

THE CONSTITUTIONAL AUTHORITY OF THE FEDERAL GOVERNMENT IN STATE CRIMINAL PROCEEDINGS THAT INVOLVE U.S. TREATY OBLIGATIONS OR AFFECT U.S. FOREIGN RELATIONS

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I.

Does the United States have the constitutional authority to make binding commitments and to require state compliance on matters that affect state criminal proceedings? The perception, both outside the United States and within the United States government, seems to be that it does not. For example, in the *Soering*¹ case, which involved an action in the European Court of Human Rights to prevent the extradition from the United Kingdom to the United States of someone charged with a capital crime in Virginia, the Court stated: “[I]n respect of offences against State laws the Federal authorities have no legally binding power to provide, in an appropriate extradition case, an assurance that the death penalty will not be imposed or carried out. In such cases the power rests with the State.”² In the *Breard* case, following a unanimous decision by the International Court of Justice (I.C.J.) that the United States “should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings,”³ Madeleine Albright wrote a letter to the governor of Virginia, requesting him to stay Breard’s execution.

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1. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

2. *Id.* at 28. Great Britain also apparently assumed that the federal government did not have the authority to do so. In its note to the United States, requesting assurance that “the death penalty, if imposed, will not be carried out,” Great Britain stated,

[s]hould it not be possible on constitutional grounds for the United States Government to give such an assurance, the United Kingdom authorities ask that the United States Government undertake to recommend to the appropriate authorities that the death penalty should not be imposed or, if imposed, should not be executed.

Id. at 12 (emphasis added).

3. Case Concerning the Vienna Convention on Consular Relations, *Paraguay v. United States*, 1998 I.C.J. (Interim Protection Order of Apr. 9) (Judges Schwebel, Oda and Koroma attached separate declarations to the opinion.). Text of decision available at <<http://www.1.C.J.-cij.org/idoocket/ipaus/ipausframe.htm>>.

In her letter, the Secretary of State said:

I am particularly concerned about the possible negative consequences for the many U.S. citizens who live and travel abroad. The execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention. The immediate execution of Mr. Breard in the face of the Court's April 9 action could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad.⁴

She did not, however, say that for all those reasons the United States had decided to comply with the provisional measures indicated by the I.C.J. to stay the execution and was so notifying the governor. Rather, she wrote, "[i]n light of the Court's request, the unique and difficult foreign policy issues, and other problems created by the Court's provisional measures, *I therefore request that you exercise your powers as Governor and stay Mr. Breard's execution.*"⁵ Moreover, she added, "[i]t is only with great reluctance that I make this request."⁶

In its brief to the Supreme Court, signed by the Legal Adviser, the U.S. government took the position that it could not require Virginia to stay the execution. After arguing that the I.C.J. decision is "precatory rather than mandatory," the brief states:

But in any event, the "measures at [the government's] disposal" are a matter of domestic United States law, and our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The "measures at [the United States'] disposal" under our Constitution may in some cases include only persuasion—such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution—and not legal compulsion through the judicial system. That is the

4. Letter from Madeleine Albright, Secretary of State, *United States Department of State*, to James Gilmore, Governor, *Commonwealth of Virginia* (Apr. 13, 1998) (copy on file with author).

5. *Id.* (emphasis added).

6. *Id.*

situation here.⁷

In a letter to the International Court of Justice following Breard's execution, David R. Andrews, the Legal Adviser, noted that the Secretary of State requested the governor of Virginia to stay the execution, and concluded:

This Court's April 9 Order indicated that the United States "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." The United States has taken "the Court's indications seriously into account." Through its actions, culminating in the Secretary of State's April 13 request to the Governor of Virginia to stay Mr. Breard's execution on account of this Court's indication of provisional measures, *the United States took all measures lawfully at its disposal to do what the Court requested.*⁸

II.

