

MEMORANDUM

Date: April 25, 2008

From: Kathy Patchel

To: Martha Walters, Harriet Lansing, Ed Smith and John Sebert

Re: *Medellin v. Texas*

I. Introduction

In March 2008, the U.S. Supreme Court decided *Medellin v. Texas*, a case dealing with the effect of a judgment of the International Court of Justice (ICJ) and a Presidential Memorandum purporting to effectuate the ICJ judgment on U.S. domestic law. In the course of deciding *Medellin*, the Court touched on several of the issues the ULC currently is dealing with in its work regarding implementation of private law treaties covering areas currently governed by state law at the domestic level – the distinction between the international obligations the U.S. incurs in ratifying a treaty and the domestic effect of that treaty, the effect of non-self-executing treaties under the Supremacy Clause, the appropriate means of determining whether a treaty is self-executing, and the ability of the Executive branch to carry out its international obligation to implement a treaty in good faith when implementation involves state law. This Memo briefly discusses the facts and holding in the *Medellin* case, and then discusses the possible implications of *Medellin* for the work the ULC is doing in the private law treaty area.

II. The *Medellin* Decision

Medellin arises out of an alleged violation of Article 36 of the Vienna Convention on Consular Relations, which provides that when a foreign national is detained in another country, the appropriate authorities of the detaining country must notify the foreign national's consular post of his detention upon his request, and must inform the detainee of his right to request assistance from his consulate. Mr. Medellin is a Mexican national who was convicted of capital murder and sentenced to death in the Texas criminal courts. Local law enforcement officials did not inform Medellin of his Article 36 rights. Medellin raised the failure to notify for the first time in his first application for state postconviction relief, and the Texas courts held that the claim was procedurally defaulted because Medellin failed to raise it at trial or on direct review. The Texas courts also addressed the merits of Medellin's claim, holding that he had failed to show any adverse impact of the failure to notify on his conviction and punishment.

Meanwhile, Mexico had filed an action in the ICJ against the United States on behalf of fifty-one Mexican nationals, including Medellin, asserting that the United States had failed to comply with the Vienna Convention notification provision. The ICJ issued its decision in that case, *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12

(*Avena*), in March 2004 while Medellin was seeking federal habeas review of his case in the 5th Circuit. The 5th Circuit denied Medellin's appeal, and the U.S. Supreme Court granted certiorari. Before oral argument, however, President Bush issued a Memorandum to the U.S. Attorney General, stating that the U.S. would discharge its obligations under the *Avena* decision by having state courts give effect to the decision in accordance with general principles of comity. Medellin filed a second habeas petition in the Texas courts based on the Memorandum, and the Supreme Court dismissed his cert petition to await the state court's action. The Texas Court of Criminal Appeals dismissed Medellin's second habeas petition as an abuse of the writ, finding that neither the *Avena* decision nor the President's Memorandum was binding federal law that could displace state procedural limitations on filing successive habeas petitions. The U.S. Supreme Court once again granted certiorari and in the present case affirmed the Texas court's denial of relief, holding that neither *Avena* nor the President's Memorandum constituted directly enforceable federal law that could preempt state procedural limitations on filing successive habeas petitions.

A. Enforceability of the ICJ Judgment in *Avena*

The Court framed the issue with regard to enforceability of the ICJ judgment in terms of whether the treaties relating to ICJ jurisdiction over disputes against the U.S. under the Vienna Convention were self-executing treaties, and thus automatically binding federal law under the Supremacy Clause. The Court stated that "while treaties may comprise international commitments ... they are not domestic law unless Congress either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." The Court noted that "interpretation of a treaty, like the interpretation of a statute, begins with its text," but that it would also consider the negotiation and drafting history of the treaty as well as the postratification understanding of the signatory nations. The Court in fact also considers statements made during hearings before the Senate Foreign Relations Committee and Subcommittee, the views of the current Administration, which it says are entitled to great weight, the purpose of the ICJ, a clear statement rule to the effect that the procedural rules of the forum govern in the absence of a clear and express statement to the contrary, and the implications of holding the ICJ treaty provisions to be self-executing, including that this result would make such decisions nonreviewable by U.S. courts and would lead to the improbable result that ICJ judgment could trump state procedural rules when even basic constitutional rights are subject to those rules.

