵ Ibid. 529.

¹⁶ Ibid. 529.

¹⁷ Green, Hayward Hackworth, *Digest of International Law*, 4 (1942): 47, as cited in Zagaris supra note 2, 530.

¹⁸ Supra Zagaris at note 2, 530.

¹⁹ Jimmy Carter, Letter of Submittal, Extradition Treaty Between the United States of America and the United Mexican States (Mexico), U.S. Department of State, March 5, 1979. The Treaty, in its entirety, is archived here <http://internationalextraditionblog.com/tag/mexico-international-extradition-treaty-with-the-us/>

²⁰ 7 United States Foreign Affairs Manual 1613.4.

²¹ Supra note 1, 584-586.

²² Ibid. 584.

²³ Ibid. 584.

²⁴ Ibid. 585.

²⁵ Soering v United Kingdom, 11 EHRR 439, (1989), and archived here <http://eji.org/eji/files/Soering%20v.%20United%20Kingdom.pdf>

²⁶ United States v. Burns, 1 S.C.R. 283, (2001).

²⁷ Ibid. 13.

²⁸ Lillich, Richard, "The Soering Case", *American Journal. International Law*, 95 (1991):128, 141, as cited in Schabas supra note 1.

²⁹ Givelber, Daniel, "Innocence Abroad: The Extradition Cases and the Future of Capital Litigation", *Oregon Law Review*, 81(2002):161.

³⁰ Knight v Florida, 520 U.S. 990, (1999).

³¹ Kindler, v Canada, 2 S.C.R. 779, (1991), and archived here <http://scc.lexum.org/en/1991/1991scr2-779/1991scr2-779.pdf>

³² Supra note 24, 295.

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- ³³ Scheck, Barry, "Actual Innocence", *Doubleday Press*, (2000).
- ³⁴ Abbott, Gregg, Texas Attorney General's Office, Criminal Prosecutions Under Article 4 of the Mexican Federal Penal Code, p. 1, Undated, and archived here https://www.oag.state.tx.us/AG_Publications/pdfs/article4.pdf
- ³⁵ *Ibid.* 3.
- ³⁶ *Ibid.* 3.
- ³⁷ *Supra* note 5, 551-557.
- ³⁸ *Ibid.* 555-557.
- ³⁹ *Ibid.* 557-559.
- ⁴⁰ *Ibid.* 579.
- ⁴¹ Constitution of Mexico, Article 25.
- ⁴² Constitution of Mexico, Article 27.
- ⁴³ Amparo law Art. 103, 107, enacted January 10, (1936).
- ⁴⁴ Lee Warren, Mary, Deputy Assistant Attorney General for the U.S. Department of Justice giving testimony before the U.S. 106th Congress, Subcommittee on Criminal Justice regarding the issue of murders escaping American justice by fleeing to Mexico, cited in an unpublished working paper by Heather Smith titled "International Extradition: A U.S. Mexico Case Study", is archived here <http://bulk.resource.org/gpo.gov/hearings/106h/63595.txt>
- ⁴⁵ McHam, Monica, "All's Well That Ends Well: A Pragmatic Look at International Criminal Extradition", *Houston Journal of International Law*, 20 (1998):419.
- ⁴⁶ Minai, Leonora, "Slaying Saga Twists, Turns", *St Petersburg Times*, August 1, (1999), as cited in Smith *supra* note 42
- ⁴⁷ *Reyes v Texas*, No. 05-09-000286-CR, Texas Court of Criminal Appeals, March 31, (2011).
- ⁴⁸ All of the facts of the case as presented by the police and prosecution are recounted in the Texas Court of Appeals opinion cited *Id.*, in Section I, Factual Background, beginning on page 1 of the opinion.
- ⁴⁹ *Ibid.* 2.
- ⁵⁰ Holmberg, Sara, "Cold Blooded Murder Caught on Tape, But Whom Would the Jury Believe?" *ABC News*, July 8, (2009), archived here <http://abcnews.go.com/Primetime/story?id=8021557&page=1>. Reyes' statements are taken from an article published by Holmberg, and based upon an interview Reyes' did with a Spanish language television reporter. This interview was presented during trial by Reyes' defence team to create probable doubt among jurors, and keep Reyes' off the witness stand to avoid the possibly damaging testimony Reyes' could give during a cross examination.
- ⁵¹ *Ibid.*
- ⁵² *Ibid.*
- ⁵³ *Supra* note 45, 2.
- ⁵⁴ *Ibid.* 3.
- ⁵⁵ *Ibid.* 3.
- ⁵⁶ *Ibid.* 3.
- ⁵⁷ *Ibid.* 3.
- ⁵⁸ *Ibid.* 6.
- ⁵⁹ *Ibid.* 6.
- ⁶⁰ "Cop's Hunt Suspect in Student's Burning Death, Another Arrested For Tampering With Evidence", *Fox News Service*, September 28, (2007), archived here <http://www.foxnews.com/story/0,2933,298459,00.html>
- ⁶¹ "Ernesto Reyes was Arrested While Hiding in Mexico for Murdering Melanie Goodwin and Burning Her Body", October 11, (2007), archived at <http://www.foxnews.com/story/0,2933,298459,00.html>
- ⁶² *Ibid.*
- ⁶³ "Testimony to Begin in Capital Murder Trial for Ernesto Reyes", Press Release from the Office of Craig Watkins, Criminal District Attorney, Dallas County, Texas, February 22, (2009).
- ⁶⁴ *Ibid.*
- ⁶⁵ Record on file with author.