It may well be, as the United States government argued, that (1) "there is no basis for concluding that the assistance of a consular officer would have changed the outcome of the criminal proceedings,"⁹ and that (2) "the remedy Paraguay seeks—[setting aside the conviction]—is not supported by the Convention's text, its negotiating history, or the subsequent practice of state parties."¹⁰ Further, that (3) Breard's failure to raise the issue earlier precluded him from raising it on federal habeas corpus and that (4) the Eleventh Amendment precluded the action by Paraguay. But none of these arguments dispose of the question whether the United States government had the constitutional authority to require Virginia to stay the execution. I believe that it did. It is unthinkable that the federal government lacks the power under the Constitution to comply with an order of the International Court of Justice, precatory or mandatory, if it determines that it is in the interest of the United States to do so. I also believe, contrary to the views expressed by the European Court in the *Soering* case,¹¹ that federal authorities do have legally binding power to provide, in an appropriate extradition case, that the death

7. Brief for the United States as Amicus Curiae at 51, *Paraguay v. Gilmore*, 523 U.S. 371 (1998) (No. 97-1390, 125 Orig.) (brackets in original) [hereinafter U.S. Amicus Brief].

8. Letter from David R. Andrews, Legal Adviser, *United States Department of State*, to Eduardo Valencia-Ospina, Registrar, *International Court of Justice* (Apr. 15, 1998) (citation omitted) (emphasis added) (copy on file with author).

9. U.S. Amicus Brief, *supra* note 7, at 13.

10. *Id.*

11. See *supra* text accompanying note 2.

penalty will not be imposed or carried out.¹²

Article VI of the Constitution provides that "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land."¹³ The *Soering* case involved an extradition treaty between the United States and the United Kingdom. The *Breard* case involves three treaties to which the United States is a party: the Vienna Convention on Consular Relations,¹⁴ the U.N. Charter,¹⁵ and the Statute of the International Court of Justice.¹⁶ These treaties are all clearly within the treaty power of the United States. They all deal with matters that have traditionally been the subject of treaties and that are clearly of international concern.¹⁷

Nor are states' rights a limitation on the treaty power. That view was rejected by the Supreme Court over a half century ago.¹⁸ *Missouri v. Holland* makes clear that the United States may enter into treaties on matters that are otherwise exclusively within the jurisdiction of the states and that Congress may enact legislation to implement a treaty even if in the absence of the treaty it could not regulate the conduct. Thus, there can be no doubt that Congress could adopt legislation to implement these treaties and that such legislation would supersede state law.¹⁹ For example, Congress could adopt legislation providing that whenever an extradition treaty permits a contracting party to condition extradition on a promise that the death penalty will not be imposed, the Secretary of State may make such a commitment and that that commitment

12. See *infra* text at notes 20-28.

13. U.S. CONST. art. VI, § 2, cl. 2.

14. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36(1)(b) provides, "if [the foreign national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, . . . a national of that State is arrested *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.*" *Id.* art. 36, para. 1(b) (emphasis added).

15. The U.N. Charter states: "Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. CHARTER art. 94, para. 1.

16. Statute of the International Court of Justice, Oct. 24, 1945, 59 Stat. 1055 [hereinafter I.C.J. Statute]. Technically the Statute of the I.C.J. is not a separate treaty, but part of the U.N. Charter. See U.N. CHARTER art. 92. Article 41 of the I.C.J. Statute provides that the Court "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." I.C.J. Statute, art. 41, 59 Stat. 1055, 1061.

17. It had been suggested at one time that treaties must deal with matters of "international concern." RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 117(a) (1965). The present Restatement rejects that position. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 302 cmt. c & reporters note 2 (1986). For a recent discussion of "international concern" as a limitation on the treaty power and criticism of the Restatement (Third) position, see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 429-32 (1998).

