Article VI vs. International Law ?

You are subscribed. Unsubscribe

No tags yet. + Add Tag

Sort replies by: Oldest first Newest first Most popular

Luis Manuel Xavier de Castro · 2 months ago

How do we understand Article VI (supremacy of The Constitution) when confronted with International Law and Treaties? Does the Constitution maintains its supremacy even when International Imperative Norms apply?

1 · flag

Joel Kovarsky · 2 months ago

This point has been under discussion for a while. There are those legal scholars who do defend the supremacy of US law and its constitution relative to international agreements, treaties, and organizations: http://www.foreignaffairs.com/articles/137541/julian-kujohn-yoo/taming-globalization-international-l... . It is no surprise that this would be a contentious arena, at least for some: http://www.fas.org/sgp/crs/misc/RL32528.pdf .

4 · flag

Joe Caro · 2 months ago

Luis poses a good question. I have to get clarification as to what he means, however, by the term international law and treaties. If by that he means law and treaties duly approved by a constitutional process, then yes, the U.S. has agreed to abide by the terms.

There are international laws established by OTHERS as well as treaties that do NOT have the imprimatur of having followed the constitutional process of approval and therefore I would argue that the U.S had NO OBLIGATION with respect to them.

Take the recent example of the Kyoto accords that the U.S is NOT a party to because the Senate did not ratify nor the President sign it thus the U.S. has no requirement to follow it.

Joel is correct that this is a contentions area for SOME, but lets face it, the process is very clear. The contention might be as to WHETHER the treaty should be ratified, but if not there is not any basis for the debate to go on other than to try to persuade ratification. Without

ratification i believe we have NO OBLIGATION towards it in a legal sense.

↑ 1 ↓ · flag

 Luis Manuel Xavier de Castro · 2 months ago

I believe that further clarification regarding my initial question is in order to fully understand to what extent International Laws or Treaties might supercede 'The Constitution' (USA). For that purpose I suggest the viewing of of the following definition of key terms regarding international treaties with particular emphasis to the extract I reproduce below from the same source:

"Signature: 'Signature' of a treaty is an act by which a State provides a preliminary endorsement of the instrument. Signing does not create a binding legal obligation but does demonstrate the State's intent to examine the treaty domestically and consider ratifying it. **While signing does not commit a State to ratification, it does oblige the State to refrain from acts that would defeat or undermine the treaty's objective and purpose.**"

I particularly call your attention to the bold part I have highlighted especially **'....it does oblige the state to refrain from acts.....'**

I 'read' the specific above part as signaling an effective supremacy of international law over the 'Constitution'.

Furthermore, I would like you (dear fellow students of this course) to consider a more specific case, regarding the meaning of the term '**ius congens**' and its implications in current society.

Under your evaluation please consider the information provided in the Wikipedia link considering 'imperative norms' (ius congens) and the specific case of Michael Domingues vs United States:

"...The case of Michael Domingues v. United States provides an example of an international body's opinion that a particular norm is of a jus cogens nature. Michael Domingues had been convicted and sentenced to death in Nevada, United States for two murders committed when he was 16 years old. Domingues brought the case in front of the Inter-American Commission of Human Rights which delivered a non-legally binding report. The United States argued that there was no jus cogens norm that "establishes eighteen years as the minimum age at which an offender can receive a sentence of death". The Commission concluded that there was a "jus cogens norm not to impose capital punishment on individuals who committed their crimes when they had not yet reached 18 years of age." The United States has subsequently banned the execution of juvenile offenders. Although not necessarily in response to the above non-binding report, the Supreme Court cited evolving international norms as one of the reasons for the ban (Roper v. Simmons)....."

Your particular attention should be directed at the following ***" .....the Supreme Court cited evolving international norms as one of the reasons for the ban (Roper v. Simmons)....."***

What do you think? Thanks

P.S. Further reading might include the following article.

3 · flag

Joe Caro · 2 months ago

Luis, I suggest the highlighed comments have NO basis in law for the US. The country is under absolutely no legal requirement viv a vis unless the treaty is ratified constitutionally. Otherwise all you have is the executives sense of the issue which has no basis in law. But it may make someone feel better.

0 · flag

 Luis Manuel Xavier de Castro · 2 months ago

Hi Joe, just saying that the highlighted comments have NO basis in law for the US is not sufficient, nor the statement "... the country is under no absolutely legal requirement vis a vis unless the treaty is rectified constitutionally...", you would have to elaborate further.

Here is my reasoning:

1) Under the Constitution, the Federal Government at its core institutions (in Legislature, Executive and Judicial levels, under articles I through III, respectively) received a mandate from the 'People' that they can not under no circumstance derogate. This means that these institutions ultimately must abide and protect the constitution at all cost. Therefore, an individual act by one branch must be sanctioned (positively or negatively) by the others. Meaning that if the 'Executive' branch (or any other branch) acts in anyway against said imperative maxima (norm) ,which is the protection of the constitution, a position is required in its defense by the other branches of the federal government (namely the Legislature - Congress and/or the Judiciary - Supreme Court) . Silence or the absence of a position is not permitted simply because it would not constitute a defense of the constitution. The defense of the constitution is absolute.

When the Executive branch (under the Presidency) signs an international treaty (please refer to the meaning and implications that signature represents), namely **"....While signing does not commit a State to ratification, it does oblige the State to refrain from acts that would defeat or undermine the treaty's objective and purpose."**, the executive branch is accepting that it is obliged to refrain from certain acts under the international norm, therefore surrendering and confirming power to an external instrument. My view is that that act per si is an acceptance of the international law and its imperative over the constitution when it clearly says that "....it does oblige the State to refrain from acts that would defeat or undermine the treaty's objective and purpose."

The Congress and/or the Supreme Court (whenever it is permitted to do so) under their supervision powers must decide positively or negatively on such act. Meaning that they must endorse it (i.e. through ratification, in Congress) or repudiate it (i.e. by rejecting ratification or by passing a new law according to the spirit of the constitution with restrictive conditions for such acts). Silence or absence of action by their part when required is not an option under the constitution and under the principal of no derogatory functions.

Silence or absence of action, when required, mean simply the acceptance of the terms. In this case the precedence of International Law over the Constitution.

2) Should one choose to accept the opposite (precedence of the Constitution over International Law), although tempting, one might be putting at risk all the things that the Constitution chooses to protect in first place. Freedom and Welfare are concepts that are not exclusive of the US Constitution. Other models exist. Choosing to ignore all of them might prove to be more threatening for the "People" than embracing them.

What is it, at the end of the day, that the US Constitution has that other democratic constitutions around world, probably even more innovative now, don't have? Nothing, I say.

0 · flag

 Anthony Gary Brown Signature Track · 2 months ago

Luis, I think your arguments a) confuse "Treaties" and "International Law / Norms", and b) your argument is in any case rather circular.

