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***Breard* and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures**

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BREARD AND THE FEDERAL POWER TO REQUIRE COMPLIANCE WITH ICJ
ORDERS OF PROVISIONAL MEASURES

Among the puzzling aspects of the *Breard* episode was the Elinton administration's claim that the decision whether or not to comply with the Order of the International Court of Justice requiring the postponement of *Breard*'s execution lay exclusively in the hands of the Governor of Virginia. The ICJ's Order provided that "[t]he United States

²¹ *United States v. Pink*, 315 U.S. 203, 233 (1942). Compare *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 413-14 (1821) (Marshall, C.J.). See also Calhoun: "In our relation to the rest of the world . . . the States disappear." 29 ANNALS OF CONG. 531 (1815-16).

²² U.S. CONST. Art. II.

²³ *Id.*, Art. VI.

* Of the Board of Editors.

should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.” The Clinton administration argued that the Order was not binding, but it also took the position that, *even if the order were binding*, there would be no authority in the federal Government to require a postponement of the execution. As the administration explained to the Supreme Court:

[T]he “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 That is the situation here.¹

Accordingly, Secretary of State Madeleine Albright wrote a letter to Governor Jim Gilmore explaining that it was important to our foreign relations and to the safety of American citizens abroad that the ICJ’s Order not be flouted, and requesting that the Governor protect those interests by postponing the execution. The Governor remained unpersuaded. In a statement issued the night of the execution, he said that he had given “serious consideration” to the request of the Secretary of State, whose views on foreign policy matters are of course “due great respect,” but “[a]s Governor of Virginia my first duty is to ensure that those who reside within our borders . . . may conduct their lives free from the fear of crime.”² Additionally, he explained that he preferred to disregard the ICJ’s Order now because doing so later might prove more difficult.³

It is neither surprising nor particularly objectionable that the Governor of a state believes he owes his primary duty to its citizens.⁴ Although the Framers of the Articles of Confederation mistakenly expected state officials voluntarily to subordinate their citizens’ interests to those of the nation as a whole, the Framers of our Constitution clearly understood that state officials would reason as Governor Gilmore did. This was obviously a problem—indeed, it was one of the principal problems with the Articles of Confederation and among the most important reasons the Founders decided to draft a new Constitution. Specifically, state officials (reasoning as Governor Gilmore did) violated treaties that had been entered into by the Continental Congress, and the federal Government could do nothing more about it than supplicate (as Secretary Albright did).⁵ Describing this state of affairs as “imbecili[c]”⁶ and “humiliat[ing],”⁷ the Founders fixed the problem by giving the federal Government the authority to compel states to comply with treaties. First, they declared treaties to be the “supreme Law of the Land” and, as such, enforceable in the federal courts,⁸ which in Article III were given jurisdiction over cases “arising under” treaties.⁹ Second, the President in Article II was given the power and duty to “faithfully execute” federal law,¹⁰ including treaties. Finally, Congress in

¹ Brief for the United States as Amicus Curiae at 51, *Breard v. Greene*, 118 S.Ct. 1352 (1998) (Nos. 97-1390, 97-8214) (the material in brackets appears in the original).

² Commonwealth of Virginia, Office of the Governor, Press Office, Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard at 2 (Apr. 14, 1998).

³ “Should the [ICJ] resolve this matter in Paraguay’s favor, it would be difficult, having delayed the execution so that the [ICJ] could consider the case, to then carry [] out the jury’s sentence despite the rulings [of] the [ICJ].” *Id.*

⁴ *But cf.* Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, *supra* p. 679, 683 (criticizing Gilmore’s decision); Frederic L. Kirgis, *Zschernig v. Miller and the Breard Matter*, *infra* pp. 704, 707–08 (same).

⁵ See generally Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1101–05 (1992).

⁶ THE FEDERALIST NO. 15, at 107 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁷ *Id.* at 106.

⁸ U.S. CONST. ART. VI, cl. 2. See generally Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AJIL 695 (1995).

⁹ U.S. CONST. ART. III, §2, cl. 1.

¹⁰ *Id.*, ART. II, §3.

