

DEFENDING U.S. SOVEREIGNTY, SEPARATION OF POWERS, AND FEDERALISM IN *MEDELLÍN V. TEXAS*

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In 2008, the U.S. Supreme Court decided *Medellín v. Texas*,¹ a case that implicated virtually every conceivable axis of the structural limitations on government. President vis-à-vis Congress, President vis-à-vis the Supreme Court, international law vis-à-vis domestic law, federal government vis-à-vis the States, and, with a Möbius twist, President vis-à-vis the state judiciary. In *Medellín*, the State of Texas vigorously defended U.S. sovereignty, separation of powers, and federalism, and, by a vote of 6-3, Texas prevailed.

The Supreme Court's resolution of this case presents reason for both celebration and great trepidation. We should celebrate because U.S. sovereignty was preserved and because separation of powers and federalism—both foundational limits on governmental authority—were respected and enforced. Each of these structural limitations on government serves to diffuse power and to safeguard the citizenry, and it is only by ensuring the vitality of these democratic checks on unilateral authority that liberty can be secured. At the same time, the case invites great trepidation, because it represents an assault on those principles that will continue unabated for many years to come.

I. HOW THE CASE AROSE

The principles at stake were monumental, but, as always, the case arose from concrete facts. And, in this case, the facts were horrific. One night in 1993, two teenage girls were walking home

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1. 128 S. Ct. 1346 (2008).

in Houston when they had the ill fortune of stumbling into a gang initiation.² What ensued was the brutal gang rape and murder of both girls.³ Even in Houston, a city hardened to violent crime, the facts of this case shocked the conscience of the city.⁴ Within days, police apprehended the gang members, who in turn confessed.⁵ José Ernesto Medellín, the second-in-command of the gang, waived his *Miranda* rights and wrote a four-page hand-written confession.⁶ Displaying no remorse whatsoever, he admitted gang-raping both girls, and he described how they pleaded for their lives before he stomped on one girl's neck and strangled them both with a shoelace and a belt.⁷ Medellín committed an unspeakable crime, confessed to that crime, and, after being vigorously represented by two state-funded lawyers,⁸ was convicted and sentenced to death by a jury of his peers.⁹

Medellín's conviction was affirmed on appeal.¹⁰ Then, four years later, he brought a new claim into his case on state habeas: He alleged that he was denied his rights under the Vienna Convention on Consular Affairs. The Vienna Convention, a multi-lateral treaty ratified in 1969, provides that a foreign national has the right to contact his consulate if arrested in a foreign country, and that the arresting authorities are required to inform the national of that right.¹¹ Although Medellín had lived most of his life in the United States, had attended American schools, and read and wrote English, he was born in Mexico and therefore was technically a Mexican national.¹² And, there was no dispute that the local police had failed to inform Medellín of his rights under the Vienna Convention.

2. *Medellín*, 128 S. Ct. at 1354.

3. *Id.*

4. Mike Tolson, *5 Rape-murder Trials Shake City Inured to Crime*, HOUSTON CHRON., Sept. 25, 1994, at A1.

5. See John Makeig & Lisa Teachey, *Five teens indicted for capital murder in 2 girls' deaths*, HOUSTON CHRON., Aug. 31, 1993, at A15; Tolson, *supra* note 4, at A1.

6. See Brief for Respondent at 2, *Medellín*, 128 S. Ct. 1346 (No. 06-984). The brief's appendix reproduces the text of the confession. *Id.* at app. 32-36.

7. *Id.* at app. 35.

8. See Respondent's Brief at 3, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928) (describing the aggressive defense mounted by Medellín's counsel).

9. *Medellín*, 128 S. Ct. at 1354.

10. *Id.* at 1354-55.

11. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261, 292.

12. *Medellín*, 128 S. Ct. at 1354.

That, however, was not the end of the matter. It is a bedrock principle of American criminal procedure that rights not preserved at trial cannot later be used to collaterally attack a conviction.¹³ In this case, Medellín’s lawyers never raised the Vienna Convention at trial, and so the habeas court held that any claim under that treaty was procedurally defaulted.