Treaties, lawfully signed, ratified and (to the extent necessary) enacted domestically become the law of the US. Your rationale for the signing of a Treaty having some - admittedly temporary - legal force within the US, until ratified or rejected, is based on the wording of the Vienna Convention on the Law of Treaties of 1970. That's the *whole* of the basis of its force, derived from a Treaty (not some notion of extra-Treaty "International Law" that binds nations, "like it or not"). But *that Treaty* was never ratified by the US Senate, so it has no force in US law whatever (though the US does voluntarily abide by many of its technical provisions). The specific reason for non-ratification was and is that The Conventions claim, to some degree, to supersede domestic laws, something that Congress has never accepted in principle. (As you know, many nations simply reject that *in practice*, even if they have signed up....)

Thus your "*[signing] does oblige the State to refrain from acts that would defeat or undermine the treaty's objective and purpose*" (in the Vienna Convention Treaty, and oft repeated in the wording of subsequent Treaties) cannot bind those who never agreed to be bound by it in the first place. Which the US never did. And thus "International Law" (as agreed in a Treaty) cannot have precedence, even temporary, over US Law unless *fully* ratified and enacted in the US. And in any case, it's a highly moot point whether a Treaty obligation, passed into US law, can trump the Constitution itself.

In Roper v Simmons, Justice Kennedy did indeed have regard to "international norms", but neither he or the majority decided the case on that point. And, as Scalia said in dissent, proponents of "international norms" being incorporated into US law tend to cherry-pick, looking not to all norms, but to those norms they happen to like.

Furthermore, I'm sure you'll know there is a great deal of jurisprudence (court and academic) on what exactly is and is not encompassed by the phrase *a Treaty's objective and purpose* (in the un-ratified Vienna Convention). It's a very strong view of the jurisprudence to assert that it

means that every detailed provision of a Treaty shall be followed until such time as it's ratified or not. Most practice is to give a very much lesser accord to the Treaty "obligations" until full ratification and domestic enactment. (see, eg: this article)

Gary B.

↑ 1 ↓ · flag

Doug Karo · 2 months ago

In ***Roper v. Simmons*** I think it is only fair to note in the 5-4 decision in 2005, the clear statements in the decision to the effect that international opinion is not controlling, and a vehement dissent (joined by the Chief Justice) about even noting international opinion when deciding a case. Until this case, the United States was said to be the only country that officially executed people for crimes committed while juveniles, a proposition thought to be constitutional until this decision. I doubt the respect for international standards has increased in the current court, but I think it will some day.

↑ 0 ↓ · flag

 Luis Manuel Xavier de Castro · 2 months ago

Hi Anthony, there is no confusion between 'treaties' and/or 'international law' and/or 'imperative norms'. 'Treaties' are binding instruments between the signatories and source for International Law after they enter into force. Revise the following definition of a treaty:

"Treaty: A 'treaty' is a formally concluded and ratified agreement between States. The term is used generically to refer to instruments binding at international law, concluded between international entities (States or organizations). Under the Vienna Conventions on the Law of Treaties, a treaty must be (1) a binding instrument, which means that the contracting parties intended to create legal rights and duties; (2) concluded by states or international organizations with treaty-making power; (3) **governed by international law** and (4) in writing."

Therefore, for the purpose of this debate it would be irrelevant to even raise the subject, because when the US signs and ratifies a treaty it will be automatically governed by international law and not the US Constitution. It would be irrelevant in this context, in case of a conflict of interests to evoke the US Constitution because the governing law is International. If the US (Federal Government) accepts this fact is a different matter altogether....

One could also argue that the key principles that govern international treaties emanate from international organizations, namely the United Nations which incorporates in its constitution charter many of said principles (or rights) and as long as the US and other countries are members of said organizations are constitutionally obliged to respect and promote said organizations constitutional rights regardless of whether they have ratified a particular treaty or not. In practice this means that a non ratification of a treaty allows only the said state not to

incorporate the exact wording of said treaty into their legal system but does not exclude the said state from being obliged and respect and promote the key principals or rights stated, if those are part of a core foundational purpose of the organization of which that state is a member.

It would seem, at least, strange for the US to be member of an organization and not accept its core fundamental principles..... even if it does not agree with the specific wording of any particular treaty.

For me, this is one of the reasons why the Supreme Court has chosen by majority of votes to recognize and reproduce, correctly in my view, the powerful impact of international law. At the end, it is irrelevant if there was any dissents.

↑ 0 ↓ · flag

 Anthony Gary Brown Signature Track · 2 months ago

Luis: you keep referring to the *Vienna Convention on the Law of Treaties* as your source for definitions and rules. That Treaty was never ratified by the USA. So no-one entering into a subsequent Treaty with the USA - not the USA' s own negotiators, not the Treaty partners, not International bodies, not the President, not the Congress - can possibly think that the USA is bound by the terms of a *controlling treaty* that it never ratified.

You also seem to be arguing that a ratified Treaty's law trumps the Constitution. That's not a relevant consideration when we are talking about *unratified* Treaties, such as the ones you keep raising. Your argument that UN membership was a voluntary and binding agreement that *all* future treaties will fully bind all members, whether they ratify them or not (or maybe even, following your logic, whether they sign them or not, or even are part of a negotiation....) is innovative, and I would suggest has little real support amongst the member states.

You seem to think that in Roper v Simmons a binding part of the majority view was that "International Law" has some role in the USA *per se*. But that's not a binding part of the majority decision at all - it was a (controversial) *obita* by Justice Stevens.

In any case, the US Constitution makes clear that no Treaty can become part of the *Supreme Law of the Land* unless it's *made* according to US law, and such Treaties are only effectively *made* (*per* the Constitution) when signed by the President *and* ratified by the Senate.

Gary B.

↑ 1 ↓ · flag

Joel Kovarsky · 2 months ago

You can also look at the US State Depts. short statement regarding the Vienna Convention on the Law of Treaties: http://www.state.gov/s/l/treaty/faqs/70139.htm :

"**Is the United States a party to the Vienna Convention on the Law of Treaties?**
No. The United States signed the treaty on April 24, 1970. The U.S. Senate has not given its advice and consent to the treaty. The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties."

It is possible to think that the US means this--that the Convention is customary international law, but we are not a party to it. That does create quite a bit of room for discussion, but is clearcut that we are not a consenting party.