18. See *Missouri v. Holland*, 252 U.S. 416 (1920).

19. U.S. CONST. art. I, § 8, cl. 18; *Holland*, 252 U.S. at 432.

will be binding on the state in which the extradited person is tried. Similarly, Congress could enact legislation specifically authorizing the Attorney General to bring an action to enforce a judgment of the I.C.J. if the Executive deems it in the national interest to do so. However, such legislation is not a prerequisite for executive action, either in the *Soering* situation or in the *Breard* case.

Legislation is not the exclusive means of implementing a treaty. Treaties may also be implemented by an exchange of notes between the Secretary of State and the appropriate person in the other state or international organization concerned.²⁰ Although the practice in the United States is apparently for the Secretary of State to forward requests regarding non-imposition of the death penalty to the state in which the accused is to be tried, that is a matter of policy, not constitutional requirement. Thus, in the *Soering* case, had the Secretary of State chosen to respond to the United Kingdom's request for assurances that the death penalty, "if imposed, will not be carried out"²¹ with a note giving such assurances, rather than forwarding the request to Virginia, the assurances would have been binding on Virginia. Similarly, in the *Breard* case, had the Secretary of State, instead of merely "requesting" the governor of Virginia to stay Breard's execution, written a note to Paraguay, the I.C.J., or both, stating that notwithstanding the United States' disagreement with Paraguay's position that the failure to inform Breard of his right to consult his consul requires vacating the judgment, the United States would comply with the I.C.J. decision to stay the execution, that would have been binding on Virginia. The reason for that is that an exchange of notes between the United States and another country involving the implementation of a treaty constitutes

20. See GREEN HAYWOOD HACKWORTH, 5 DIGEST OF INTERNATIONAL LAW 397 (1942); HUNTER MILLER, 1 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 10 (1931); JOHN BASSETT MOORE, 5 A DIGEST OF INTERNATIONAL LAW 215 (1906). See also MAJORIE M. WHITEMAN, 14 DIGEST OF INTERNATIONAL LAW 195 (1970) (noting that the Foreign Affairs Manual of the United States provides that the "executive agreement form" may be used for agreements "made pursuant to or in accordance with . . . a treaty."). Numerous such agreements have been made involving the North Atlantic Treaty. In testimony before the Senate Judiciary Committee in 1953, in connection with proposals that Congress regulate executive agreements, Secretary of State John Foster Dulles estimated that there were about ten thousand such agreements made under the North Atlantic Treaty. *Id.* at 231. For recent examples of such agreements, see Agreement Regarding U.S. Approval for Retransfer of U.S. Defense Articles and Services to NATO for Purposes of Supporting the NATO-led Implementation Force, Exchange of letters at Brussels, Dec. 18, 1995, Hein's No. KAV 4495, Temp. State Dept. No. 96-19; Agreement Regarding the Transfer of USG-origin Spare Parts and Components Maintained and Serviced by NAMSOC (North Atlantic Treaty Organization Maintenance and Supply Organization), Exchange of notes at Brussels and Capellen, Nov. 16, 1992 and March 5, 1993, Hein's No. KAV 3511, Temp. State Dept. No. 93-67. See also *infra* note 60 for a discussion of the Agreement Between the United States and the German Democratic Republic.

21. See *supra* note 2.

a valid executive agreement²² and that executive agreements, like treaties, supersede inconsistent state law.²³

In *Belmont*²⁴ and *Pink*²⁵ the Supreme Court held that an exchange of notes between Litvinov, the Commissar for Foreign Affairs of the Soviet Union, and President Franklin Delano Roosevelt, whereby the United States recognized the Soviet Union and the Soviet Union assigned its claims to property located in the United States to the United States, constituted an executive agreement. Moreover, that agreement superseded New York law, which denied effect to confiscatory takings. In *Belmont* the Court said:

[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.²⁶

In *Pink* the Supreme Court stated:

We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.²⁷

The agreement in *Belmont* and *Pink* was a sole executive agreement. The President's authority to enter that agreement stemmed from the President's power to recognize foreign governments. If, as the Supreme Court held in the *Belmont* and *Pink* cases, an executive agreement based on the President's authority to recognize foreign governments—an authority that is

22. See *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

23. See *Pink*, 315 U.S. 203; *Belmont*, 301 U.S. 324.

24. *Belmont*, 301 U.S. at 331.