The Supreme Court has long held that legal claims—even constitutional claims, which enjoy the highest level of protection in criminal law—generally cannot be raised on habeas if they were not raised first at trial.¹⁴ And there is no sound basis for according treaty claims more force than constitutional claims. For that reason, in 1998 the Supreme Court in *Breard v. Greene* squarely held that if a defendant does not raise a Vienna Convention claim at trial, then that claim is forfeited and cannot be raised on habeas.¹⁵

The reason for the procedural default rule, the Supreme Court has explained, is that the trial should be the “main event”¹⁶—the central moment for determining guilt and resolving all of the legal issues in the case. And *Medellín* illustrates well the reason for that rule: Had Medellín’s lawyers asserted at trial his treaty right to contact the Mexican consulate, the trial judge could have resolved the issue on the spot, allowing him simply to contact the consulate. The claim would have gone away, and he no doubt would still have been convicted for the brutal crime to which he had confessed. Instead, Medellín urged, the treaty claim that he had never raised should serve as a basis to set aside his long-completed trial and final conviction. The state courts rejected Medellín’s claim,¹⁷ and, following *Breard*, the Fifth Circuit likewise rejected Medellín’s federal habeas claim.¹⁸

The Supreme Court granted certiorari and heard oral argument, but then dismissed the case as improvidently granted because Medellín had subsequently brought a successive state habeas peti-

13. *Breard v. Greene*, 523 U.S. 371, 375 (1998) (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)).

14. See *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000) (noting that the procedural default rule applies to constitutional claims); *Breard*, 523 U.S. at 376 (noting that the procedural default rule applies to “provisions of the Constitution itself”); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (noting that the procedural default rule applies to “federal claims”).

15. See *Breard*, 523 U.S. at 375–76.

16. *Wainwright*, 433 U.S. at 90.

17. See *Ex parte Medellín*, 280 S.W.3d 854, 856 (Tex. Crim. App. 2008).

18. *Medellín v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004).

tion, urging that a recent memorandum signed by President Bush (discussed below) superseded state law.¹⁹ Then, the Texas Court of Criminal Appeals denied the successive petition as an abuse of the writ, and unanimously held that the Presidential Memorandum exceeded the President's constitutional authority.²⁰ And so the Supreme Court granted certiorari once again.²¹

Before the Supreme Court, Medellín advanced two principal arguments: *First*, he argued that the *Avena* decision of the World Court constituted a binding judgment, which the Supreme Court was obliged to enforce. And *second*, he argued that the Presidential Memorandum constituted binding federal law, which trumped all state and federal law to the contrary. Both arguments had grave implications.

II. THE WORLD COURT DECISION

In 2004, the World Court²² issued its *Avena* decision, which purported to order the United States to reopen the convictions and sentences of fifty-one Mexican nationals on death row across the country.²³ For the first time in the history of our nation, a foreign tribunal attempted to bind the U.S. justice system, and to disturb final criminal convictions.

Thus, the central issue in *Medellín* was a question of U.S. sovereignty—who makes the laws that bind the citizens of the United States. Are the American people governed by judges, courts, and laws of nations other than our own, or are they governed by the United States Constitution, by the U.S. Congress, the United States government, and ultimately by “We the People”? It is difficult to imagine a more fundamental question.

Medellín's answer to this question was straightforward. He argued that the “judgment of the ICJ” is “binding” on the United States and on “all of its [judicial] organs.”²⁴ Hence, the Supreme Court could no more decide the matter differently from

19. *Medellín v. Dretke*, 544 U.S. 660, 666–67 (2005) (per curiam).

20. *Ex parte Medellín*, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006).

21. *Medellín v. Texas*, 550 U.S. 917 (2007).

22. The formal name for the World Court is the International Court of Justice (ICJ). It serves as the judicial arm of the United Nations. Statute of the International Court of Justice art. 1, June 26, 1945, 59 Stat. 1055, 1055.

23. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31).

24. Brief for Petitioner at 20, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984).

the ICJ than could a federal district court disregard a holding of the Supreme Court. That understanding of the relationship between the U.S. Supreme Court and the ICJ—that the former is an inferior court bound by the authority of the latter—is profoundly wrong, and the Court rightly rejected it.

Indeed, a question at oral argument illustrates just how radical Medellín’s position really was. Chief Justice Roberts asked Medellín’s lawyer the following:

Suppose, for example, that the International Court of Justice determined in this case its judgment was the same, but they added: As a matter of deterrence, we think the officers who failed to give consular warning should each be sentenced to 5 years in jail. . . . So if the ICJ determined that the officers should each go to jail for 5 years, [your position is that] we would have no basis for reviewing that judgment?²⁵

Despite repeated questioning by the Court, Medellín’s counsel was never able to respond directly to that hypothetical, for one simple reason: Any answer he might give would prove indefensible. An answer in the affirmative—that the Supreme Court would be obliged to obey the World Court and order police officers imprisoned for five years—would have been subject to withering skepticism by the Court. An answer in the negative would have conceded Medellín’s central argument about the “binding” nature of the World Court decision.