But as seen in this board, the discussions about what we should do remain contentious, as can be seen in this 2011 essay by Lea Brilmayer & Isaias Yemane Tesfalidet in *The Yale Law Journal*: http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/international-law/treaty-denunciation... . Their essay was written as a rebuttal to an earlier article by Bradley and Gulati in the 2010 journal: http://www.yalelawjournal.org/the-yale-law-journal/article/withdrawing-from-international-custom/ . The summary of that latter article:

"Treaties are negotiated, usually written down, and often subject to cumbersome domestic ratification processes. Nonetheless, nations often have the right to withdraw unilaterally from them. By contrast, the conventional wisdom is that nations never have the legal right to withdraw unilaterally from the unwritten rules of customary international law (CIL), a proposition that we refer to as the “Mandatory View.” It is not obvious, however, why it should be easier to exit from treaties than from CIL, especially given the significant overlap that exists today between the regulatory coverage of treaties and CIL, as well as the frequent use of treaties as evidence of CIL. In this Article, we consider both the intellectual history and functional desirability of the Mandatory View. We find that a number of international law publicists of the eighteenth and nineteenth centuries thought that CIL rules were sometimes subject to unilateral withdrawal, at least if a nation gave notice about its intent. We also find that the Mandatory View did not come to dominate international law commentary until sometime in the twentieth century, and, even then, there were significant uncertainties about how the Mandatory View would work in practice. Moreover, we note that there are reasons to question the normative underpinnings of the shift to the Mandatory View, in that it may have been part of an effort to bind “uncivilized” states to the international law worked out by a small group of Western powers. After reviewing this history, we draw on theories developed with respect to contract law, corporate law, voting rules, and constitutional design to consider whether it is functionally desirable to restrict opt-out rights to the extent envisioned by the Mandatory View. We conclude that, although there are arguments for restricting opt-out in select areas of CIL, it is difficult to justify the Mandatory View as a general account of how CIL should operate."

↑ 0 ↓ · flag

 Anthony Gary Brown Signature Track · 2 months ago

Joel - thanks for that. It's what I was alluding to when I opined that Luis was conflating *law derived from Treaties* and *International Law*. The latter - the *Mandatory View of Customary International Law* - purports to exist more-or-less independently of what sovereign states have

fully agreed in equal-party Treaties.

Whilst I - or anyone else - might find some of the "norms" of *CIL* quite attractive (perhaps even core to our moral identity), I'm far from convinced that *We The People* (understood even globally) ever agreed to them by something resembling a democratic process. That is, my claim - if I make one - that *other folks* must abide by my principles is essentially a moral one, not a legal one.

Or, of course, I can enforce my principles (or submit to someone else's) by virtue of the barrel of a gun..... Me, I prefer diplomacy and careful agreement.

Gary B.

0 · flag

 Luis Manuel Xavier de Castro · 2 months ago

So, in your opinion even the treaties that were signed and ratified could never be 'treaties' per si, because the US never ratified the convention that establishes the treaties in the first place?!!!!! So if they are not treaties what are they? The US constitution clearly says as you pointed out that "...This Constitution, and 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...".

I am not saying that a ratified treaty trumps the Constitution, what I am saying is that a ratified treaty will ultimately find its source of law not in the constitution but in international law because the parties are external entities to the US. The US constitution is only "by the people for the people" not for others. Even in the initial frame of building up the constitution the founding members chose to interpret a treaty as a bounding agreement between two parties, which in case of dispute would redeem a solution for an alternative instrument than the mere individual state constitutions. Without that frame 'the people' would not have a constitution at all.

Regarding, unratified international treaties, because the other parties are not bound by the US constitution, the US, if in good faith, must find a common ground for debate. Such debate is actually a mission that the federal government must engage under the constitution because is the source for ultimately achieving and fulfill the People's mandate. Whether the international definitions are right or wrong is irrelevant as this never represented a reason evoked by the US, therefore it is only fair to assume that if such fundamental international treaties definitions were wrong (against the constitution) the federal government would have already dismissed them, which is not the case.

Regarding the 'Simmons' case I think it is relevant indeed because 5 said yes and 4 said no. 5 judges concurred with Justice Stevens and followed his reasoning. The others that said no, and in this case 2 followed Justice Scalia dissent with exception of Justice O'Connor who wrote her own. So even in the dissents there was 2 different views. The reference to international law by the rendered opinion of the majority of judges, incorporates relevance to

international law (otherwise it should not be there in the first place), in the constitutional agenda because of the binding decision. If it was not the case there would be no reason for Justice Scalia to mentioned it in his dissent.

Regarding your last paragraph are we to assume that the US Supreme Court when renders a majority opinion it is not constitutionally biding because there is not such explicit reference to it in the US Constitution ?

↑ 0 ↓ · flag

 Anthony Gary Brown Signature Track · 2 months ago

Luis - you wrote:

So, in your opinion even the treaties that were signed and ratified could never be 'treaties' per si, because the US never ratified the convention that establishes the treaties in the first place?!!!!!

No. I'm saying that you are consistently invoking a controlling principle that "*[signing] does oblige the State to refrain from acts that would defeat or undermine the treaty's objective and purpose*" - but that "controlling principle" comes from a 1970 Treaty that the US did not ratify. So, for the US, it has no effect. I'm guessing that you think the obligation really derives from some "higher authority", regardless of whether anyone specifically agreed it or not. That's where we part company.

You say that the US government has never disputed these internationally-agreed definitions. But the US Senate refused to ratify the 1970 Treaty precisely because it felt that too many of its provisions and definitions were in conflict with US law. And the US regularly refuses to ratify wide-ranging Treaties that claim, implicitly or explicitly, to establish over-arching law or definitions that may impact domestic US law. The US doesn't suggest that those other countries that do ratify - by whatever means that are locally legal - are not bound by the Treaty (that's up to them); and the US often does voluntarily comply with the truly international parts of such treaties. (The US usually does sign, ratify and comply with limited-party treaties that may require lawful alterations in domestic codes).

I think we may have to agree to disagree about Simmons. Under a Common Law system, not everything in a majority judgement is binding precedent *per se*, and in my view Stevens' remarks are classic *obita*. Neither he nor his concurring colleagues decided the case on that point. And nor did Scalia say that they had.

I'm not sure I follow your final point. The Constitution is not, and need not be, explicit on everything: no, not at all. In this case, the Constitution allows Congress to set up a legal system, which it did. The impact of SC decisions - whether straight majority or something more subtle - can be a tad difficult sometimes to figure out, but few folk deny them "Constitutional validity"; at least until they're reversed!. Though of course, the proper extent of "judicial review" is hotly debated (as Prof. Amar outlined a few weeks ago).

Good discussion.

Gary B.

0 · flag

Joe Caro · 2 months ago

Gary I think your reasoned and facts based arguments are an excellent explanation of our constitutional form of government.

This was an excellent line of discussion, in my opinion in light of its civility and opportunity to address the positions on this issue. What is important, in the end, is that constitutional principles prevail and such discussuions allow those of us who believ this make us think more about such principles and not take them for granted.

0 · flag

 Anthony Gary Brown Signature Track · 2 months ago

Why thank you, Joe! I'm enjoying the company (well, most of it....) on this course.

Now back to the tax returns.....

Gary B.