25. *Pink*, 315 U.S. at 230.

26. *Belmont*, 301 U.S. at 331 (citations omitted).

27. *Pink*, 315 U.S. at 233-34.

not even mentioned in the Constitution but derived from the President's authority to receive ambassadors²⁸—is sufficient to supersede state laws, a fortiori an executive agreement implementing a treaty entered into by the President with the advice and consent of two-thirds of the Senate, on matters that are clearly within the treaty power of the United States, is sufficient to supersede state law.

As a policy matter, the federal government may prefer not to grant assurances concerning the imposition of the death penalty in state criminal cases, leaving it to each state to decide whether it wishes to give the requested assurances or to forego the extradition.²⁹ It is unlikely, however, that as a policy matter the United States would prefer to leave it to each state to decide whether to comply with an order of the International Court of Justice.³⁰

III.

Nor should the federal government's authority to implement an I.C.J. decision depend on whether the decision is mandatory or precatory. In opposing the stay of execution, the government argued that an order indicating provisional remedies is not binding, that the language of Article 41(1) of the I.C.J. statute is precatory.³¹ The implication seems to be that if the decision were binding the federal government could implement it, but because it is not, the government cannot implement it. Commentators differ on whether I.C.J.

28. Professor Henkin notes that “[w]hile making treaties and appointing ambassadors are described as ‘powers’ of the President (Article II, section 2), receiving ambassadors is included in section 3 which does not speak in terms of power but lists things the President ‘shall’ or ‘may’ do.” LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 41 (1972). Hamilton characterized the President's receiving ambassadors as “more a matter of dignity than of authority” and as “a circumstance which will be without consequence in the administration of government.” *THE FEDERALIST* NO. 69, at 388 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

29. Following the European Court of Human Rights decision in the *Soering* case, Virginia gave the requested assurances, Soering was extradited, and he is serving a life sentence. See Ronan Doherty, Note, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281, 1302-03 (1996).

30. There may be instances in which the United States will decide not to comply with an order of the I.C.J., as it did in the *Nicaragua* case. See Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.), 1986 I.C.J. 14 (merits). But that decision, too, should be made by the federal government, not left to each state. In the oft-quoted words of Madison, “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.” *THE FEDERALIST* NO. 42 (James Madison).

31. U.S. Amicus Brief, *supra* note 7, at 49-51. For the language of Article 41, see *supra* note 16.

decisions indicating provisional measures are binding.³² But, even if the government is correct that I.C.J. orders indicating provisional measures are not binding, surely the decision, whether to comply with the provisional measures that the International Court has indicated "ought to be taken,"³³ is for the federal government to make. As has repeatedly been stated by the Supreme Court, in matters that affect our foreign relations it is essential that the United States "speak with one voice."³⁴

The government's brief gives reasons and cites authorities in support of its position that provisional measures are precatory, not mandatory.³⁵ The government's brief gives no reasons and cites no authority for its conclusion that international obligations that are not mandatory cannot be enforced by the federal courts. While there does not appear to be a decision directly on point, the Supreme Court has made clear in other contexts that the power of the federal government to supersede state law is not limited to action that the United States is *obligated* to take by international law. In *Sabbatino*,³⁶ the Court required states to apply the Act of State Doctrine, though it specifically recognized that the doctrine was not "*compelled*" by "international law."³⁷ In

