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Choosing Between Constitutional and International Law:

Why the United States May Have Good Reason To Ignore the Recent World Court Order

By [JULIAN KU](#)

Tuesday, Feb. 11, 2003

For the third time in the past five years, the International Court of Justice (the "World Court") has ordered the United States to stay the executions of foreign nationals on death row in the U.S. This time, the condemned men are three Mexican citizens.

The orders are called temporary or "provisional measures," because they impose only a temporary, not a permanent, stay of the executions, pending the ultimate outcome of the case. Nevertheless, they are intended to have the force of law for the stay's duration. The Court's authority to impose the order flows from the United Nations Charter, which is a treaty signed and ratified by the U.S.

On the previous two occasions, the U.S. failed to obey the order. Now it is likely that it will reject the World Court's command for a third time. When it does so, many critics will accuse the U.S. of flouting international law, and undermining the authority of the World Court, which is an arm of the United Nations.

These criticisms may be valid, but they also ignore an important constraint on the United States. If the U.S. were to obey the World Court's orders, it would have to choose between its constitutional commitment to federalism and its obligations under international law. All three Mexican citizens were convicted under U.S. state, not U.S. federal, law. As a result, it is doubtful whether the federal government could constitutionally obey the World Court's order, even if it wanted to.

The World Court Issues a Stay

The most recent order came as a result of a case brought by Mexico before the World Court seeking to stop the executions of all Mexican nationals in the U.S. Mexico feared that these executions might occur before the World Court case could be resolved.

Accordingly, Mexico asked the World Court to stay the executions while the case was pending, and it did so with respect to three Mexicans. Indeed, the World Court also took the unusual step of announcing that it stood ready to make similar orders with respect to the other 48 Mexican nationals facing possible executions in the U.S., as their execution dates draw closer.

The merits of the case have yet to be decided. Like Paraguay and Germany before it, Mexico is arguing that its citizens cannot be executed because they were not notified by the U.S., upon being arrested, of their right to seek assistance from Mexico's consul in the United States. (The Vienna Convention for Consular Relations, a treaty signed and ratified by both the U.S. and Mexico, requires such notice.)

Constitutional Obstacles to Compliance with the World Court

To begin, the President cannot pardon, or even issue a stay of an execution for, a criminal convicted of a state crime, only one convicted of a federal crime. Such powers are held exclusively by the governors of the individual states.

Could the President then order the state governors to issue the stay by Executive Order? Mexico claims he could, but it's not so simple. Recognizing a Presidential power to order states to comply with international law would create a troubling precedent, because this power would not be restricted to orders like these.

In recent years, international law has been extended to encompass many areas of law currently controlled by the state governments. Accordingly, if the President had the power to compel states to comply with international law, it would be very broad. He would almost always be able to find authority to override or suspend state laws pursuant to his need to enforce international obligations.

Could the President claim statutory authority for the stay? After all, federal law trumps state law, pursuant to the Constitution's Supremacy Clause. But no existing federal statute gives the President authority to suspend - that is, to temporarily stay - a state criminal death sentence.

Couldn't the problem then be easily solved if the President asked Congress to pass just such a statute? Not necessarily. Under the U.S. Supreme Court's recent federalism decisions, such a statute might be unconstitutional, on the ground that the federal government has no right to interfere in the states' administration of their own criminal laws and penalties. See, for example, the Supreme Court's 1995 decision in [United States v. Lopez](#).

Could the President simply sue in federal court to enforce the order, as Mexico has also suggested? Although there is some precedent for such a suit, this would raise the same concerns as an Executive Order.

Then couldn't Mexico itself, perhaps supported by a "friend of the court" brief from the federal government, go to a U.S. court to enforce the World Court order? Again, not necessarily.

In past cases, the U.S. Supreme Court has refused to allow foreign states to enforce such World Court orders against the states. In support of its holdings, it has cited the U.S. Constitution's Eleventh Amendment guarantee of state sovereign immunity - an amendment the U.S. Supreme Court recently has read to give the states extremely broad protection from lawsuits. See, for example, the U.S. Supreme Court's 1999 decision in [Alden v. Maine](#).

In sum, in all these scenarios, if the federal government attempts to compel state compliance to satisfy the World Court, it will threaten basic constitutional understandings about the division of powers between the federal and state governments in the United States. Whether the compulsion came through an Executive Order, a federal statute, or a court complaint, the issue of encroaching on state autonomy would be the same.

Given these concerns, it is not surprising that the federal government has been reluctant to order direct state compliance with similar international law obligations. In the past, rather than ordering state governors and legislatures to comply with international treaty obligations, the State Department has usually only requested that they do so.

For instance, in 1934, California initially refused to permit Mexican consular officials to meet with a detained Mexican national. Then Secretary of State Cordell Hull sent a letter to the Governor of California informing him that the U.S. recognized an international legal obligation to permit such consular assistance, and "earnestly requested" that the Governor do so. This "request" was granted.

What if the U.S. were simply to issue such a request in the case of the three Mexican nationals on death row? If the states complied, all might be well. But if they did not (and Texas has already announced it will not), the World Court would not be satisfied by the mere fact that the request had been made. After all, the World Court itself did not issue a "request" to the United States - it issued an order.

In This Difficult Position, What Should the Federal Government Do?

The federal government is thus faced with a choice between constitutional law, which mandates that state governments retain some independence from the federal government, and international law, which compels obedience to the World Court's order. In the past, the federal government has chosen to defer to the states, and ignore the World Court's orders. The choice is not surprising - to do otherwise might lead to a constitutional crisis, and upset the delicate balance of federalism.

Ignoring World Court orders, however, also has a cost. It will damage America's standing abroad, its relations with Mexico, and its ability to use the World Court to pursue its own cases.

Is there any solution? The answer may lie in a shift of focus. Currently, policymakers tend to either side with the World Court, bemoaning U.S. unilateralism, or side with the states, and accuse the World Court of overreaching. Instead, policymakers should recognize the federal government's dilemma, and avoid future clashes between constitutional and international law.

How? When signing future international treaties the U.S. should be more careful to ensure that it can constitutionally comply with its obligations - as it has been in signing past treaties.

For instance, when signing the World Trade Organization agreement, Congress established complex state consultation mechanisms, by which adverse judgments would be implemented. To take another example, when the U.S. Congress has ratified international human rights treaties, it has often expressly limited their effects against the states, or else allowed the states to decide how to (or whether to) carry out those obligations. So far, mechanisms like these have been able to avoid the international law/state law dilemma that the World Court death penalty stays have raised.

Still, such benefits must be carefully weighed against the cost of fundamentally altering our constitutional scheme of federalism. In recent years, new and important international treaty regimes have proliferated, and this issue is likely only to repeat itself in the future. When it does, the U.S. should take care to ensure that its participation in such regimes is designed to avoid future conflicts between constitutional and international law.

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