0 · flag

 Luis Manuel Xavier de Castro · 2 months ago

Hi again

1) The controlling principal arises because when any country decides to sign a treaty it is expected that does so in good faith and not work against it. When you negotiate you negotiate in good faith. That is the only mandatory imposition upon signature. Should a country not wish to negotiate in good faith or finds 'a priori' that the terms of such treaty unconceivable with its own standards, then better not sign at all. The "controlling principle" does not arise here from the Vienna convention but from the intermediary or proposing party (i.e. The UN or any other proposing Organization). Signing a treaty signals the other parties ones intention to adopt the principals of the treaty but not to be bound by it. Intention to adopt the principals means that reasonable effort was made to find the treaty acceptable.

2) The convention just reaffirms and expands on those particular definitions.

3) The definitions don't derive from a 'higher authority' like you put it but rather from 'good old common sense' (refer to the initial elaboration of the US constitutional frame).

4) '...not everything in the majority is binding...' you say. I ask, is that the case in here (Simmons)?

5) '...in my view Steven's remarks are classic obita...', fair enough, it is your view but Steven's never used them as remarks but rather as a statement/fact and he was not alone in this view. Scalia did say that and others too.

6) If the constitution is not as clear as you say regarding some issues, and I agree with you on that, is it possible for one to affirm with certainty that the current view about this issue is simply to be ignored? Especially in a more Global World? What if the purposes and interest of the 'People' could also be protected, at least in some cases outside that reductive mentality?

In conclusion, and what I am afraid at the end is that someday everybody starts to think like the US legislature and finds that their Constitutions are not to be 'ignored' as well.

Thanks for the debate.....

↑ 0 ↓ · flag

 Anthony Gary Brown Signature Track · 2 months ago

Just as a matter of record on the Simmons case, here's what the court majority, authored by Stevens, said:

The overwhelming weight of international opinion against the juvenile death penalty ***is not controlling here****, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18.*
.....
[The International opinion] ***does not become controlling****, for the task of interpreting the Eighth Amendment remains our responsibility.*

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

[my emphasis]

Justice Ginsburg issued a short concurring remark, in which she did not mention the "international" issue.

Justice O'Connor, dissenting from the majority, nevertheless gave some support for looking to foreign legal opinions and practices, though never as controlling: *the existence of an international consensus ... can serve to confirm the reasonableness of a consonant and genuine American consensus*.

Justice Scalia - well, everyone can read Scalia for themselves. Like him or loathe him, the Justice can write!

Gary B.

↑ 0 ↓ · flag

Joe Caro · 2 months ago

I would really like to see where in the constitution it forbids that juveniles is forbidden, other than Justice Stephens essentially pulling the notion out of his rear end that it is "disproportionate" punishment.

I would submit that in every case the punishment has been imposed on a "disproportionate" offense, such as the first degree killing of a human being. I just do not believe that the good Justice makes his case at all. Any appeal to what international law says, or what any law in another country says is totally irrelevant to any U.S. case and the entire package of opposition to capital punishment for a juvenile is a creation of the creative writing skills of the justice.

until capital punishment (an issue worthy of its own debate) is abolished in the United States, the argument is but one of what people HOPE to believe. I wonder what the parents, relatives and loved ones of a murdered victim think about the penalty being "disproportionate." Those who have said they do not believe the juvenile murder would get the death penalty are in a very small number but do indeed exist. But wait folks, such opinions have NO bearing on the decisions either.

Until there is appropriate law on the issue, that is FORBIDDING specifically such punishment, then it is allowed, no matter whose sensibilities are offended. Remember the old say about being a nation of LAWS? Well you cannot pick and choose what laws YOU personally wish fell into this category without the nation becoming fundamentally a banana republic where the laws are enforced upon the whim of the leaders. Now, some may choose this path, but we are not entirely there yet thus relevant LAW and not wishes and politics, must prevail.

↑ -1 ↓ · flag

Doug Karo · 2 months ago

Four of the justices couldn't find it either, but five could using the 8th amendment via the 14th (at least that is what I remember of the decision).

↑ 0 ↓ · flag

Joe Caro · 2 months ago

Doug, it is not in those either. It is an example of WANTING to find something in the constitution that is not there to support their belief on an issue as if they are saying, it does not say it, but what they think it SHOULD say, substituting their personal opinion for the law, thus trying to create a law where non exists. This takes us away from one our most important

tenants as a republic, that we are a nation of laws and NOT MEN.

Those supporting such a ruling ignore the fundamentals of our constitution but will accept it because they agree with a certain decision. Well, guess what. the avenue for created judgments that they do NOT agree with then becomes wide open. THEN, of course they will rail on about the judges over stepping their bounds. It must be left up to SOMEONE to stand up and say this cannot stand and if our leaders will not do it then it is left to us. In other words, if we win WRONGLY we need to stand up and say so, not just whine when we lose wrongly If we do not do it then think Argentina, Venezuela, Cuba and Russia, all nations that hold "elections." How is the rule of law doing in these examples?.

To bring this back to the specific issue at point the issue can be debated and changed, but not the legal principles.Whether we should execute a juvenile found guilty of such a heinous crime that it would carry a death penalty is subject for debate, but it is nowhere in the constitution. Should we wish it to be we have the tools given us by the founders to put it in there for ourselves, something we have not done.

↑ 0 ↓ · flag

Rebecca Hahn · 2 months ago

I was going to wait until later in the course to broach this, but since you brought it up. In his *Two Treatises of Government* under the section regarding "Of the Dissolution of Government" Locke posits that the "delivery also of the people into the subjection of a foreign power, either by the prince or by the legislative, is certainly a change of the legislative, and so a dissolution of the government. For the end why people entered into society being to be preserved one entire, free, independent society to be governed by its own laws, this is lost whenever they are given up into the power of another."

As Joe stated we are a "nation of laws." I would add that using foreign precedents to determine cases amounts to the people being "given up into the power of another."

↑ 0 ↓ · flag

+ Comment

Sarah Woods · 2 months ago

I think the Constitution maintains supremacy in the US, but when one goes elsewhere he/she is subject to those nations' laws. No treaty or deal-like the UN Arms Treaty-can mandate/dictate what we individual citizens can do or own.

↑ 0 ↓ · flag

Joe Caro · 2 months ago

I believe sarah is on solid constitutional ground in this position. It would take an AMENDMENT to the constituion to do this and not a TREATY because even the congress cannot take away a constitutional right of the people.

↑ 0 ↓ · flag

+ Comment

 Anthony Gary Brown Signature Track · 2 months ago

What Article VI says is:

This Constitution, and 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.

Some folk read that to mean that a Treaty made and signed by the President, under his Constitutional Authority in Art II:2, becomes part of the Supreme Law of the US.

Others note that they only become law if they are made *under the Authority of the United States*.

Does that mean just that they have to be signed by the Pres *and* ratified by Congress (Art II: *[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur*...].