Article I was given the authority to “provide for calling forth the Militia to enforce the Laws of the Union,”¹¹ including treaties, as well as to “make all Laws which shall be necessary and proper for carrying into execution . . . all . . . Powers vested by this Constitution in the Government of the United States,”¹² including the power to make treaties.

If ICJ orders of provisional measures are binding, they are treaty-based obligations of the United States by virtue of Article I of the Optional Protocol to the Vienna Convention on Consular Relations, pursuant to which the United States submitted to the compulsory jurisdiction of the ICJ, and Article 94(1) of the United Nations Charter, pursuant to which the United States “under[took] to comply with the decision of the [ICJ] in any case in which it is a party.” It is difficult to understand how the administration could have concluded that the only measure at the federal Government’s disposal under such circumstances was to beseech a state Governor to comply with the Order. By hypothesis, the law of the land required compliance with the Order and thus preempted the conflicting state order setting the execution date. The Governor of Virginia and the lower-level state officials responsible for carrying out the execution were accordingly *required* by federal law not to execute Breard on the scheduled date. If those state officials threatened to violate that duty, then state and federal courts with jurisdiction over the subject matter had the authority and indeed the duty to give effect to that treaty-based obligation in preference to any conflicting state law.

To be sure, the administration argued that Paraguay’s Vienna Convention–based claims should be dismissed (*inter alia*) on political question grounds.¹³ But, whatever the merits of this claim,¹⁴ even if accepted it would not establish that the “federal Government” lacked the authority to require the relevant state officials to comply with the supreme law of the land. For even if the treaty-based duty to comply with ICJ orders were judicially unenforceable for political question or similar reasons, there would remain the President’s authority to “take Care that the Laws be faithfully executed” (to say nothing of Congress’s powers). Putting aside the question whether the President had a duty to do something (more) to avert Virginia’s violation of the ICJ Order, surely he had the *power* to do so. If the courts lacked the authority to enforce the ICJ Order, then the President himself could have issued an executive order postponing Breard’s execution.¹⁵ The President has the responsibility and authority to “faithfully execute” even a law that raises “political questions.” Indeed, to say that a law raises political

¹¹ *Id.*, Art. I, §8, cl. 15.

¹² *Id.*, cl. 18.

¹³ Brief of the United States as Amicus Curiae at 15–23, *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770).

¹⁴ A group of law professors submitted a brief disputing the administration’s political question arguments. See Brief Amicus Curiae of a Group of Law Professors, *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770).

¹⁵ If an executive order seemed too dramatic a step, he could perhaps have accomplished his goals through less visible measures, such as a letter to Governor Gilmore demanding that he postpone the execution, buttressed by the threat of a legal action (of the sort Professor Henkin alludes to, *supra* p. 681) in the event of a refusal. Such an approach would perhaps have been more palatable politically, but a letter would have differed from an executive order in form only, and I do not think anything in the constitutional analysis would turn on this difference. If the *Breard* matter did indeed present a political question, then the ICJ Order by itself would not have been directly enforceable in court. A lawsuit by the executive branch would therefore have to have been preceded by a presidential demand that the execution be postponed; the lawsuit would have sought a court order requiring the Governor to comply with the demand of the President, to whom the matter had (by hypothesis) been constitutionally entrusted.

I shall henceforth consider the constitutionality only of an executive order on the theory that, if such an order would be valid, so would less dramatic steps by the President to achieve the same result.

questions is to say that its enforcement has been allocated to a branch other than the judiciary,¹⁶ and in this case that branch would clearly be the Executive.¹⁷

Although it is difficult to defend the claim that the Constitution leaves the decision whether to comply with binding treaty obligations to state Governors, the administration did not regard the ICJ's Order as binding.¹⁸ I will not consider here the merits of the administration's position on this point except to note that it seems strange to regard an order of provisional measures not to be compulsory where, as in *Breard*, (1) the measures were found by the ICJ to be necessary to preserve the rights of the parties pending its resolution of the dispute, and (2) the ICJ's jurisdiction over the dispute was compulsory.¹⁹ Instead, I shall consider whether, assuming the ICJ Order was not binding, there were nevertheless measures at the federal Government's disposal to protect the important foreign policy interests described by the Secretary of State beyond imploring the Governor of Virginia to postpone the execution.