32. See SHABTAI ROSENNE, 3 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996 § III.340, at 1434 (3d ed. 1997); Bernard H. Oxman, *Jurisdiction and the Power to Indicate Provisional Measures*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 323, 331-33, (Lori F. Damrosch ed., 1987). Professor Vagts, who is critical of the Supreme Court's decision denying a stay, nevertheless states, "[t]o be sure, the binding character and enforceability of provisional measures are subject to some doubt." Detlev F. Vagts, Editorial Comments, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458, 461-62 (1998). Shabtai Rosenne, one of the leading authorities on the I.C.J., appears to take the position that there is an obligation to comply with a provisional order. See ROSENNE, *supra*, § I.48, at 240 (although a provisional "order is not on the same footing as a judgment from the point of view of the Security Council's powers under Article 94 of the Charter, . . . it is a decision and, so long as it is in force, it comes within the conventional and customary obligations to comply with the decision of the Court, incumbent upon every litigating State.").

33. I.C.J. Statute, art. 41, 59 Stat. 1055, 1061.

34. See, e.g., *Japan Lines, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976). In her letter to the governor of Virginia, and in her public discussion of the problem, though not in the brief to the Supreme Court, the Secretary of State made clear that this is a matter that may seriously affect our foreign relations. See text at note 4 *supra*.

35. U.S. Amicus Brief, *supra* note 7, at 49-51.

36. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

37. *Id.* at 427 (emphasis added). The Court had earlier stated,

That international law does not require application of the doctrine is evidenced by the practice of nations. Most of the countries rendering decisions on the subject fail to follow the rule rigidly. No international arbitral or judicial decision discovered suggests that international law prescribes recognition of sovereign acts of foreign governments, and apparently no claim has ever been raised before an international tribunal that failure to apply the act of state

Zschernig v. Miller,³⁸ the Court invalidated a state probate statute, which the Court believed might have an adverse effect on foreign relations, even though the state law did not violate any treaty obligations of the United States. The Court said,

The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. Where those laws conflict with a treaty, they must bow to the superior federal policy. Yet, *even in [the] absence of a treaty, a State's policy may disturb foreign relations. . . .* "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or *permitted*, by a government."³⁹

The policy considerations generally given in support of federal supremacy, such as the need for uniformity,⁴⁰ that the consequences of any action "will be felt by the nation as a whole,"⁴¹ or the "potential for disruption

doctrine constitutes a breach of international obligation.

Id. at 421-22 (citations omitted).

38. *Zschernig v. Miller*, 389 U.S. 429 (1968).

39. *Id.* at 440 (emphasis added) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941)).

40. *ITEL Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 85 (1993) (foreign commerce); *Japan Lines, Ltd. v. County of Los Angeles*, 441 U.S. 434, *passim* (1979) (foreign commerce); *Hines v. Davidowitz*, 312 U.S. 52, 72 (1941) (alien registration); *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933) (foreign commerce); *The Chinese Exclusion Case*, 130 U.S. 581, 605 (1889) (immigration).

41. *Japan Lines*, 441 U.S. at 451; *Zschernig*, 389 U.S. at 429; *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (mem.). *Chy Lung* involved a California statute that required the master of a vessel to post a bond for certain classes of passengers to ensure that the state would not have to bear the expenses for their support and authorized the State Commissioner of Immigration to charge for making certain examinations and preparing certain documents. In holding the statute unconstitutional, the Court said:

[I]f this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the Federal

or embarrassment”⁴² to the government in its relations with other states, apply with great force in this case, irrespective of whether the order of the I.C.J. is mandatory or precatory. This is clearly an area where there is need for uniformity, where the consequences will be felt by the nation as a whole, and where there is not only potential but actual embarrassment to the United States in its relations with other states. As the Secretary of State stressed, “the immediate execution of Mr. Breard . . . could be seen as a denial by the United States of the significance of international law and the Court’s processes,” and could have “negative consequences for the *many U.S. citizens who live and travel abroad.*”⁴³

Moreover, whatever the distinction between “precatory” and “mandatory,” the United States clearly believes that provisional measures impose some obligation on states. In the hostage crisis, the United States

government? If that government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?