Or does *under the Authority of the United States* mean more, that provisions of Treaties only become US law if Congress passes specific laws enacting them, in whole or part, for the territory of the US? And can any sort of Treaty - however ratified or enacted - over-ride a State law?

Gary B.

↑ 1 ↓ · flag

Joel Kovarsky · 2 months ago

Gary,

That second link I gave above does discuss quite a few issues: "International Law and Agreements: Their Effect Upon U.S. Law" by Michael John Garcia, Legislative Attorney, March 1, 2013 (from the Congressional Research Service). That discussion is obviously not aimed at "original meaning."

↑ 0 ↓ · flag

+ Comment

Doug Karo · 2 months ago

My sense is that this issue is being fought out now. At present the 'U.S. is sovereign in everything' camp have the upper hand (particularly in the Supreme Court), but time is not on their side. I believe In the past we only accepted international statements on human rights with conditions that some not apply to us if we didn't want them to. That approach does not seem viable to me in the future.

1 · flag

+ Comment


Susan Ye Laird Signature Track · 2 months ago

In the light of above discussion, pending on Amanda Knox's appeal to the Supreme Court of Italy, beginning in March 2014, since she is physically in US, what is international imperative norm if she loses her appeal again? http://en.wikipedia.org/wiki/Amanda_Knox

0 · flag


Anthony Gary Brown Signature Track · 2 months ago

The issue is covered primarily not by any "international imperative norm" but by an extradition treaty agreed between the sovereign governments of Italy and the USA in 1984.

The treaty seems quite clear in allowing for Ms Knox's extradition, if the Italian authorities so request. If they do, I nevertheless imagine there will be a battle royal in the US courts (recourse to which is of course Ms Knox's right under the norms of extradition), mostly on the grounds of whether the prohibition in the US on double-jeopardy at trial somehow undermines Ms Knox's conviction in Italy. I'm not sure that legally it does - but it will turn complicated, I'm sure.

What is the case under the Treaty is that extradition is a diplomatic procedure, and consequently in the US it's actually the Secretary of State who makes the final call: I'm not sure the US courts could *prevent* an extradition, though they have a (delaying) role in establishing if the extradition is lawful on the facts and Treaty provisions. A back-stop for Ms Knox might be the Treaty provision that she can't be extradited if she's been *pardoned* for the offence - and I guess that the US President could do that.

If I had to hazard a guess, mine would be that Italy will simply never request her extradition, under the rather peculiar circumstances of both the case and the several trials.

Gary B.

0 · flag

Joel Kovarsky · 2 months ago

This could set off years of legal wrangling, whatever competing analyses suggest:

1. Alan Dershowitz in WSJ: http://online.wsj.com/news/articles/SB10001424127887324789504578384871256488436?KEYWORDS=lawyer&mg=r... -- she was under Italian law as an exchange student, but this reverted to US law when she returned; this falls under transnational law, not international law (i.e. law that is applied by the domestic legal system of one nation against citizens of other nations); this could be double jeopardy under US law, but the same would not necessarily apply under Italian law

2. Carlo Davis (New Republic): http://www.newrepublic.com/article/116451/amanda-knox-extradition-should-be-granted -- he seems to think the US should turn her over if Italy asks, and goes after the logic of double jeopardy and other considerations; the does acknowledge that if the SCOTUS gets involved, they will infuriate someone (not so much of a surprise these days)

3. Dan Roberts (The Guardian): http://www.theguardian.com/world/2014/jan/31/amanda-knox-extradition-us-politicians-crucial-role -- seems relatively neutral, and notes that the White House declined comment given the ongoing issues with the Italian courts, and future management would fall to the Dept. of Justice

4. Merry Neal (legalweek.com): http://www.legalweek.com/legal-week/blog-post/2327968/the-amanda-knox-case-and-the-politics-of-extra... -- maybe the most detailed review of legal issues?; she acknowledges this will keep a talented team of lawyers busy, and notes:

"America is infamous for taking a hard line when it plays the part of the requesting state - look at Edward Snowden, Richard O'Dwyer and Roman Polanski - so it will not lend credibility to their extradition demands if they do not cooperate with Italy in the Knox debacle. If her conviction is finalised, Knox will take her fight as far as she is able through the American courts."

1 · flag


Anthony Gary Brown Signature Track · 2 months ago

One thing that does catch my eye in the Treaty is this:

ARTICLE VI
Non Bis in Idem
Extradition shall not be granted when the person sought has been convicted, acquitted or pardoned, or has served the sentence imposed, by the Requested Party for the same acts for

which extradition is requested.

[in this case the *Request**ed** Party* is the USA, with Italy being - potentially - the *Request**ing** Party*]

At first I though (as above), Ah-ha! The US President could pardon her! (Though that would hardly be legally necessary as a back-stop - if the US simply refuses extradition, there's nothing under the Treaty that Italy can do, other than tit-for-tat *political* retaliation).

But, *Non Bis In Idem* is Latin for "No Double Jeopardy" (lit: "no Two for One-and-the same"). Now, the circumstance in that sentence supposes that if Ms Knox had already been tried in the US for the same factual murder (even though committed in Italy), she could then not be extradited to Italy for the same crime. And vice-versa. It doesn't, on its face, give Ms Knox a get-out that she's been tried twice in *just the one country*, Italy, rather than in both. But I dare say smart lawyers can make much of the "unfairness" that a clause headed "No Double Jeopardy" doesn't prevent - well - Double Jeopardy.

Not that I'm sure it matters, but does anyone know whether, *when the Treaty was signed and ratified*, Italian law would have allowed the double trial that Ms Knox has faced?

Gary B.

↑ 0 ↓ · flag

Joel Kovarsky · 2 months ago

"Despite Thursday's verdict, the case is not necessarily closed. Either side can appeal a verdict they are unhappy with, under Italy's three-strike trial system. This could also mean the case would continue with no immediate outcome.":
http://www.cnn.com/2014/01/30/world/europe/italy-amanda-knox-verdict-explainer/

Someone else would have to validate the accuracy of that remark from CNN. So whether or note other treaty issues would have influenced this...?

↑ 0 ↓ · flag

Joe Caro · 2 months ago

Someone would have to examine the extradition treaty between the United States and Italy to answer this question. Each treaty with each nation with which we have such treaties varies so much that this is a specific issue with respect to each nation with which we have a treay.

I realise that many of them offend our sensibilities but that is the way it is. Thus Ms. Knox, clearly a killer, will skate on this one. She and her supporters should get down on their knees and give thanks that Italy allowed her to leave the country. Those of you who wish to judge the Italian judicial process by ours need to understand that their is different than ours, and that

"double jeopardy" is not an element of JUSTICE it is an element of law and that law and justice are not the same things. Even in the U.S. a person can be charged for the same incident in both Federal and State court without double jeopardy being a problem because it is only under the identical law that this applies, and federal and state law is NOT the same.