Though the nonbinding quality of the ICJ's "order" gives some plausibility to the administration's profession of powerlessness, in the end its position is unconvincing. It would be strange if the authority of the federal political branches rested on as gossamer a distinction as that between "binding" and "nonbinding" ICJ orders. As a general matter, in international law the consequences of noncompliance with binding norms do not differ nearly as much as they do in domestic law from the consequences of noncompliance with nonbinding norms.²⁰ For a state that claims veto rights in the Security Council, one may question whether the formal consequences of noncompliance with a concededly "binding" final judgment of the ICJ differ at all from the consequences

¹⁶ See, e.g., *Baker v. Carr*, 369 U.S. 186, 211 (1962) (political question doctrine asks "whether a matter has in any measure been committed by the Constitution to another branch of government"). This understanding of the doctrine has become the standard one. See *Nixon v. United States*, 506 U.S. 224 (1993); *Powell v. McCormack*, 395 U.S. 486, 521 (1969).

¹⁷ Thus, if President Clinton had issued an executive order postponing the execution and Governor Gilmore had challenged it, a judge who believed that the ICJ Order raised political questions would dismiss not for lack of jurisdiction, but on the merits. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), in which the plaintiffs' trespass claim turned on whether the defendants were the agents of the lawful government of Rhode Island, which in turn depended on whether that government was "republican" in form under the Guaranty Clause. The Court ruled against the plaintiffs on political question grounds, but by this it meant that "it rests with congress to decide what government is the established one in a State," and Congress had recognized the government of which the defendants were agents as the true government of Rhode Island. *Id.* at 42. If Congress had recognized another government as the true government of Rhode Island, the Court would have been bound by that judgment and would presumably have ruled for the plaintiffs.

¹⁸ The administration argued that the relevant treaties do not give the ICJ the authority to issue binding orders of provisional measures. Although it acknowledged that the commentators were divided on this question, it concluded that the writings of the commentators supporting its position were "better reasoned." Brief for the United States as Amicus Curiae, *supra* note 1, at 49. In its brief to the Supreme Court, the administration also suggested, although it did not press the point, that the ICJ regarded its Order as merely "precatory" because it had merely said that the United States "should" take certain actions. *Id.* at 51. This argument seems strained. *Webster's* defines "should" as "an auxiliary used to express obligation, duty, propriety, necessity." "Should," def. 2(a), *WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY* (2d ed. 1983). Moreover, the inference the administration seeks to draw from the word "should" is in tension, to say the least, with the ICJ's denomination of what it wrote as an "order." See also Henkin, *supra* note 4, p. 680 (ICJ Order was binding).

¹⁹ The administration disputed the ICJ's jurisdiction over the case on the ground that, because the United States had conceded that the Vienna Convention had been violated, there was not in fact a dispute about the meaning of the Vienna Convention. See ICJ, *Verbatim Record of Oral Argument in Case Concerning the Application of the Vienna Convention on Consular Relations (Para. v. U.S.)*, Doc. 98/7, at 42-43 (www.icj-cij.org). Paraguay countered that there was a dispute about whether the Convention required that Breard's death sentence be vacated. *Id.*, Doc. 98/8, at 6-10. In any event, Article 36(6) of the Statute of the ICJ provides that, "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." The binding quality of the Order accordingly does not turn on one party's views about whether the Court possessed jurisdiction.

²⁰ See Vázquez, *supra* note 8, at 713.

of noncompliance with a (hypothetically) nonbinding order.²¹ Moreover, the nonmandatory nature of a treaty provision is often cited as a reason for finding the provision to be non-self-executing,²² and a non-self-executing treaty is typically *defined* as a treaty whose enforcement has been entrusted to the federal political branches rather than the courts.²³ That the power of the federal political branches to enforce a treaty does not in fact turn on whether its provisions are mandatory is shown by the Supreme Court's decision in *Missouri v. Holland*.²⁴ The Court there upheld a statute regulating the hunting of migratory birds as an implementation of a treaty, even though similar statutes had previously been struck down as exceeding the legislative powers of Congress and the Court assumed in its analysis that the statute would have been invalid for this reason in the absence of the treaty.²⁵ What is important for present purposes is that, according to the Court, the treaty did not, strictly speaking, *require* the United States to enact the legislation Congress enacted; it only required the United States to "propose" such legislation to Congress.²⁶ Yet the Court found that Congress had the authority under the Constitution to enact the contemplated legislation.

