PRESSURE FROM ABROAD AGAINST USE OF CAPITAL PUNISHMENT IN THE UNITED STATES*

John Quigley**

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I. INTRODUCTION

Foreign pressure on the United States on the capital punishment issue continues to build. Fewer States around the world are employing capital punishment. This progression leaves the United States more and more isolated as one of only a handful of States that execute as criminal punishment. The isolation is particularly strong on the issue of the execution of juvenile offenders. While some States have stricken capital punishment from their statute books, others have simply ceased using capital punishment in practice. They have taken the approach of a de facto moratorium.

In many States of the world, capital punishment, whether imposed on adults or on juveniles, is regarded as a throwback to a former era and is condemned out of the same considerations that have resulted in universal condemnation of the use of torture. In Europe, capital punishment is outlawed by treaty as a human rights violation. In Latin America, capital punishment is used by only a few small States. These are the two regions of the world with the closest ties to the United States.

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** President's Club Professor in Law, Ohio State University. A.B., LL.B., M.A., Harvard University.
II. POLITICAL PRESSURE

In addition to isolating the United States by their own practice, other States have taken affirmative steps to curb the use of capital punishment by the United States. Within the past year, capital punishment in the United States has become a major political issue in the United States-Europe relationship. When the European Union and United States met for a summit meeting in 2000, capital punishment in the United States was viewed by commentators as a major issue impeding the development of a closer transatlantic relationship. European leaders frequently raise the capital punishment issue with United States officials.

On April 13, 2000, the European Parliament formally requested of President Clinton that he institute a moratorium on federal executions in the United States. On July 12, 2000, the European Union made a similar request of President Clinton. The European Union added a call to President Clinton to exercise his power of clemency with respect to Juan Garza, who was scheduled to be executed for a federal crime, and who would have been the first person executed under recently adopted federal legislation providing the death penalty for a wide variety of offenses.

These démarches are, as international relations go, extraordinary developments. States do not readily make a public request to another State on a matter of the domestic policy of the other State. States value too highly their own sovereignty to criticize other States over domestic policy. To do so sets a precedent and may lead to a request by the United States in the future on some issue of domestic policy in Europe. The fact that the European Parliament and the European Union took this step indicates strong sentiment in Europe that the United States, by using capital punishment, acts beyond the limits of what is acceptable.

International human rights mechanisms have also been invoked with respect to use of capital punishment in the United States. The United Nations Human Rights Commission undertook a study of the application of the death penalty in the United States, sending a special rapporteur to visit the United States and to analyze the manner in which capital punishment is used.1 The report found racial bias in the use of capital punishment in the United States.3 It also concluded that the use of capital punishment is arbitrary in that standards do not seem to be followed with respect to the question of who is subjected to capital punishment.3

2. Id.
3. Id.
III. EXTRADITION IN CAPITAL CASES

Many States, both European and others, refuse to extradite persons requested by the United States, if capital punishment awaits them in the United States. Many foreign States have insisted on the insertion, in bilateral extradition treaties with the United States, of a clause that allows the requested State to decline to surrender a person being charged capitally. In the context of requests by the United States for the surrender of suspects, many foreign States have insisted on this clause and have refused to extradite unless the United States first agreed that capital punishment would not be sought for the suspect.

In one case in Europe, the United States sought the surrender by the United Kingdom of a man wanted on a capital charge in Virginia. A United States-United Kingdom treaty contained a clause on capital punishment, but the United Kingdom, after some hesitation, did not insist that United States authorities commit to foregoing a capital charge against the man. The man took the matter to the European Court of Human Rights, which ruled that if the United Kingdom were to extradite, it would itself be in violation of a provision in the European human rights treaty that precludes inhuman and degrading treatment.

The United Kingdom complied with the ruling of the European Court of Human Rights. It informed the United States that it would surrender the man only if the United States undertook that he would not be executed. The United States was forced to make such a commitment, and only then was the man surrendered. After being surrendered, he was convicted of non-capital murder in Virginia.

Pressure has also been exerted on the United States by the committee that monitors compliance with the International Covenant on Civil and Political Rights. In one case, the issue was manner of execution. Canada was about to extradite to the United States a man sought on a capital charge in California. In a complaint against Canada to the monitoring committee, the man argued that the gas chamber as then used in California inflicted unnecessary suffering, and therefore if Canada surrendered the man, Canada would violate a provision in the International Covenant on Civil and Political Rights that forbids inhuman and degrading treatment or punishment.