III. THE PRESIDENTIAL MEMORANDUM

On the eve of oral argument in *Medellín v. Dretke* (*Medellín I*),²⁶ President George W. Bush issued a two-paragraph “Memorandum for the Attorney General,” which stated that he had “determined” that the United States would “discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.”²⁷ Medellín’s second argument to the Court was that the Presidential Memorandum constituted binding federal law,

25. Transcript of Oral Argument at 4-5, *Medellín*, 128 S. Ct. 1346 (No. 06-984).

26. 544 U.S. 660 (2005).

27. Brief for the United States as Amicus Curiae Supporting Respondent at 41-42, *Medellín*, 544 U.S. 660 (No. 04-5928).

superseding any contrary state or federal law. On this ground, the Department of Justice agreed with Medellín.

Texas advanced three arguments against the Presidential Memorandum: that it transgressed the authority of Congress, of the judiciary, and of the States.

First, the Presidential Memorandum impermissibly intruded upon the authority of Congress. The Presidential Memorandum contradicted the express understanding under which the Senate ratified the three treaties at issue—the Vienna Convention, the U.N. Charter, and the Optional Protocol. The Senate understood—and, until recently, the Executive Branch embraced—three key limitations on those treaties. First, they create no individual rights.²⁸ Second, they are enforceable politically and diplomatically through the U.N. Security Council, and not through domestic courts of law.²⁹ And third, they were not intended to alter preexisting U.S. law.

The ICJ statute limits that court's jurisdiction only to disputes between nations,³⁰ and then only when those nations have expressly consented to ICJ jurisdiction.³¹ Thus, the ICJ's decisions, by its own governing treaties, have binding force only between the parties, which must be sovereign nations, and only with respect to the particular dispute.³² Indeed, the Senate debates at the time of ratification of the U.N. Charter expressly confirm that it understood that the ICJ's judgments would not bind domestic courts.³³

28. The Vienna Convention expressly provides that “the *purpose* of [the] privileges and immunities [discussed in the Convention] is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States[.]” Vienna Convention on Consular Relations, *supra* note 11, 21 U.S.T. at 79, 596 U.N.T.S. at 262 (emphasis added). Moreover, the Senate's understanding that the Vienna Convention created no individual rights mirrored that of every other signatory. As the United States observed, “[n]either petitioners [in *Sanchez-Llamas*] nor their amici offer a single unambiguous example in the 40-year history of the Vienna Convention from any of its 161 parties of an individual defendant being afforded a remedy in his criminal case on the basis of a Vienna Convention violation.” Brief for the United States as Amicus Curiae Supporting Respondents at 8, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (Nos. 05-51 & 04-10566).

29. See Brief for Respondent, *supra* note 6, at 22–24 & n.19.

30. Statute of the International Court of Justice art. 34, para. 1, June 26, 1945, 59 Stat. 1055, 1059 (“Only states may be parties in cases before the Court.”).

31. *Id.* art. 36, paras. 2–3, 59 Stat. at 1060.

32. *Id.* art. 59, 59 Stat. at 1062.

33. See, e.g., 92 CONG. REC. 10,694 (1946) (“[W]e never intended that the United Nations—and the International Court is a part of the United Nations structure—should ever have jurisdiction of essentially domestic issues.”). As one Senator put it:

Likewise, the U.N. Charter, the treaty establishing the ICJ, provides that the only way to enforce ICJ decisions is through the U.N. Security Council, which may “make recommendations or decide upon measures to be taken to give effect to the judgment.”³⁴ And using the U.N. Security Council to enforce ICJ decisions makes sense. The treaties at issue are obligations sovereign-to-sovereign and nation-to-nation.³⁵ The enforcement mechanism for these international agreements is designed and intended for sovereigns to resolve disputes as a matter of political and diplomatic negotiation. Decisions of the ICJ were never intended to be enforced in domestic courts of law.