In any event this is not in the political and not the legal arena so law and justice will have nothing to do with any of this from now on. Meanwhile there IS a dead girl who got that way somehow. Where is HER justice?

0 · flag

Doug Karo · 2 months ago

I suspect in this case the U.S. domestic politics are important enough and we don't have anything we want from Italy that is critical right now so nothing will happen, at lest until after the next presidential election.

-1 · flag

Joe Caro · 2 months ago

LAWS! LAWS! We don't need no stinkin' laws.

(Until of course we get on our high horse should any OTHER nation not jump to it when we want a suspect turned over to us.)

-1 · flag

Joel Kovarsky · 2 months ago

There is an additional angle here. A number of observers have opined that the final decision could rest with Secretary of State John Kerry, and not the courts. I would guess he hopes this does not end up being the case.

0 · flag

 Anthony Gary Brown Signature Track · 2 months ago

The Treaty itself isn't quite clear as to who in the USA is the "decider". One route is the *Executive Authority* acting through the *Diplomatic Channel* (ie, effectively the Sec. of State - though my feeling is that Mr Kerry will be long gone before this case is decided.....). The other route is that the Sec of State merely communicates to Italy the US *Court's Decision*.

Art X: 5 of the Treaty:
5. If the person sought has been convicted in absentia or in contumacy, all issues relating to this aspect of the request shall be decided by the Executive Authority of the United States or the competent authorities of Italy.

But Art XIII: 1 + 2
Decision and Surrender
1. The Requested Party shall promptly communicate to the Requesting Party through the diplomatic channel its decision on the request for extradition.
2. The Requested Party shall provide reasons for any partial or complete rejection of the request for extradition and a copy of the court's decision, if any.

BTW, I'm *assuming* that the Extradition Treaty was ratified by the Senate (for some reason I can't track the ratification vote down....). And, if it was, is it a Self-Executing Treaty, or did Congress need to pass an enabling Bill in respect of the Treaty? To quote Justice Sotomayor: I don't know.

Gary B.

↑ 0 ↓ · flag

Joel Kovarsky · 2 months ago

Gary,
I was able to find documentation of ratification: http://archive.org/stream/unitedstatestrea015934mbp/unitedstatestrea015934mbp_djvu.txt (Full text of "UNITED STATES TREATIES AND OTHER INTERNATIONAL AGREEMENTS VOL-35 (PART-3)")

```
ITALY

Extradition

Treaty signed at Rome October 13, 1983;

Transmitted by the President of the United States of America to
the Senate April 18, 1984 (Treaty Doc. No. 98-20, 98th
Cong., 2d Sess.J;

Reported favorably by the Senate Committee on Foreign Rela-
tions June 20, 1984 (S. Ex. Rept. No. 98-33, 98th Cong., 2d
Sess.);

Advice and consent to ratification by the Senate June 28, 1984;

Ratified by the President August 10, 1984;
```

```
Ratified by Italy May 23, 1984;

Ratifications exchanged at Washington September 24, 1 984;

Proclaimed by the President October 31, 1984;

Entered into force September 24, 1984.
```

0 · flag

Doug Karo · 2 months ago

I continue to believe that politics will trump the law in this case, particularly when the party seeking extradition does not appear to have any pressure to bring on the U. S. except law.

-1 · flag

+ Comment

Anthony Gary Brown Signature Track · 2 months ago

Well done Joel! That procedure is interesting, no? Signed - Transmitted to Senate - Approved in Committee - Consent to Ratification by Senate - **Ratified by President** - Ratifications Exchanged - Proclaimed - Entered into Force.

I particular, I guess we are being legally careless in saying (in discussions above) the *Pres Signs* and the *Senate Ratifies* (or not): technically, the Pres does both (but needs the Senate's formal permission so to do).

Did you spot anything on the *Self-Executing* issue?

Gary B.

0 · flag

Anthony Gary Brown Signature Track · 2 months ago

BTW, I'm not sure that Ms Knox's recent conviction was technically *in absentia*. I do believe that technically means that the defendant, by reason of physical absence, was *unable to mount or direct their own defence* (even though they may have had a court-appointed attorney, as per local procedures). In Ms Knox's case, she was *permitted* to leave Italy for the

duration of her trial - but she was fully in control of her defence, from afar. So I'm not conviced that the *in absentia* procedure of Sect X: 5 of the Treaty applies....

Gary B.

0 · flag

Joel Kovarsky · 2 months ago

Best I can do, given my decidedly amateur status: http://extradition.uslegal.com/international-extradition/ :

"An extradition treaty is self-executing and a criminal can be arrested under the terms of the treaty alone. The statutes enacted by the legislatures are not necessary to implement a treaty. The treaty can be considered as binding as a statute. Treaties are made for the benefit of the party nations. Therefore, only a foreign government has standing to assert a flaw in extradition proceedings."

These discussions generate so many questions, which is precisely what this class is meant to do. It would help me, and likely many others, if we could get temporary access to LexisNexis, at least for the duration of the course. Probably not financially possible, and maybe with logistical difficulties as well. That said, it is remarkable the amount of information that is now freely accessible.

1 · flag

 Anthony Gary Brown Signature Track · 2 months ago

Interesting - I wonder what the determinant for a Treaty being *self-executing* is?

To tie all this back to Luis original questions and points, what would happen if - speculation! - Secretary Kerry announced that he was invoking his Treaty Article X: 5 "authority" to make an executive decision to send Ms Knox to Italy (upon their eventual request). And let's say the Sec. Kerry says that, as per the Treaty Art X: 5, it is he, not the US courts who have the say in this. Does the Treaty (whether self-executing or not....) trump Ms Knox's 5th and 6th Amendment rights (and any procedural rights that Congress has enacted subsequent to them)?

Also, does the Supreme Court itself have first bite at the cherry in extradition cases, they being in may ways a dispute (if there is one) between the US and a sovereign foreign state?

Questions, questions, questions.....

Gary B.

0 · flag

Joel Kovarsky · 2 months ago

While I do not know at which point SCOTUS enters into each case, or even if it is always at similar junctures, they have been involved for a very long time: http://internationalextraditionblog.files.wordpress.com/2011/02/international-extradition.pdf . As to all the potential directions, maybe a setting for a Dan Brown (or a Tom Clancey re-incarnate) novel?

0 · flag

 Anthony Gary Brown Signature Track · 2 months ago

Joel: We could make a million bucks!

BTW, just to return to Luis' very starting point, I heard last night on the PBS *Newshour* a UN official claim that the UN *Convention on the Rights of the Child* created *a Body of International Law* which bound, domestically, even nations that had not ratified the said Convention (primarily the USA). That (imho) incorrect assertion is why I am suspicious of the whole notion of "International Law", preferring the (imho) more accurate *Treaty Law*, or *Inter-Nation Law*.

Gary B.

0 · flag

 Robert Prince III · 2 months ago

The Country should have formed and founded as a singular nation.