5. Id. at 444.
6. Id. at 439.
The monitoring committee agreed with this argument and ruled that Canada would be in violation of the International Covenant were it to surrender the man for a trial on a capital charge in California. Canada surrendered the man without conditions. However, after he was surrendered, United States courts came to the same conclusion as the monitoring committee about the California gas chamber, ruling that its use caused unnecessary suffering and therefore violated United States constitutional protections.

IV. FOREIGN CONSULS IN UNITED STATES COURTS

Consuls of foreign States who are accredited in the United States have become increasingly active in recent years in seeking to ensure that capital punishment not be imposed on their own nationals. It is estimated that approximately seventy foreign nationals are currently under a sentence of death in the United States and are awaiting execution. In a recent case in Illinois, a Polish national was convicted of capital murder and sentenced to die. The Polish Consul in Chicago intervened in the case at the appellate stage, thereby becoming a third party to the litigation. The consul's challenge to the death sentence was based on the failure of Chicago police to inform the individual at the time of arrest that he had a right to approach the Polish Consul for assistance. The governments of both Germany and Mexico filed briefs as amicus curiae in support of Poland's Consul.

The United States, along with some one hundred sixty other States, is party to a multilateral treaty, the Vienna Convention on Consular Relations, which stipulates that detaining authorities must inform a foreigner, upon detention, of the right to contact the home State consulate for assistance in preparation of a defense. Police in the United States rarely comply with this obligation, and as a result most of the seventy or so foreigners presently under death sentences in the United States were not informed of their right of consular access.

The Chicago case went to the Supreme Court of Illinois, which upheld the death sentence by a four to three vote, on the ground that the defendant had not raised in a timely manner the issue of the failure of police to

11. Id. at 423.
12. Id. at 425.
13. Id. at 426.
inform him of his right to approach the Polish Consul.15 The three dissenting judges would have voided the death sentence for the police's failure.16 One of the four judges in the majority stated that he considered it more appropriate that the individual serve a jail term in Poland, rather than be executed in Illinois.17

Foreign governments now routinely file briefs as amicus curiae in cases in which foreign nationals are subjected to a capital charge. While such briefs more often than not do not convince the court to reverse a death sentence, the cumulative effect may be considerable. On occasion, courts respond. One recent murder case in Ohio, albeit a non-capital case, involved a young Mexican man who had recently arrived in Ohio to do agricultural work.18 In the middle of the night, someone broke into the apartment where he and several other young Mexicans were living, with the apparent intent to steal.19 One of the young Mexicans apparently chased the intruder out of the house and shot and killed him.20 One of the young Mexicans was arrested and was interrogated through an interpreter at a local police station.21 He was tried and convicted and sentenced to life in prison.22

On appeal of the conviction, the Mexican government filed a brief as amicus curiae on behalf of the young man. In preparing that brief, the Mexican government discovered a fact that had to that point not been apparent to lawyers on either side, namely, that the interpreter who helped the police interrogate the young man barely spoke Spanish, and that, in particular, the manner in which she rendered the Miranda warnings bore little relation to the warnings the United States Supreme Court requires be conveyed to a suspect. As a result, the Ohio Court of Appeals reversed the murder conviction.23

Incidents like this case can have an impact at the local level that can raise protections for foreign nationals against false convictions, including capital convictions. Following the reversal by the Ohio Court of Appeals, procedures in the particular county were changed to increase the chances that a non-English-speaking suspect would be properly informed of the

15. Madej, 739 N.E. 2d at 427.
16. Id. at 429-32.
17. Id. at 428.
19. Id. at 1066.
20. Id.
21. Id.
22. Id.
Miranda rights and would be interrogated through a competent translator. Procedures were also changed to ensure that foreigners arrested as criminal suspects be informed of their right to contact the consul of their home country.

In their efforts to stop executions, foreign consuls have found an ally in non-governmental organizations with an international focus. Both Amnesty International and the American Branch of the International Law Association have filed *amicus curiae* briefs in such cases, urging strict compliance with the Vienna Convention on Consular Relations.

V. INTERNATIONAL LITIGATION

In two instances, a foreign State has taken the United States to the International Court of Justice over the imposition of capital punishment on one of its nationals. Paraguay filed such a case in 1998, and Germany did so in 1999. Germany's case is pending before the Court, having proceeded through the state of oral argument. Germany's ground for alleging illegality is that the two German nationals, who were charged with capital murder in Arizona, were not informed at the time of arrest of their right to contact a German Consul. A multilateral treaty to which Germany and the United States are parties requires that such information be given. A protocol to the treaty provides that in the event of non-compliance, the State whose national was the suspect may sue in the International Court of Justice. Under procedures of the International Court of Justice, which are agreed by treaty, decisions of the Court are binding on the parties.