⁶⁶ Record on file with author.

⁶⁷ "Feds Arrest 50 in Drug Ring", ABC News, December 14, (2000), archived here <http://abcnews.go.com/US/story?id=94702&page=1>

⁶⁸ "Desde las entrañas del Ejército, Los Zetas". Blog del Narco, May 23, (2010) archived here, and accessed through Wikipedia, <http://www.blogdelnarco.info/desde-las-entranas-del-ejercito-los-zetas/>.

⁶⁹ Federal Bureau of Investigation Press Release, "Osiel Cardenas-Guillen, Former Head of the Gulf Cartel, Sentenced to 25 Years' Imprisonment, Judgment Entered Forfeiting \$50 Million of Cardenas-Guillen's Ill-Gotten Gains to the United States", February 24, (2010), archived here <http://www.fbi.gov/houston/press-releases/2010/ho022410b.htm>

⁷⁰ Drug Enforcement Agency Brief, Operation Impunity II, December 20, (2000), archived here, <http://www.justice.gov/dea/major/impunity.html>

⁷¹ "Mexico-to-U.S. Extraditions Increasing, Report Shows, Researcher Predicts ICE-Killing Suspects to be Handed Over Soon", *The Monitor*, March 7, (2011), archived here <http://www.themonitor.com/articles/cartel-47801-osiel-extraditions.html>

⁷² *US v Cardenas Guillen*, Sentencing Transcript, Criminal Action No. B-00-118-1, US Southern District of Texas, Brownsville Division, February 21, (2010).

⁷³ *Supra* note 67.

⁷⁴ *Supra* note 69.

⁷⁵ Roberts, Michelle, "US Fugitives Who Escape to Mexico Avoid Death Penalty", *Associated Press*, January 18, (2008), archived here <http://www.nysun.com/foreign/us-fugitives-caught-in-mexico-escape-death-penalty/69760/>

Conclusion

This dissertation has undertaken a critical examination of the myriad ways US death penalty policies can be impacted by exogenous political forces seeking to shift domestic treatment of capital punishment cases. It has been amply demonstrated through an exhaustive and methodical case study analysis that foreign pressure can affect death penalty policies in ways both *de jure* and *de facto*. Each chapter explored strategic tactics employed by foreign actors attempting to exert influence on U.S. policymakers by using the exploitation of extradition policies, international litigation, and foreign consul intervention to push the United States to recalibrate death penalty policies widely repudiated as inhumane and in violation of international law by the global community. Although the case studies presented in this dissertation illustrate both the strengths and weaknesses of foreign actors organized attempts to shape U.S. domestic death penalty policies, at times experiencing success and at other times failure, the sole objective of this case study analysis was to critically deconstruct individual seminal cases involving capital punishment and foreign actor involvement and subject each potentially dispositive event within the case to rigorous scrutiny, and draw inferential assertions that can be extrapolated to a more largely generalizable population. On balance, this dissertation achieved its overall objective and presents a novel contribution to academic disciplines that are concerned with the viability of death penalty policies and their use in the future.

In the case study analysis undertaken in Chapter 4 involving the case of *Texas v Green*, a trace process analysis was unable to conclusively prove that Judge Kevin Fine was motivated by international pressure when he declared the death penalty in Texas to be unconstitutional. After careful consideration of all

substantive evidence the case study conclusion inevitably found that Judge Fine was moved by personal preference and public opinion when he engaged in an act of judicial activism that flouted Texas jurisprudence by denouncing the implementation of the death penalty in Texas as inconsistent with constitutional mandates. However, in the comparative analysis of a similar case arising in Delaware, the case study conclusion determined that an emphatic argument against the death penalty firmly rooted in judicial precedent provided a more successful route to ensuring that a judge's ruling against the death penalty would not be overturned by higher appellate court.