Moreover, the U.S. State Department—hardly a bastion of conservative principles—has uniformly maintained for the last forty years that the U.N. treaties at issue have only diplomatic remedies and are neither self-executing nor enforceable in U.S. courts.³⁶ Even the Clinton Administration embraced that interpretation.³⁷ Unfortunately, the Presidential Memorandum rejected those four decades of consistent policy and asserted instead the authority singlehandedly to overrule state law in the interest of international comity. As the Department of Justice candidly conceded, the Presidential Memorandum was an “unprecedented action.”³⁸

On a personal level, I found myself in the unusual position of arguing against President George W. Bush, under whom I served for many years and of whom I remain a strong admirer; instead, ironically enough, Texas found itself agreeing with the Clinton Justice Department. In fact, we quoted extensively from

If it is decided that a question is domestic, it therefore means that it is not a question covered by international law If the court should commit the error of taking jurisdiction of a case plainly within the domestic jurisdiction of the United States, the United States could on this ground refuse to comply with the decision.

92 CONG. REC. 10,684 (1946) (statement of Sen. Morse).

34. U.N. Charter art. 94, para. 2.

35. See Statute of the International Court of Justice art. 34, para. 1, *supra* note 30, 59 Stat. at 1059 (“Only states may be parties in cases before the Court.”).

36. See *United States v. Li*, 206 F.3d 56, 63–64 (1st Cir. 2000) (en banc) (describing the State Department’s consistent position that the Vienna Convention “establish[es] state-to-state rights and obligations” and “does not require the domestic courts of State parties to take any actions in criminal proceedings, either to give effect to its provisions or to remedy their alleged violation”).

37. See *id.* at 64 (quoting the Clinton-era State Department for this proposition).

38. Brief for Respondent, *supra* note 6, at 12 (quoting Brief for the United States as Amicus Curiae Supporting Respondents, *supra* note 28, at 29).

the Clinton Justice Department's brief in the *Breard* case, which advocated precisely our position—that the federal government had no authority to interfere with state judicial systems.³⁹

Were Medellín's view correct, the implications would be staggering. The President could overturn any law at any time in the name of enforcing any vague, aspirational, international obligation the United States might have ratified. For example, the International Covenant on Civil and Political Rights guarantees to every individual the right to treatment in accordance with "the inherent dignity of the human person."⁴⁰ When the Senate ratified that treaty, it was not self-executing, meaning that no plaintiff could sue in court to enforce his right to "personal dignity."⁴¹ But if the Court adopted Medellín's view, any future President, in the interest of international comity, could order the state courts to set aside any state laws inconsistent with our international obligation to ensure "personal dignity."

And there are dozens of other treaties, with similar, amorphous, non-self-executing provisions. Any President could find an international hook to set aside virtually any state laws he or she wished. A host of state laws—including state environmental laws, limitations on tort damages, marriage and divorce laws, adoption laws, and death penalty laws—could all be at risk, if a President who disagreed with them had the ability simply to set them aside.

Like many Federalists, I am an ardent defender of a strong executive, but not an executive who can do this. Regardless of one's substantive policy preferences, our constitutional system simply does not grant the President the power to unilaterally set aside state laws with which he or she disagrees.

Second, the Presidential Memorandum encroached on power properly belonging to the U.S. Supreme Court. Just the previous Term, the Court had declared in *Sanchez-Llamas v. Oregon* that the *Avena* decision was *not* enforceable in U.S. courts.⁴² Medellín's po-

39. See Brief for Respondent, *supra* note 6, at 33 (quoting Brief for the United States as Amicus Curiae at 51, *Breard v. Greene*, 523 U.S. 371 (1998) (Nos. 97-1390, 97-8214)).

40. International Covenant on Civil and Political Rights art. 10, Dec. 19, 1966, 999 U.N.T.S. 171, 176.

41. See *Beazley v. Johnson*, 242 F.3d 248, 267 (5th Cir. 2001); 138 CONG. REC. 8071 (1992).

42. 548 U.S. 331, 355-56 (2006).

sition and the position of the Justice Department was essentially that lower courts should obey the Presidential Memorandum and not the Supreme Court's *Sanchez-Llamas* decision.