It is true that the Supreme Court has in recent years been taking federalism-based limitations on congressional authority more seriously than it has at any time since the New Deal.²⁷ But the Clinton administration has been resisting this trend, not encouraging it. It would be ironic if the one area in which the administration were to champion such a trend were that of foreign affairs and treaty implementation. After all, *Missouri v. Holland* was decided at a time when the Court was still striking down commercial statutes as violations of the Commerce Clause. Since congressional authority regarding foreign affairs and treaty enforcement has long been thought to be far less vulnerable to federalism-based challenges than domestic legislation, it would be odd if this were the one area in which the administration believed that the states' constitutional prerogatives limited the Congress.²⁸

²¹ UN CHARTER Arts. 27, 94; ICJ STATUTE, June 26, 1945, Art. 58, 59 Stat. 1055, TS No. 993. The Clinton administration conceded in its brief to the Supreme Court that final decisions of the ICJ are binding under Article 94(1) of the UN Charter. Brief for the United States as Amicus Curiae, *supra* note 1, at 50. Yet, even though the ICJ decided in the *Nicaragua* case that "the United States had violated customary international law and [a treaty] by a number of acts," BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 329 (2d ed. 1995), and indicated that the United States was "under a duty immediately to cease and to refrain from all such acts," Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 146–49, para. 292 (June 27), the United States "veto[ed] a Security Council resolution calling upon it to comply," Richard B. Bilder, *The United States and the World Court in the Post-"Cold War" Era*, 40 CATH. U. L. REV. 251, 255 (1991) (citing United Nations Security Council: Excerpts from Verbatim Records Discussing I.C.J. Judgment in *Nicaragua v. United States*, 25 ILM 1337, 1352, 1363 (1986)), "ignor[ed] . . . [the ICJ's] final Order," Detlev F. Vagts, *Taking Treaties Less Seriously*, 92 AJIL 458, 461 (1998), and "took no steps to change its activities in Central America," CARTER & TRIMBLE, *supra*, at 329.

I am not suggesting that "bindingness" always or necessarily turns on the availability of effective enforcement mechanisms. In international law, it assuredly does not. My point is that the international law distinction between what is binding and what falls short of bindingness is too elusive a basis for a constitutional judgment about the allocation of power between the federal and state governments.

²² See generally Vázquez, *supra* note 8, at 712–13 (citing cases). I am using the terms "binding" and "mandatory" interchangeably, as apparently the Solicitor General was. See Brief for the United States as Amicus Curiae, *supra* note 1, at 51 (order is not binding if the parties not "required to heed" it).

²³ See Vázquez, *supra* note 8, at 695–96 (citing authorities). See also Lori Fisler Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, *infra* p. 697, 698.

²⁴ 252 U.S. 416 (1920).

²⁵ *Id.* at 434.

²⁶ *Id.* at 431.

²⁷ See *Printz v. United States*, 117 S.Ct. 2365 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995).

²⁸ Professors Bradley and Goldsmith write in this *Agora* that "[t]here may be some instances . . . in which the federal political branches will lack the authority to override state law, even pursuant to a treaty." Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, *supra* p. 675, 677

In any event, arguments made by the administration in this and other recent cases strongly suggest that it does not think that there are significant federalism-based constitutional limits on congressional authority in this area. For example, at an earlier stage of the *Breard* litigation, the administration advanced the rather bold argument that the Eleventh Amendment is inapplicable in the foreign affairs area,²⁹ an argument the lower court rejected.³⁰ It is thus likely that the administration misspoke when it said the federal Government as a whole lacked the authority to require compliance with the ICJ Order. It probably meant to maintain only that the executive and judicial branches lacked such authority.