Thus, Germany seeks a Court ruling that would be binding on the United States in this case. Germany is asking the Court to rule that if the obligation to provide the necessary information to a suspect is not fulfilled, a court may not convict the person, and if it does the conviction must be reversed. In the instant case, the two German nationals have already been executed by the state of Arizona. Germany seeks a ruling by the Court that would preclude the United States from executing in the future a foreign national who has not been informed of the right to contact a consul.24

Pressure has also been brought to bear on the United States by a 1999 advisory opinion issued by the Inter-American Court of Human Rights. The opinion dealt with the obligation to inform foreign nationals detained as criminal suspects of their right to contact their consulate, in particular in the context of capital cases. The Court ruled that a conviction secured after a failure to comply with this obligation may not stand. The Court

also ruled that where such a flawed conviction leads to a death sentence, the right to life, an internationally secured human right, is violated. The Court said consular assistance is an element of due process because it allows a foreign national to present a proper defense. The Court said the imposition of a death sentence without compliance with the obligation to inform of the right of consular access constitutes arbitrary deprivation of life, in violation of the International Covenant on Civil and Political Rights, and of the American Convention on Human Rights.

VI. FEDERALISM AS AN OBSTACLE

A factor that limits the effectiveness of international pressure on the United States on the capital punishment issue is the nature of the United States' system of government as a federal system. The pressure is felt largely by the federal government, because it carries out foreign relations. Capital punishment, however, is carried out primarily by the constituent states.

The pressure complicates life for the federal government, as it is forced to respond to criticism, and as it is responsible for extradition. The pressure is felt much less by the states, where the executive branch (state governors) and the legislative branch largely view international pressure as irrelevant. Some pressure, to be sure, has been exerted on state institutions by foreign actors, in particular in making representations to state governors about particular pending executions. In many instances, foreign non-governmental organizations and individual foreign officials have approached a governor to ask for a reprieve, even in cases in which the condemned person was a United States national. Nonetheless, because state governors do not have to deal with foreign governments on a regular basis, they can ignore the representations without any significant political cost.

The federal government has exerted some pressure on states in response to pressure being exerted from abroad on the federal government. To date, however, the federal government has tread quite cautiously in this realm. It has not taken action to compel states to comply with international obligations. The instance in which the federal government has gone the farthest is extradition. Here it has, on more than a few occasions, made a commitment to a foreign government that a person sought by a state within


26. Id. at ¶ 137.
the United States on a capital charge would not be subjected to capital punishment. It has then informed the authorities of the state that it is able to secure the surrender of the individual only on condition that capital punishment not be imposed. To date, state prosecuting officials have complied with this condition and have foregone pursuing a death penalty.

Federalism, to be sure, may not be an insuperable obstacle to the federal government in securing a change in policy by the states on an important social issue. One need only recall school desegregation in the 1950s, where the federal government pursued a policy of reform despite strong opposition from many states.

VII. THE IMPACT OF INTERNATIONAL PRESSURE

International pressure operates in a fashion that oftentimes seems exceedingly weak. When the United Nations Human Rights Commission, as noted above, criticized the United States on its use of capital punishment, federal authorities immediately rejected the report. They had, in fact, declined to cooperate with the United Nations rapporteur while he was in the United States conducting his study.\(^7\) Despite such reactions, one cannot dismiss such pressure. It is difficult to predict the long-term effect of pressure. Measures of pressure that seem inconsequential can work with others to produce results. On the one hand, the United States is more resistant to international pressure than most States, as a result of its economic independence and strength. Weaker States are more subject to pressure, because they depend for economic aid on other States that may invoke human rights criteria as a condition to extending aid.

One example among many is the concern shown by Ethiopia in trials that have been in process there for a number of years against members of the prior government for atrocities those persons are alleged to have committed while in office. On the one hand, Ethiopia was under pressure from the donor community to try these persons. At the same time, it was under pressure from the donor community to try them applying standards of due process. Donor States established aid projects to assist in the conduct of both the prosecution and defense in these cases, to ensure observance of due process. Because Ethiopia is dependent on aid for economic progress, it was keen to accept this assistance in order to maintain good standing with the donor community.

A State like the United States is obviously in quite a different position. Far from being subject to pressure like that which can be placed on Ethiopia, the United States often seems to enjoy a kind of informal

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immunity on human rights matters. As a State that gives aid instead of receiving it, it is unlikely to be pressured by States that receive aid from it, and most States of the world do. The only States with sufficient economic independence to put pressure on the United States are the European States. It is those States, for example, and those alone, that have filed formal objections to the extensive reservations that the United States entered when it ratified the International Covenant on Civil and Political Rights. In particular, several of them filed objections to the United States reservation to the provision of the Covenant that prohibits the execution of persons who were juveniles at the time of committing the offense for which they were convicted. Only a very few States of the world allow the execution of such persons, so presumably most States of the world viewed the United States' reservation in a negative light. However, it was only several States in Europe that went to the length of filing a formal reservation.