0 · flag

Joel Kovarsky · 2 months ago

Gary,

There are significant criticisms, even if in the minority, regarding multiple issues in international law: http://www.beyondintractability.org/essay/international-law . Under their "critiques" section:

"Although much of this discussion has portrayed international law as a potential means of conflict management or resolution, it should be remembered that law is itself a source of significant conflict. The shape and content of law often favors particular groups or countries. Not only is international law often most influential when it favors the strongest, but the powerful are also typically the source of law. For example, because much of international law is formed by the U.N., the Security Council has a disproportionate influence in shaping it...

International law has also been criticized as fundamentally Western. Certainly, most

international law is based on Western notions. One sign of this might be that the Western Countries are more compliant with the international laws on human rights.[13] Others argue, however, that the widespread acceptance of international law is evidence that the principles on which it is based are not strictly Western. Still, it is not clear that many developing countries are entirely free to accede to these rules, as the WTO example above suggests. Western countries are able to provide incentives for less powerful countries to accede to their wishes. Either way, however, it means that international law has at least some force behind it, though not nearly as much as domestic legal systems."

↑ 0 ↓ · flag

 Luis Manuel Xavier de Castro · 2 months ago

A short remark regarding "International Law". Most people when referring to it do not make the necessary differences that the term can convey.

International Law - Imperative Norms or 'Ius Congens' Protects concepts that supercede any body of Law Domestic or International. It is the most restrictive and only applies to a very restrictive number of cases.

International Law - Produced by Treaties (note that there are other type of instruments that don't necessarily fall under the type of a Treaty. In example: Judicial Agreement regulating extradition) Are binding according to the terms of the same. Domestic Law although valid can not be applicable. As these treaties are celebrated normally between states, no state would accept it if it had to obey to the rules of another state, disputes are treated under a neutral body of rules previously agreed upon.

International Law - Customary Law Produced by historical, geographical and other factors that might be relevant for the parties. The value each of the parties gives to it, is relative.

Note that the Knox case discussed here resumes to the following: (no judgement here from me....)

1) Knox was convicted in a Court of Law of murder. She appealed the decision. 2) Appealing court ruled in her favor. She was set free. Prosecutors appealed to the Supreme Court. 3) Supreme Court ordered the case to return to the first court for retrial. 4) She was found guilty again.

Basically as I see it the case was not finished. If she was declared innocent in the first trial and no appeal by prosecution had been done and later evidence was found that she was guilty, then double jeopardy could be evoked and she could appeal to the Italian Constitutional Court for violation under the Italian law.

Note there is an extradition agreement but the Italians are unlikely to ask her to return to Italy. Italian courts would probably require an American court to recognize their verdict and request that she goes to jail in America (as she is American afterall), to complete the rest of the sentence (I believe she already served 4 years).

↑ 0 ↓ · flag

 Anthony Gary Brown Signature Track · 2 months ago

Luis - good point on the "local prison" issue. That's covered I think by a *separate* US-Italy Treaty - and there was some political controversy to do with it a few years ago (maybe under Clinton?). But I can't now recall the details! But I think the essence is that a prisoner has to serve "at home" the sentence imposed by the foreign court, not the sentence that would have been imposed locally. And I think (though I'm not at all sure) that it's the *sentencing country's* early-release provisions that control, not the local ones.

Gary B.

0 · flag

 Luis Manuel Xavier de Castro · 2 months ago

You are correct, sentencing country provisions would apply not domestic ones. The issue that sometimes occurs has to do with the nature of conflicting legal systems. For instance in the US there is still the Death Penalty and Life Imprisonment while in Italy there is not. A crime committed in Italy by an American could never result in a Death Penalty or Life Imprisonment sentence even if he was to be serving the sentence in the US, and there, such options were possible. On the other hand an American which committed a capital offense in the US and runs away to Italy could only be extradited back to the US, if the US government and the Supreme Court jointly offered guarantees that the death penalty or the life imprisonment would not be applied but rather the maximum possible conviction in Italy.

0 · flag

 Luis Manuel Xavier de Castro · 2 months ago

More complex than Knox story is this one:

George Wright 'wins US extradition case in Portugal'

And at the end of the day, if one thinks about it without passion, one concludes that it was the right decision.....

0 · flag

 Anthony Gary Brown Signature Track · 2 months ago

As to whether it was "right", one begs to disagree..... But it was lawful.

The whole issue shows that words matter, and that precise agreement between States matter:

Here's the operative part of the 1908 Extradition Treaty between the USA and Portugal:

ARTICLE VIII. Under the stipulations of this Convention, neither of the Contracting Parties shall be bound to deliver up its own citizens or subjects.

And here's the operative part of the 1984 Extradition Treaty between Italy and the USA:

ARTICLE IV Extradition of Nationals - A Requested Party shall not decline to extradite a person because such a person is a national of the Requested Party.

Of course, the factual issues (regarding citizenship etc) were rather tricky to resolve, but the Agreements are pretty clear.

Gary B.

0 · flag

Doug Karo · 2 months ago

Luis Manuel Xavier de Castro: you write "On the other hand an American which committed a capital offense in the US and runs away to Italy could only be extradited back to the US, if the US government and the Supreme Court jointly offered guarantees that the death penalty or the life imprisonment would not be applied". I can believe that the prosecuting organization or the government could offer such a guarantee, but it seems most unlikely to me that the Supreme Court would ever become involved in an advance guarantee whether or not a case had reached it. That really would seem to be a violation of separation of powers, etc. Do you have a reference for the requisite joint role of the Supreme Court in making a guarantee?

0 · flag


Anthony Gary Brown Signature Track · 2 months ago

Doug - not to speak for Luis (who's probably a-bed in Portugal just now....), but I wonder if he mis-spoke on the technicalities?

That said, here's what the Italy Treaty says:

ARTICLE IX Capital Punishment
When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not provide for such punishment for that offense, extradition shall be refused unless the requesting Party provides ***such assurances as the requested Party considers sufficient that the death penalty shall not be imposed****, or, if imposed, shall not be executed.*

[emphasis added]

which does suggest that Italy (here) can make some stringent demands that the US would somehow have to fulfil. Nevertheless, it must surely *only* be the Executive, via the State Department, that actually gives the assurance to Italy, having (presumably) first secured something iron-clad from the State or Federal Attorney-General. (BTW, by "iron-clad", I mean something legally enforceable, by the Supreme Court if it came to it - otherwise the word of the USA would be worthless).

Oddly, the 1908 Portugal Treaty has no "death penalty" provision such as the Italian one, even

though capital punishment had been all but abolished there long before the Treaty. Nevertheless, I'm certain Portugla would seek and receive the necessary iron-clad guarantee.

Gary B.