The text is central to the Court's interpretation, and, particularly the text of Article 94 of the U.N. Charter, which provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the ICJ in any case to which it is a party." The Court believes that the "undertakes to comply" language indicates a commitment for future action through the political branches to comply with the judgment, rather than an agreement that a judgment will be automatically binding on U.S. courts. The Court also finds persuasive the fact Article 94 provides for an express diplomatic remedy through referral of a failure to comply to the U.N. Security Council – a body in which the U.S. can protect itself from punishment for

noncompliance by exercising its veto – rather than a legal remedy.¹ The Court’s textualism in *Medellin* is not, however, the stringent textualism of Justice Scalia, but rather an interpretive method that, while emphasizing the importance of the text, considers a number of sources before reaching its conclusion. The Court ultimately states that “[n]othing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher statute than that enjoyed by many of our most fundamental constitutional protections.”

B. President’s Power to Enforce the ICJ Judgment

The second issue in *Medellin* is whether the President has power under the Constitution to establish binding rules of decision that preempt contrary state law. The Court notes that the President’s power must come either from an act of Congress or from the Constitution, and applies Justice Jackson’s “sliding scale” analysis, a framework often used by the Court in determining Presidential power.

The treaty provisions dealing with U.S. obligations towards the ICJ do not authorize the President to give the *Avena* judgment domestic force because those treaties are not self-executing. The power to transform the international obligation arising from a non-self-executing treaty into domestic law belongs to Congress, not the Executive. Under the Constitution, the President has the authority to “make” a treaty, and if the Executive wants that treaty to be self-executing, then the Executive can do so “by ensuring that it contains language plainly providing for domestic enforceability,” subject to the Senate’s consent. “Once a treaty is ratified without provisions clearly according it domestic effect, however, whether the treaty will ever have such effect is governed by the fundamental constitutional principle that “[t]he power to make the necessary laws is in Congress; the power to execute in the President.” Further, as a non-self-executing treaty is ratified with the understanding it will not have domestic effect, the fact these treaties are non-self-executing not only means they do not constitute authorization for the President’s alleged power, but in fact are an implicit prohibition against the President giving them direct domestic effect. This, thus, would place the President’s action in the third category of Justice Jackson’s framework – where the President is acting in a manner incompatible with the will of Congress, a situation in which he can act only if his power is superior to that of Congress. Further, even if Congressional acquiescence were relevant (which it normally is not

¹The Court also looks at the text of the Optional Protocol to the Vienna Convention by which the U.S. consented to the compulsory jurisdiction of the ICJ with regard to Vienna Convention disputes, finding that the most natural reading is that the Optional Protocol is a bare grant of jurisdiction that says nothing about the effect of the resulting judgment, and the text of the ICJ Statute, which the Court notes states that the purpose of the ICJ is to arbitrate disputes between national governments, and which provides that ICJ decisions have no binding force except between the parties (that is the two countries involved) and in respect to the particular case.

under this third category) the Court finds no evidence that it exists. Finally, the Court finds that the President's attempt to give the ICJ judgment domestic effect does not come within his independent foreign affairs power to resolve foreign claims by executive agreement. Unlike the situations in which that power has been upheld, there is no longstanding practice of congressional acquiescence with regard to actions of the type taken in the Memorandum.

The Court notes that its determination that the President does not unilaterally have the power to give a non-self-executing treaty domestic effect is grounded in the concept of checks and balances, which dictates that an international treaty obligation can be given domestic effect under the Constitution only by joint action of the Executive and Legislative branches – “[t]he Senate can ratify a self-executing treaty ‘made’ by the Executive, or, if the ratified treaty is not self-executing, Congress can enact implementing legislation approved by the President.” The President cannot make a law without Legislative participation under the Constitution, but that would “seem an apt description of the asserted executive authority unilaterally to give the effect of domestic law to obligations under a non-self-executing treaty.”