Accordingly, in arguing *Medellín*, I had the remarkable privilege of walking into the Supreme Court and relying as a principal authority on . . . *Marbury v. Madison*. Our position at oral argument was literally that "[i]t is emphatically the province and duty of [this Court] to say what the law is," and it is emphatically *not* the province and duty of the President of the United States to set aside this Court's judgments and to bind all the courts of the United States with determinations to the contrary.⁴³

Medellín argued that the authority to "say what the law is" could be given by treaty to the World Court. Another oral argument question, this one in 2005 in *Medellín I*, illustrated just how extreme that position really was. Justice Scalia posed the following hypothetical: "[D]o you think that the President can enter into a treaty, with the approval of Congress, that would provide that, in a particular combat, the Commander in Chief will be somebody other than the President of the United States?"⁴⁴

In other words, could a treaty delegate the President's core constitutional powers? Again, *Medellín's* counsel was unable to answer directly, for the same reason: Any answer was untenable. If the answer were yes—that a treaty could name Kofi Annan as the Commander-in-Chief of the U.S. armed forces—that answer would be roundly rejected by the Court. And if the answer were no, it would immediately beg the question of why, then, could a treaty give away the core constitutional responsibility of the Supreme Court to a foreign tribunal.

The answer, of course, is that no treaty can do so.

Third, the Presidential Memorandum intruded on the sovereignty of the States. The President's Memorandum commandeered state judges, instructing them to reopen final cases, decide them differently, and set aside any state law to the contrary. This directive conflicts with our constitutional structure, which preserves state sovereignty and secures the States' authority as sovereigns to "order the processes of [their] own governance."⁴⁵ Likewise, the

43. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

44. Transcript of Oral Argument at 11–12, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928).

45. *Alden v. Maine*, 527 U.S. 706, 752 (1999).

federal government may not treat the States as “mere political subdivisions of the United States.”⁴⁶ Thus, the federal government may not commandeer the machinery of state government to implement federal policy. Indeed, the Constitution “recognizes and preserves the autonomy and independence of the States— independence in their legislative and . . . judicial departments.”⁴⁷ Neither the President’s foreign affairs power under Article II nor the Supremacy Clause can support an attempt to force Texas to enlarge the jurisdiction of its courts.⁴⁸ Under longstanding Supreme Court precedent, that exceeds the executive’s authority.

* * *

In *Medellín*, the Supreme Court held as follows:

In sum, while the ICJ’s judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that preempts state restrictions on the filing of successive habeas petitions. As we noted in *Sanchez-Llamas*, a contrary conclusion would be extraordinary, given that basic rights guaranteed by our own Constitution do not have the effect of displacing state procedural rules. Nothing 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 status than that enjoyed by “many of our most fundamental constitutional protections.”⁴⁹

Thus, the *Medellín* Court rightly held that World Court decisions do not have authority greater than that of U.S. domestic courts, that the World Court cannot overrule the Supreme Court, and that the executive branch cannot unilaterally set aside state laws inconsistent with its policy preferences.

And, it should be noted, this holding is consistent with the considered judgment of every other nation on earth. Not without some irony, some ninety nations appeared as *amici* against

46. *New York v. United States*, 505 U.S. 144, 188 (1992).

47. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938).

48. See *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (noting that the “treaty power” shall not “authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States”).

49. *Medellín v. Texas*, 128 S. Ct. 1346, 1367 (2008) (citations omitted).

Texas before the U.S. Supreme Court.⁵⁰ Nonetheless, *not one* of those nations enforces the Vienna Convention or the judgments of the World Court in its own courts.⁵¹ *No other nation accords binding force to World Court rulings in its own domestic courts*—and yet a great many nations wished for the United States to sacrifice its own sovereignty and be bound by the World Court.

The Supreme Court rightly rejected that invitation.

Likewise, the Supreme Court rejected the invitation of the Department of Justice to sacrifice separation of powers and federalism to uphold the Presidential Memorandum. As Madison famously observed in *The Federalist*: Power in our government is divided between three branches in the federal government, and between the national government and the states, and by dividing the power, the Constitution protects the liberty of everyone.⁵²

Medellín was a significant victory for U.S. sovereignty, for separation of powers, and for federalism. Yet these fights will keep on coming. The creep of international law, and the asserted authority of international tribunals, will pose one of the greatest challenges of coming decades. And there will remain a continued need to defend our sovereignty, and our structural limitations on government, so as to preserve our liberty.

50. See, e.g., Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner at 3–4, *Medellín*, 128 S. Ct. 1346 (No. 06-984) (representing the European Union, its member states, and certain members of the international community); Brief of Foreign Sovereigns as Amici Curiae in Support of Petitioner José Ernesto Medellín at 14, *Medellín*, 128 S. Ct. 1346 (No. 06-984) (representing Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Peru, Uruguay, and Venezuela).

51. *Medellín*, 128 S. Ct. at 1363 & n.10.

52. THE FEDERALIST NO. 51, at 357 (James Madison) (Clinton Rossiter ed., 1961) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”).