Id. at 279-80. See also, THE FEDERALIST NO. 80 (Alexander Hamilton). Hamilton stated:

[T]he peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquillity. A distinction may perhaps be imagined between cases arising upon treaties and the law of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulation in a treaty or the general law of nations.

THE FEDERALIST NO. 80, at 444-45 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

42. *Zschernig*, 389 U.S. at 429. See also *Sabbatino*, 376 U.S. at 398.

43. Letter from Madeleine Albright, *supra* note 4 (emphasis added).

sought⁴⁴ and obtained provisional measures⁴⁵ against Iran. President Carter criticized Iran for its failure to release the U.S. hostages, despite the I.C.J. decision indicating provisional measures and a Security Council resolution calling upon Iran to do so;⁴⁶ and Secretary of State Cyrus Vance urged the Security Council to adopt "a resolution which would condemn Iran's failure to comply with earlier actions of the Security Council and of the International Court calling for the immediate release of all the hostages."⁴⁷ The Security Council adopted a resolution which "deplored the continued detention of the hostages contrary to Security Council Resolution 457 (1979) and the order of the International Court of Justice of 15 December 1979 (S/1369)."⁴⁸ In his oral argument before the I.C.J. on the merits phase of the case, Robert B. Owen, the then Legal Adviser to the Department of State, after reviewing the

44. In his oral argument before the I.C.J., Benjamin R. Civiletti, the then Attorney General of the United States said, "[w]e who speak the sober language of jurisprudence say the United States is seeking the 'indication of provisional measures.' What we are asking this Court for is the quickest possible action to end a barbaric captivity and to save human lives." *Reprinted in DEP'T ST. BULL.*, Feb. 1980, at 41.

45. *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1979 I.C.J. 7 (Dec. 15). In that case the Court indicated provisional measures that Iran should immediately ensure that the premises of the United States Embassy, Chancery and Consulates[,] be restored to the possession of the United States authorities under their exclusive control, . . . should ensure that the immediate release, without any exception, of all persons of United States [origin] who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or have been held as hostages elsewhere, and afford full protection of all such persons, . . . [and should] afford to all the diplomatic and consular personnel of the United States the full protection, privileges and immunities to which they are entitled . . . , including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran.

Id. at 20-21.

46. President Carter stated:

The Government of Iran must realize that it cannot flaunt with impunity the expressed will of the world community. . . . The world community must support the legal machinery it has established so that the United Nations and the International Court of Justice will continue to be relevant in settling serious disputes which threaten peace among nations.

DEP'T ST. BULL., Feb. 1980, at 53, *reprinted in THE WASH. POST*, Dec. 22, 1979, at A16. The I.C.J. decision to which the President referred was the order entered on December 15, 1979, indicating provisional measures; the decision on the merits was issued on May 24, 1980, after the President's speech. *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)* 1980 I.C.J. 3 (May 24).

47. Speech of Secretary of State Vance to the U.N. Security Council, Dec. 29, 1979, *reprinted in DEP'T ST. BULL.*, Feb. 1980, at 67.

48. S.C. Res. 461, U.N. SCOR, 34th Sess., 2184th mtg. at 24, U.N. Doc. S/INF/35 (1979).

efforts by the United States to gain release of the hostages, said,

the most important of these efforts was our institution of the present proceeding before this Court. . . . [A]t the time we filed our application we had in mind that as a member of the United Nations, Iran had finally undertaken, pursuant to Article 94, paragraph 1, of the U.N. Charter, to comply with the decisions of this Court in any case to which Iran might be a party. Accordingly, it was the hope and expectation of the United States that the Government of Iran, *in compliance with its formal commitments and obligations, would obey any and all orders and judgments which might be entered by this Court in the course of the present litigation.*⁴⁹

The very fact that the matter is the subject of a treaty brings it within the scope of federal authority. The Supreme Court has repeatedly stated, in a variety of contexts, that in matters that affect foreign affairs the federal government is supreme⁵⁰ and that in the realm of foreign affairs, "with its