III. Possible Implications of *Medellin*

As the above discussion of the *Medellin* decision illustrates, the Supreme Court in *Medellin* touches on a number of issues relevant to the work the ULC is doing with regard to private law treaties. The Court, however, discusses those issues in a very different context from that in which the ULC is considering them. This fact, coupled with the often (perhaps overly) broad language the Court uses, makes it difficult to determine with any certainty just what significance *Medellin* will have on the ULC's implementation projects. For example, the *Medellin* Court says that the responsibility for transforming the international obligation arising from a non-self-executing treaty into domestic law is given to Congress. Does this mean that the Court is saying that a non-self-executing treaty cannot be implemented through state law rather than federal law? Read literally, one could reach that result, but the issue was not before the Court, and it seems highly unlikely the Court would intend to prejudge it through statements made for an entirely different purpose.

Nevertheless, there are some aspects of *Medellin* that seem to have at least indirect significance for the ULC work with regard to implementation of private law treaties. Some of these are discussed below.

A. *Medellin* reaffirms the basic legal concepts in which state law implementation is grounded

The conceptual basis for preserving state law in the areas covered by private law treaties through state law implementation is the Supreme Court's interpretation of the Supremacy Clause in *Foster v. Neilson*, decided in 1829, in which the Court held that only self-executing treaties become part of the supreme law of the land under the Supremacy Clause. If the treaty is not self-executing, then it is the legislation by which the treaty is implemented, rather than the treaty itself, that becomes part of domestic law. The *Medellin* Court reaffirms, and relies heavily upon,

the *Foster* interpretation of the Supremacy Clause in reaching its decision. It thus makes it clear that the *Foster* interpretation of the domestic effect of a treaty remains a solid basis for developing state law implementation techniques.

As discussed above, the *Medellin* Court's statement of these principles, however, leaves something to be desired from the standpoint of state law implementation, as the Court makes a number of statements which indicate an assumption that Congress is the only body that can implement a non-self-executing treaty. For example, the Court states that "while treaties 'may comprise international commitments ... they are not domestic law unless *Congress* has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms.'" (emphasis added). It seems unlikely, however, that the Court would consider these statements binding upon it if were to consider the issue of state law implementation in the future.

B. Chief Justice Robert's textualist interpretive method in *Medellin* and Justice Breyer's reaction to it in his dissent create uncertainty as to what must be done in order to express the intent that a treaty be self-executing.

The test stated in *Medellin* for determining whether a treaty is self-executing is the traditional test – the intent of the parties – and, as Chief Justice Roberts notes, looking to the text of the treaty as a source of that intent is also traditional. *Medellin* also provides some useful guidance by suggesting that the most relevant intent is that of the Senate that gave its consent to the treaty and the Executive that ratified it, rather than the intent of the parties to the treaty. Although the Court suggests that the intent of other signatory countries is relevant, its primary focus is on what the ratifying parties intended. This makes a great deal of sense in light of the fact different nations can have very different intents with regard to how a treaty will be implemented.

Justice Breyer's dissent, however, takes issue with what he views as the majority's inordinate emphasis upon the text in determining the intent with regard to self-execution. He reads the majority opinion as suggesting that for a treaty to be found to be self-executing there must be language in the treaty itself that specifically addresses the issue. He states that "insofar as today's majority looks for language about "self-execution" in the treaty itself and insofar as it erects "clear statement" presumptions designed to help find an answer, it is misguided" and that the majority "looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language)."

The majority, on the other hand, denies that it is creating a clear statement rule:

Contrary to the dissent's suggestion, neither our approach nor our cases require that a treaty provide for self-execution in so many talismanic words; that is a caricature of the Court's opinion. Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.

One can find evidence for both views in the majority opinion – Justice Breyer points to the majority’s use of a presumption that “absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State,” as well as the majority’s statement that

[i]f the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented “in mak[ing]” the treaty by ensuring that it contains language plainly providing for domestic enforceability.

On the other hand, in addition to the Court’s objection to Justice Breyer’s characterization of what is required, there is other language in the opinion indicating the text could implicitly reveal an intent for the treaty to be self-executing, and there is the basic fact that what Justice Breyer is suggesting the Court is requiring is not what the Court in fact does – as discussed above, while the Court places emphasis on the language of the text, it does not rely on the absence of a clear statement of self-execution as the basis of its decision, but rather looks at a number of factors, including not only text, but legislative history and purpose, to make its determination. In fact, as suggested above, as a textualist opinion, Chief Justice Robert’s opinion is a much softer form of textualism than that utilized by Justice Scalia, including in past decisions interpreting treaties.