Chapter 5 embarked upon a vigorous exploration of the causal linkages between public opinion of the death penalty in United States, and the impact of international organizations waging a public campaign against the death penalty. The case study analysis focused on the Gary Graham case, and the efforts of Amnesty International to draw attention to the plight of Graham by holding media events in an attempt to shift public opinion concerning Graham's fate. Although unable to secure relief for Graham, the comparative cross case analysis demonstrated that Amnesty International has been successful employing the same tactics under fact similar circumstances. The chapter's analysis in its entirety strongly suggests that foreign organizations that promote political and media campaigns to focus public interest on individual policy outcomes can successfully couch issues to mobilize citizen involvement and ultimately impact policymaking decisions.

Chapter 6 focused on bureaucratic instrumentality and its receptivity to foreign actor pressure attempting to influence the bureau's stance on U.S. domestic death penalty policies. This chapter examined the opportunity for foreign actors to influence U.S. Department of State policymakers regarding the imposition of the death penalty on foreign nationals. The case study analysis considered

the Medina case, and scrutinized the motivation of diplomatic officials within the State Department tasked with conducting delicate negotiations with foreign countries opposed to U.S. death penalty policies, but also compelled to acquire international political capital by acquiescing to the demands of a foreign state seeking to save the life of one of its citizens sentenced to death in the U.S. In the context of seeking diplomatic reciprocity, the case study analysis amassed persuasive evidence that the U.S. State Department has established a clear pattern of willingness to intercede on behalf of a foreign national should the diplomatic rewards so justify. The chapter ultimately concludes that foreign governments can influence U.S. policies on the death penalty through strident diplomatic negotiations on behalf of their imprisoned national.

The case study analysis in Chapter 7 considered the impact of consular intervention under the Vienna Convention on behalf of foreign nationals charged with capital crimes, and the availability of foreign representation. Analysis of two companion cases, the Montoya and Guerra cases, offers a striking contrast of outcomes illustrating the importance of foreign consul involvement in both the trial and appellate stages of capital punishment proceedings. Without the benefit of consular intervention until late in the appellate stage, Montoya was unable to avail himself of the rights accorded to him under the Vienna Convention, and ultimately suffered execution. Guerra however was the fortunate beneficiary of a freshly funded consular program expressly designed to assist Mexican nationals confronting a potential death sentence at the hands of the Texas judiciary. Mexico's enhancements to its consular defense program in the United States, and the concomitant intervention on Guerra's behalf offers persuasive proof that a concerted effort on the part of a foreign consulate can have a profound impact on the outcome of a U.S. death penalty case.

The case analysis in Chapter 8 provides a detailed in-depth exposition of international litigation and its impact on U.S. domestic death penalty policies. Focusing largely on the Garza case, and using Medellin as a cross case comparison, this chapter explores decisions of the ICJ and their respective impacts on both Presidents Clinton and Bush. Although the opacity of the presidential political processes involved in responding to the edicts of international judicial bodies prevents a thorough analysis of each case, in that trace process observations cannot be fully gleaned through the veil that obfuscates the machinations of political maneuvering, certain inferential assumptions can be proffered and tested for probative value. In exploring all of the many variable observations in both cases, the chapter ultimately concluded that the ICJ has accomplished progress in expanding its recognition as international judicial body among U.S. political elites, and offers compelling proof of a slow erosion of resistance by U.S. political and judicial institutions in opposing the influence of external forces.

Finally, chapter 9 centered on the use of extradition treaties by foreign nations to extract concessions from U.S. death penalty policymakers by refusing to authorize extradition of wanted fugitives to the United States in exchange for the U.S. commitment to withdrawal the possibility of imposing the death penalty, and in some cases forcing the U.S. to refrain from issuing a sentence of life without parole. The case study analysis of the Reyes case provides incontrovertible evidence that the state of Mexico has successfully exerted pressure on the United States through the expert use of extradition negotiation to force a death penalty policy shift. By refusing to surrender a fugitive to law enforcement officials in the United States unless certain policy concessions are observed, Mexico has created definitive proof that foreign governments can have a direct and indelible impact on the shaping of U.S. domestic policies concerning capital punishment.

This dissertation, in part and in whole, weaves a compelling tapestry of case study evidence strongly supporting the thesis that foreign actors through deliberate and methodical means can adopt specific

positions, craft political postures, implement directed campaigns, engage in forceful negotiations and avail themselves of international judicial bodies, all in a concerted effort to limit, constrain and compel the United States to abandon its policies of executing foreigners as well as its own citizens.

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