If the administration was making a statement about the horizontal allocation of powers among the branches of the federal Government, its argument is in some respects refreshing. Practically from the beginning of our history, the executive branch has claimed ever-broader inherent powers in the area of foreign affairs at the expense of both the legislative and the judicial branches. Even where the constitutional text appears to allocate responsibility to Congress, the President has made broad claims of independent authority based on his unenumerated "foreign affairs" power. Most relevantly, the President has long claimed (and the courts have conceded him) the authority to act independently to protect U.S. citizens abroad, even when the actions taken brush up against Congress's power to declare war.³¹ Though it is laudable that the President is now taking seriously the constraints the Constitution places on his authority even in the realm of foreign affairs (if that is what he is doing), it is surprising that he would disclaim the authority to protect U.S. citizens abroad through actions that do not implicate powers

n.18. *But see* Henkin, *supra* note 4, pp. 682–83. Be that as it may, no one maintains that regulation of the treatment of aliens is beyond the treaty-making power, even if that regulation "interferes with" the freedom of states to enforce their criminal laws. It is common for treaties to "interfere with" the freedom of the states parties to enforce their criminal laws against nationals of the other states parties. *Cf. Italy Dismisses Ski Case*, N.Y. TIMES, July 14, 1998, at A4 (reporting that an Italian court had dismissed criminal cases against Americans, ruling that "Italian courts lacked jurisdiction under a NATO treaty").

²⁹ *See* Brief of the United States as Amicus Curiae, *supra* note 13, at 30–32. In other cases, the administration has advanced the somewhat more limited argument that the 11th Amendment does not restrict Congress's exercise of the War Power. *See* Brief of the United States as Intervenor at *5–15, *Velasquez v. Frapwell*, No. IP 96–0557–C H/G, 1998 U.S. Dist. LEXIS 1344 (S.D. Ind. Feb. 6, 1998); Brief of the United States as Intervenor-Appellant at 6–17, *Velasquez v. Frapwell*, Nos. 98-1547, 98-2034 (7th Cir. Feb. 26, 1998); Brief of the United States as Intervenor at 6–17, *Palmatier v. Michigan Dept. of State Police*, No. 97-1982 (6th Cir. Dec. 15, 1997); Reply Brief for the United States as Intervenor at 2–5, *Palmatier v. Michigan Dept. of State Police*, No. 97-1982 (6th Cir. Feb. 18, 1998). One court adopted that position shortly after the Court decided in *Seminole Tribe* that Congress does not have the authority to abrogate 11th Amendment immunity under the Commerce Power, *see* *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 616 (1st Cir. 1996), but the district courts in *Velasquez* and *Palmatier* rejected the argument.

³⁰ The court in *Republic of Paraguay v. Allen* affirmed the district court's dismissal on 11th Amendment grounds, 134 F.3d 622, 629 (4th Cir.), *cert. denied*, 118 S.Ct. 1352 (1998), and the Supreme Court expressed agreement with this disposition of the case. The Supreme Court's 11th Amendment decisions draw a distinction between suits against state officials seeking retrospective relief such as damages, which are barred by the 11th Amendment, and suits against state officials seeking prospective relief from a continuing or threatened violation of federal law, which are permitted under the *Ex parte Young* exception. Paraguay claimed that its suit fell within the *Ex parte Young* exception because it was seeking to prevent a future violation of federal law (i.e., the enforcement of an illegal death sentence), but the lower courts found that Paraguay was seeking retrospective relief because it was complaining of a past violation of the Vienna Convention (i.e., the failure to inform Breard of his right to consult with his consul). The Ninth Circuit reached the same decision in a similar case. *United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1517 (1998). In another article, I take issue with these 11th Amendment holdings, which if followed would call into question all habeas corpus jurisprudence. *See* Carlos Manuel Vázquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1 (1998). In his brief to the Supreme Court, the Solicitor General pointedly declined to endorse the lower courts' 11th Amendment holdings. *See* Brief for the United States as Amicus Curiae, *supra* note 1, at 15–16.