Justice Breyer’s reaction to the majority opinion and the majority response ultimately may be best explained in terms of the ongoing struggle among members of the Court as to the appropriate interpretive method – a struggle between textualists on the Court and those who argue for a more flexible approach to interpretation that has divided the Court for a number of years.² That explanation, however, does not help those who have to deal with the implementation of treaties in light of *Medellin*. Perhaps the best that can be said on this point is that the *Medellin* decision illustrates the wisdom of the position the ULC has been encouraging the State Department to take with regard to private law treaties – that is, that the anticipated method of implementation should be taken into consideration during the negotiation of the treaty, and should be made explicit in the Senate’s consent with regard to the treaty.

C. *Medellin* highlights the issue of how to ensure the U.S. ability to effectuate its international obligations under a treaty when the implementation of that treaty depends on action by the states.

The *Medellin* Court finds that the President does not have the constitutional power to unilaterally effectuate a non-self-executing treaty by giving it domestic effect. While the Court notes that the combination of a non-self-executing treaty and a lack of implementing legislation does not preclude the President from acting to comply with an international treaty obligation, it finds that the structural principle of checks and balances prevents the President from doing so by

²It is interesting to note that Justice Stevens, who often is leading the charge against textualist interpretation concurs with the majority in *Medellin*.

in essence creating domestic law without the participation of the Legislative branch.

This determination could be of significance with regard to state law implementation of treaties in at least two ways. First, on the constitutional level, *Medellin* finds that there are structural limits on the ability of the Executive branch to implement a treaty. While the limits found are based on separation of powers and checks and balances, not federalism, federalism also is a structural limitation and, thus, *Medellin* provides some support for the suggestion that the Court also would find some federalism limits on treaty implementation.³

Second, and more significantly from the standpoint of the ULC's efforts, *Medellin* underlines the problem of effective implementation of U.S. treaty obligations at the international level when implementation depends upon action by the states. Even before the actual decision in *Medellin*, we had already seen its impact in this regard through the increased focus within the State Department on ensuring that the federal government retain some "hook" in connection with state law implementation that would allow it to fulfill its international obligations in the face of state refusal to do so.

It is somewhat ironic that *Medellin* should have led to this result, as in that case there was in fact a federal hook – federal habeas review of Mr. Medellin's state conviction. The real problem in *Medellin* was that the federal courts, including the U.S. Supreme Court, agreed with the Texas courts that the Vienna Convention did not supercede state procedural requirements for post-conviction review. In an earlier case dealing with the impact of the ICJ's *Avena* decision, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the Supreme Court had held that U.S. courts were not bound by the ICJ interpretation of the Vienna Convention, and went on to interpret the Vienna Convention in a manner contrary to the ICJ's interpretation, finding that its notification right was subject to state procedural default rules. But, politics is not rationale, and it seems that one of the major impacts of *Medellin* for state law implementation efforts will be the increased focus on ensuring state compliance, a focus that certainly will not preclude state law implementation, but which will require the ULC and the State Department to be even more creative in coming up with acceptable state law implementation structures.

IV. Conclusion

The significance of *Medellin* for the ULC's implementation projects is unclear. The decision, while touching on a number of issues relevant to the ULC efforts, discusses those issues in a very different context from the one in which the ULC is considering them, and contains broad language that sometimes seems to point in more than one direction and could have unintended consequences. Its meaning is further muddled by the fact the opinions appear to some extent to

³It should be noted that *Medellin* does not of itself touch upon the ruling in *Missouri v. Holland* that Congress can pass implementing legislation under the treaty power that Congress would be outside of its powers otherwise. *Missouri* dealt with Congress' power to implement a treaty, while *Medellin* deals with Executive power. *Medellin* does, however, hold that there are structural constitutional limits on the method of treaty implementation.

be caught up in the Court's ongoing internal debate over textualism. This Memorandum suggests some of the possible ways in which *Medellin* might influence the state treaty implementation process. My own bottom line conclusion is that the decision on the whole supports the efforts the ULC has undertaken and probably will not significantly effect the way they currently are being pursued.