49. Robert B. Owen, Oral Argument before the I.C.J. (Mar. 18, 1980), *reprinted in* DEP'T ST. BULL., May 1980, at 42 (emphasis added). Owen did, however, draw a distinction between provisional measures and a judgment on the merits. In explaining why the Court should enter a judgment directing Iran "to take specific action to terminate its continuing unlawful conduct," even though Iran had disregarded the order indicating provisional measures, Owen said,

I am keenly aware of the fact that at an earlier stage in this case we asked the Court for somewhat similar relief in the form of provisional measures and that Iran's subsequent refusal to comply with the resulting provisional measures has surely created doubt as to whether it will comply with the final judgment of this Court. In response, I will simply draw an obvious legal distinction.

Within the community of international legal scholars there is at least some doubt as to whether an indication of provisional measures under article 41 of the Court's Statute is binding and enforceable, but there can be no equivalent doubt about a judgment of the Court on the merits. Conceivably, the authorities in Iran have felt that they were not legally bound by the provisional measures indicated by the Court on 15 December. But article 94 of the U.N. Charter specifically requires obedience to the final judgment on the merits and provides for its enforcement.

Id. at 54.

50. See *Zschernig v. Miller*, 389 U.S. 429, 436 (1968) ("[F]oreign affairs and international relations [are] matters which the Constitution entrusts *solely* to the Federal Government.") (emphasis added); *Banco Nacional de Cuba v. Sabbatino* 376 U.S. 398, 425 (1964) ("[O]ur relations with other members of the international community must be treated *exclusively* as an aspect of federal law.") (emphasis added); *United States v. Pink*, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with, *or impairs the policy or provisions of*, a treaty or of an international compact or agreement.") (emphasis added); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government . . . imperatively requires

important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."⁵¹ The decision whether to comply with the I.C.J. order in the *Breard* case clearly implicates American foreign relations. In her letter to the governor of Virginia, the Secretary of State spoke of the "unique and difficult foreign policy issues" involved and "the possible negative consequences for the many U.S. citizens who live and travel abroad."⁵² She stressed that the immediate execution of *Breard* could be seen by other states "as a denial by the United States of the significance of international law" and could "limit our ability to ensure that Americans are protected when living or traveling abroad."⁵³ In response to a question following a speech at Howard University, the Secretary of State said, "it is very important . . . to assure ourselves that our citizens, were they to find themselves in any trouble whenever abroad, . . . would be accorded these rights."⁵⁴ It is inconceivable that had these arguments been made by the United States in the Supreme Court in support of a stay it would have been denied.

IV.

In sum, I believe that based on Article VI of the Constitution and a long line of Supreme Court decisions, the United States had the authority to comply with the decision of the I.C.J. indicating provisional measures. The Executive could have done so in a number of ways. First, had the Secretary of State informed Virginia that the Executive had decided to comply with the order of the I.C.J. and that Virginia was required to stay the execution, Virginia would in all probability have complied. Alternatively, had the United States taken the position in the Supreme Court that the President had decided to comply with the order of the I.C.J. and asked the Court to stay the execution pending a decision on the merits, the Court probably would have done so. The Supreme Court has long deferred to the State Department on matters involving

that federal power in the field affecting foreign relations *be left entirely free* from local interference.") (emphasis added); *United States v. Belmont*, 301 U.S. 324, 330 (1937) ("Governmental power over external affairs . . . is vested *exclusively* in the national government.") (emphasis added).

51. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

52. See text at note 4 *supra*.

53. See text at note 4 *supra*.

54. Madeleine Albright, Remarks and Question and Answer Session at Howard University (April 14, 1998) (transcript on file with author).

foreign affairs,⁵⁵ and in this case the Court specifically requested the views of the government.⁵⁶ Conversely, the Executive's failure to request a stay made it unlikely that the Court would do so given its strong deference to the Executive on matters of foreign affairs.⁵⁷ Finally, the government could have brought an action to enjoin the execution.⁵⁸ The United States has standing to bring an action to "carry out our treaty obligations" and no statute was necessary to authorize the suit.⁵⁹ Whichever approach the government chose, the obligations of the United States under the Consular Convention, the U.N. Charter, and the Statute of the International Court of Justice provided ample basis for the assertion of federal authority over the matter. But, if the Executive had any doubt that it had the authority based on these treaties alone, because they do not provide explicitly for the implementation of I.C.J. decisions indicating provisional measures, it could have entered into an

55. See *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) ("We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.") (plurality opinion); *Banco Nacional de Cuba v. Sabbatino* 376 U.S. 398 (1964); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943); *Williams v. Suffolk*, 38 U.S. (13 Pet.) 415 (1839). See also Justice Powell's concurring opinion in *First National City Bank*, in which he states,

Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts have an obligation to hear cases such as this. . . . When it is shown that a conflict in those roles exists, I believe that the judiciary should defer . . .

First National City Bank, 406 U.S. 759, 775-76.

56. U.S. Amicus Brief, *supra* note 7, at 1.

57. In *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), the Court held that the State Department's silence in the face of a request by Mexico for sovereign immunity required it to deny immunity. The Court said, "It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* at 35.

58. See *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925); *United States v. Arlington*, 669 F.2d 925 (4th Cir. 1982) (holding that the United States can sue to enjoin a state from breaching treaty obligations); *United States v. Arlington*, 326 F.2d 929 (4th Cir. 1964) (noting that the United States can bring action to enforce its policies where national interest is involved; it need not have statutory authorization). In the latter case, involving the improper imposition of property tax on a member of the armed forces, the court said,

Here we find that the interest of the national government in the proper implementation of its policies and programs involving the national defense is such as to vest in it the non-statutory right to maintain this action. Under these circumstances the incapacity of the individual plaintiff to maintain his action is immaterial since he may find shelter under the Government's umbrella.

326 F.2d 929, 932-33.

59. *Sanitary District of Chicago*, 266 U.S. at 425. Such an action by the United States would not have been precluded by the Eleventh Amendment or by limitations on habeas corpus.

executive agreement through an exchange of notes with Paraguay promising to stay the execution.⁶⁰

The *Breard* case raised interesting and important questions about the limits of habeas corpus under the new statute and about the scope of the Eleventh Amendment. But, perhaps the most important question it raised is whether the United States has the constitutional authority to ensure compliance with judgments of the International Court of Justice or must leave that to the decision of each state. It would seem that to state the question is to answer it. It is unthinkable that the federal government would not have the authority. *Missouri v. Holland*, *Belmont*, and *Pink* make clear that it does. Yet, the government took the position in *Breard* that it lacked the authority. That is, perhaps, the most troubling aspect of the case.

60. See *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Arlington*, 669 F. 2d 925 (4th Cir. 1982). That is exactly what the Executive did in the *Arlington* case. In that case the United States entered into an agreement with the German Democratic Republic (GDR) in 1974, which established diplomatic relations between the two countries, but which apparently did not provide for tax exemption for property used for residential purposes. Virginia imposed a tax on such property owned by the GDR, obtained a judgment against the GDR, and imposed a lien on the property. When the GDR protested to the State Department, the United States entered into an agreement with the GDR, signed by a Deputy Assistant Secretary of State, which provided for tax exemption for property "used exclusively for purposes of their diplomatic missions, including residences for the staff of their diplomatic missions . . ." *Id.* at 928. The United States then brought an action for a declaratory judgment voiding the assessments and liens and an injunction prohibiting the county from further attempts to collect the taxes. The Court of Appeals held that the United States could "sue to enforce its policies and laws"; that the 1974 and 1979 agreements between the United States and the GDR must be accorded "the dignity of formal treaties," *id.* at 932, and that Virginia could not tax the property.