³¹ *See*, e.g., the oft-cited (by Presidents) opinion of Justice Nelson on circuit in *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186).

that the Constitution explicitly reposes in another branch of the federal Government.³² It was not that long ago that President Clinton relied at least in part on the need to protect U.S. citizens abroad in defending his decision to launch a military intervention in Haiti in the face of congressional opposition and without even a plausible claim that the threat to U.S. citizens there amounted to any sort of emergency.³³

Far be it from me to criticize the administration for acting on constitutional principle even though, had the President issued an executive order postponing the execution, he would likely have “gotten away with” protecting the important national interests the Secretary of State enumerated.³⁴ I do think, however, that the administration construed its authority unduly narrowly. An executive order postponing the execution of Angel Breard would have fallen, in my view, well within a fair, even modest, understanding of the President’s authority to execute treaties, combined with his foreign affairs power. As already noted, the distinction between binding and nonbinding international orders seems too flimsy to support a judgment about the constitutional allocation of the authority to execute treaties. Just as a nonmandatory treaty can ground congressional action in an area otherwise reserved to the states, so may treaties validly delegate authority to the President to take action he would not otherwise have been empowered to take, even if they do not *require* the President to take the action.³⁵ Even if we assumed that ICJ orders of provisional measures were nonbinding, it would be reasonable to conclude that the UN Charter, in conjunction with the Statute of the ICJ,³⁶ delegates authority to the President to take action to comply if he believes it is in the national interest to do so. As noted, Congress has the authority to require compliance with such nonbinding orders. But provisional measures by their nature must often be taken quickly to preserve the *status quo pendente lite*. It is accordingly reasonable to hold that a treaty that authorizes the ordering of nonmandatory provisional measures leaves the decision whether to comply with such orders to the Executive, the only political branch that can act with expedition.³⁷

³² It might perhaps be argued that the President’s authority to protect U.S. citizens abroad through military action stands on a firmer constitutional footing than his authority to protect U.S. citizens abroad by taking the steps the ICJ ordered, because in the former context his authority rests on an explicit constitutional provision—the Commander-in-Chief Clause. But, at best, this clause merely counterbalances the explicit constitutional limitation found in the War Powers Clause. In any event, only rather recently have Presidents begun to rely on the Commander-in-Chief Clause as the source of their authority to protect U.S. citizens abroad. For most of our history, the President’s authority in this regard was thought to derive from the “Take Care” Clause. *See Durand*, 8 F. Cas. at 112; *In re Neagle*, 135 U.S. 1, 63–66 (1890).

³³ *See, e.g., Clinton to Discuss Haiti on TV*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 14, 1994, at A1; *Why Invade Haiti? U.S. Builds Case, Clinton Wary of Public Opposition*, STATE J.-REG. (Springfield, Ill.), July 15, 1994, at 1.

³⁴ I doubt that the state officials charged with executing Breard would have disregarded an executive order postponing the execution. They may have complied without challenging it. Had they (or the Governor) challenged the order in court, the delay in resolving the dispute would effectively have resulted in the postponement of the execution.

³⁵ For example, treaties can give the President the authority to enter into executive agreements he would not otherwise have the authority to conclude without Senate consent, even if the treaty does not *require* the President to conclude any particular agreement, or any agreement at all, or even to negotiate one. *See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* §303 cmt. *f* (1987) (“An executive agreement may be made by the President pursuant to a treaty when the executive agreement can fairly be seen as implementing the treaty, especially if the treaty contemplated implementation by international agreement.”).

³⁶ Article 93 of the UN Charter provides that “[a]ll members of the United Nations are *ipso facto* parties to the Statute of the [ICJ],” and Article 41(1) of the ICJ Statute, *supra* note 21, gives the ICJ the power to indicate provisional measures.