At the extreme, international pressure takes the form of developing an international-legal norm, which could be a treaty outlawing capital punishment, or the emergence of a norm of customary international law against its use. In either event, however, the United States could opt out. It is not required to ratify any draft treaty on capital punishment. And even if all States except the United States come to the view that capital punishment is precluded by international custom, the United States could insist that it does not accept this customary norm. States that object to the formation of a customary norm are not bound by it, even if it is a customary norm as to all other States.

Finally, even if the United States did become bound by a treaty or customary norm against capital punishment, judicial redress would probably not be available, either for an individual facing execution, or for a foreign State.

The rulings by the European Court of Human Rights in the Soering case, and by the monitoring committee of the International Covenant on Civil and Political Rights in the Ng case, represent a unique form of pressure, in that the States found to be under an obligation were not the United States but the States where suspects sought by the United States were found. Thus, the United States' insistence on seeking the death penalty created international complications for the United Kingdom and for Canada. Each of them was haled in as a defendant State before an international human rights body and was required to explain its conduct. In these instances, use of capital punishment by the United States caused substantial inconvenience and significant allocation of resources by the United Kingdom and Canada in connection with the proceedings that were taken against them.
What one might call the "nuisance effect" of international pressure is one way it often operates. All States prefer smooth relations with others. For the United States, when it schedules a summit with the European Union to discuss economic and political issues, it is a significant distraction if the United States is bombarded with questions about death sentences in Texas or Florida. The "nuisance effect" is heightened when the inconvenience is caused as well to one's allies, as occurs, as noted above, when the United States seeks extradition on a capital charge.

Other States would prefer not to have to be concerned about United States' use of capital punishment when they get an extradition request from the United States. The inconvenience is particularly significant for Canada, because it shares a border with the United States and not infrequently finds itself hosting persons who have fled United States justice. Canada, on the one hand, has taken a firm stand against capital punishment, and many Canadian officials would probably prefer not to be in the position of facilitating death sentences in the United States by surrendering fugitives. On the other hand, because of its very proximity to the United States, Canada is concerned lest it become a haven for large numbers of fugitives. The use of capital punishment in the United States creates a dilemma for Canada, one in which it would prefer not to find itself.

It is difficult to calculate the cumulative effect on the United States of the pressure being exerted upon it on the capital punishment issue. On this, or other issues, pressure can be exerted over a long period without substantial effect. On the other hand, incidents may occur or situations may develop that will highlight the issue, and suddenly the cumulative effect of the pressure can produce dramatic results.

Foreign States have shown considerable consistency in pressuring the United States. This is in one sense surprising, because the United States holds a position of economic predominance that frequently immunizes it from pressure on human rights matters. The strength of sentiment against capital punishment has been sufficiently strong that foreign States have continued the pressure. Popular sentiment has at times played a role. In particular, in situations in which a national of a foreign State is scheduled for execution in the United States, marches have been held to the United States embassy in the relevant State. Such expressions of popular feeling put pressure on the government of such a State to pressure the United States, even where doing so may jeopardize economic or other kinds of relations the State has with the United States.

The example mentioned above of school desegregation may hold some precedential value. A factor in the decision by the federal authorities to desegregate the schools was pressure from abroad. Enmeshed in the Cold
War, the United States was hard-pressed to "sell" its way of life to third world countries in competition with the Soviet Union, so long as segregation remained the law of the land. The United States Department of Justice filed an *amicus curiae* brief in *Brown v. Board of Education*, urging the United States Supreme Court to desegregate the schools. The Department wrote, "the United States is trying to prove to the people of the world, of any nationality, race and color, that a free democracy is the most civilized and most secure form of government yet devised by man." The pressure of Soviet criticism of the United States over racial segregation was reflected in the quoted language from the United States brief.

To be sure, the Cold War has ended, and as a result the United States may be less responsive to criticism over capital punishment than it was to criticism over segregation. Nonetheless, the pressure being exerted on the United States over capital punishment does not appear likely to dissipate. This pressure imposes a definite diplomatic cost on the United States. Foreign pressure is, of course, not the sole factor operating on the question of the continued use of capital punishment in the United States. Domestic factors remain key. Nonetheless, the foreign pressure has become a significant element in the capital punishment picture in the United States.

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