0 · flag

 Luis Manuel Xavier de Castro · 2 months ago

Reply to: Doug Karo

The issue in Portugal with extradition does not rise from sending the person back to the US but rather the application of justice there (possibility of the Death Penalty or Life Imprisonment, superior to 23 years), which is a competence of the courts (ultimately the Supreme Court), not the executive power.

So, the Constitutional Court here would only accept a guarantee from its counterpart in the US (Supreme Court). An interference by the Portuguese government within this sphere could easily end up in the government being impeached. As to the assurance from the US government as well is to make sure that the potential person extradited does not end up somewhere else before it reaches US territory (Guantanamo, or the bottom of the Atlantic Ocean due to 'suicide' while in transfer) ;-)

PS obviously I am referring to cases where citizenship is not an issue.

0 · flag

 Luis Manuel Xavier de Castro · 2 months ago

Reply to Gary:

In 1908 Portugal was a kingdom and he (king) could ultimately do as he pleased. That is why he was assassinated along with his heir son in Feb. 1908. His substitute only lasted 2 years. Portugal became a Republic on the 5 of October 1910. Maybe that is the reason....

0 · flag

Doug Karo · 2 months ago

I thought we were talking about Italy but, in any case, I still find it hard to believe that the U.S. Supreme Court formally would even consider placing restrictions upon itself beyond deciding in accordance with the U.S. Constitution. Do you have a reference to any specific example of this from the past?

0 · flag

 Luis Manuel Xavier de Castro · 2 months ago

Please note that the original treaties mentioned by Gary were revised

Further info here

0 · flag

 Anthony Gary Brown Signature Track · 2 months ago

Luis - thanks for those revisions. A glance (though a vast document) suggests that the chief revisions are procedural (to do with documentation and the technical processes of considering extraditions). Whether any given country allows extradition of its own citizens is still, I think, an inter-country issue, not covered by that general revision convention. Certainly, that still varies across the EU: some allow it, some don't. The new Convention does however round up the whole death penalty issue with the EU, making it clear that a cast-iron guarantee of no death penalty would be required for an extradition.

Luis - I do wonder about your reference that the *US Supreme Court* would be required to make such a declaration. I can't see how that is within the actual competence of the *Court* for either Federal or State capital cases - the court is indeed called the Supreme Court, but is simply not actually supreme in everything. I'm pretty sure (without being certain) that the competent authority to issue an iron-clad and enforceable (enforceable via the Courts, of course, if there was attempted back-tracking) guarantee of no death penalty is the Attorney-General of either the Federal or State Government (recall that the vast majority of capital cases in the US are for offences against State Laws, not Federal Laws, with trail, sentence and execution carried out by the State). In the USA, it's those Attorneys-General, after all (and emphatically *not* the Courts), who decide what charges are brought against an accused, and who decide what penalties to seek, or not.

And I think that the State Department, dealing with a foreign government, would present such a certification from the State or Federal attorney as part of the "package".

Gary B.

0 · flag

 Luis Manuel Xavier de Castro · 2 months ago

There was never a case, as far as I can tell, that reached that extreme. Normally the problem is not the extradition per si but the application of those extreme sentences that are a matter of the courts. My understanding is that, in seeking the guarantees to allow and comply with the treaty of extradition the constitutional court only recognizes the authority of its equivalent peers (i.e. Supreme Court). I suppose it is a hierarchical matter. This is not done directly but indirectly in reply to the Portuguese public prosecutor office that received the initial request by the state/justice department. The US authorities at this stage give up and don't pursue the matter further. Whether they are not allowed to do it or do not want to impose a burden on the Supreme Court I don't know. I suspect the first is more likely.

0 · flag

+ Comment

Tony Breecher · 2 months ago

Perhaps the problem is a bit simpler than it appears. Consider this logic:
The United States was founded by the Constitution. The Constitution delegates specific, enumerated powers to the Federal Government and reserves all other powers in the States and the People under the Ninth and Tenth Amendments. Because the Federal Government is a government of enumerated powers, it cannot act outside the scope of the Constitution because such an act would be void, given that the government was never granted the power to do the thing it was trying to do. This basic tenet of the limitations of the Federal Government was established as binding precedent by the Supreme Court case of Marbury v. Madison, and had previously been discussed in several of the Federalist Papers. If the Federal Government were to enter into a treaty with a foreign power, in order for Congress to ratify it (which it *must* do for the treaty to become law), it must first have been granted the power, by an enumerated Constitutional Power, to do the thing the treaty contemplates. Else, the treaty would be void as a invalid action of the Federal Government.

To support this position I remind the group that Treaties occupy the same tier of the legal hierarchy as Federal Statutes, and point out that non-self-executing treaties require Congress to enact statutes in order for them to have legal force. They don't have to pass Constitutional Amendments to implement treaties, they pass *statutes*. And it is not controversial to say that statutes, even federal ones, fall before the Supremacy of the Constitution.

0 · flag

+ Comment

brianew · 2 months ago

In ***Reid v. Covert***, 354 U.S. 1 (1957) SCOTUS recognized the supremacy of the Constitution over treaties. However, the case was based on an executive agreement made without the consideration of the Congress in its enactment. Justice Black in ***Reid v. Covert*** said, “There is nothing in this language which intimates that treaties do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in ‘pursuance’ of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V." Not limiting the constitutional

powers of the federal government to those prescribed, or implied as a necessary means to enacted prescribed powers, in the Constitution could allow the federal government to usurp powers granted to the states by the Constitution piece by piece through use of the treaty Clause since states have no power to make treaties. U.S. law provides states with the ability to make agreements with foreign powers but only with the authorization of the Congress. If there is no limit on the federal government's treaty making authority what is a constitutions purpose if a government can prescribe its own powers and use the Treaty Clause as a de facto means of ending federalism and instituting a central government? The Constitution is the only limit on the power of the federal government short of armed rebellion and can not be overwritten by treaties and executive-congressional agreements.

0 · flag

+ Comment

Rodrigo Alonso Torres Jurado Signature Track · 2 months ago

Hi! In my reading of the Article VI, International Law (treaties) is in the same level of the Constitution. That´s why Constitution says "treaties made, under the Authority of the United States, shall be the supreme Law of the Land". I always talk about chilean constitution (I´m chilean) and the article 5 of our Political Constitution says: "The exercise of sovereignty recognizes as a limitation the respect of essential rights emanating from human nature. The organs of the State must respect and promote such rights, guaranteed by this Constitution as well as by the international treaties that are ratified by Chile and that are in force". So, this article talks about treaties at the same level of the Constitution (at least the human rights treaties). The question now is: do the Constitution of the United States talks about all treaties, or, like our chilean constitution, just the human righst treaties? I think i´m going to make a new post. See ya!

0 · flag

+ Comment

New post

To ensure a positive and productive discussion, please read our forum posting policies before posting.

B | I | Link | <code> | Pic | Math | Edit: Rich | Preview

Make this post anonymous to other students

Subscribe to this thread at the same time

Add post