³⁷ A treaty that gives the ICJ the power to *urge* (rather than *require*) the parties to take action by way of provisional measures presupposes that some official or group of officials of the states parties has the authority to decide whether to take the action. Identifying the relevant officials in the United States is a matter of domestic law. We have seen that Congress and the President (through legislation) have the power to compel the states to take action urged by the ICJ. But, because of the nature of provisional measures, the decision

There is, indeed, precedent that would support the President's authority to act to protect U.S. interests abroad in an emergency even when the President does not purport to be executing a treaty. *Dames & Moore v. Regan*³⁸ employed a context-sensitive, all-things-considered approach to adjudicate the validity of exercises of the President's emergency foreign affairs power. Admittedly, some of the factors supporting the actions upheld in that case are not present here.³⁹ But factors not present in that case would have supported a decision by President Clinton to issue an executive order postponing Breard's execution, most importantly the plausible claim that the UN Charter delegated him the authority to do so and the fact that the Order would have been in anticipation of a concededly binding final decision of the ICJ. At the very least, the *Dames & Moore* analysis would have supported an executive order postponing the execution for a period no longer than necessary to give Congress the opportunity to give the matter adequate consideration.

If there were merit to the claim that our Constitution and statutes, as they currently exist, leave the final decision about whether or not to comply with ICJ orders of provisional measures to state Governors, then we should all be able to agree that our Constitution and statutes are deficient in this regard, for reasons well stated by our Founders. As already explained, solving the problem would not require a constitutional amendment: a simple statute would do. If the administration believed its own argument, we would expect it to be urging Congress to enact a statute giving it the authority to execute ICJ orders of provisional measures. Perhaps it will soon do so. If it does not, we will have reason to surmise that the arguments it made to the Supreme Court did not reflect its considered constitutional judgments but, instead, were short-term and not well-thought-out litigation maneuvers—that, far from acting on constitutional principle, the administration advanced ill-founded constitutional arguments to disguise a purely political decision. A cynic might suggest that the decision not to postpone the execution, or even support Paraguay's request that the Supreme Court do so, was motivated by fear of being portrayed as soft on crime or as abdicating national sovereignty. If so, the attempt to foist on Governor Gilmore the political costs of protecting the nation's foreign policy interests was not only legally unfounded and doomed to failure, but also highly inappropriate, for the Constitution places the responsibility for making such decisions, and taking the necessary heat, on the federal Government. We can only speculate about the true reasons for the administration's decision to take the position it did, but I would not be astounded if the profession of a lack of constitutional power was disingenuous. Of course, candor is not always advisable in the diplomatic realm, and dissemblance in this case could conceivably have been defended as necessary to reduce the danger to U.S. citizens abroad that concerned the Secretary of State. But taking ill-founded and

whether to take the relevant actions will often have to be made quickly. Since legislating takes time, it is reasonable to interpret the pertinent treaty to delegate the decision to the President.

³⁸ 453 U.S. 654 (1981).

³⁹ In particular, there had been a long history of congressional acquiescence in executive claims settlement. 453 U.S. at 681. Some have suggested that presidential action to postpone Breard's execution would have contravened the Antiterrorism and Effective Death Penalty Act. But the antiterrorism law limits the power of federal courts to entertain habeas corpus petitions by persons in custody in violation of federal law who have failed to raise their federal claim in state courts in accordance with state procedures. This law does not purport to limit the federal courts' jurisdiction over Paraguay's claim based on the Vienna Convention, and the Supreme Court did not rely on it in denying Paraguay's petitions. It is even less plausible to claim that the statute limits the federal courts' jurisdiction in claims by foreign states seeking to enforce ICJ judgments involving death sentences. Finally, even if the law did reflect a congressional decision to deny the courts jurisdiction over such claims, it would not reflect a decision to deny the *executive branch* the power to take action contemplated by an ICJ order. Indeed, such a (hypothetical) congressional judgment could as easily reflect the view that this power properly resides in the President rather than the courts.

insincere constitutional positions in litigation is a strategy that can come back to haunt a President or his successors. In any event, the readers of this *Journal* should not be misled: our Constitution does not leave the decision whether to comply with ICJ orders, be they technically “binding” or not, to state Governors. If the courts lacked the authority to require the states to comply (as the administration argued), then the President had the authority. Either he mistakenly (and uncharacteristically) thought that he lacked it or he declined to use it for reasons he preferred not to disclose.⁴⁰

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