

## Texas Holds Him

Leave it to Texas to put a stop to executive overreaching.

By Dahlia Lithwick

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It's become a sort of truism that nothing earthly can halt the Bush administration's drive to reinstate the Imperial Presidency. We like to moan that as this president continues to expand the reach of his asserted authority to invade/eavesdrop/classify/torture/detain, nothing breaks his stride. Not tanking poll numbers, not losing Congress to the Democrats, not even pushback from the Supreme Court. Over seven long years, no institution of government has really been able to tell the president, "No."

Until Texas.

[Medellin v. Texas](#) could be a law-school exam unto itself. It touches on the separation of powers and the supremacy clause, international treaties and state criminal codes, federalism and the reach of the president's diplomatic authority, all wrapped up in fundamental questions about the scope of judicial review. But really, the best part of *Medellin* is that if you are a casual spectator attempting to pick out the "good guys," here's your choice: the state of Texas and its relentless quest to execute its people without regard to moral, international, or legal norms, versus the Bush administration and its claim to [broad new executive authority](#) to boss around state judges. It's like having to choose between being clawed to ribbons by a grizzly bear or gnawed to death by a killer whale.

Jose Ernesto Medellin is a living argument for the death penalty. In 1993, as part of a gang initiation, he and some friends sodomized and gang-raped two teenage girls in Houston, strangling them with their shoelaces. One victim's Goofy watch was stolen as a prize. Medellin confessed to the crime and was sentenced to death by a jury, a sentence affirmed in the appeals courts. Only later did Medellin learn that, because he is a Mexican citizen, the Vienna Convention of 1963 entitled him to consult with Mexican consular authorities—who might have helped him at his trial. For example, they might have found him a decent lawyer, instead of, say, one disbarred for ethics violations in another case.

In 2004, Mexico filed a suit on behalf of Medellin and 50 other Mexican nationals on death row in the [International Court of Justice](#) (the judicial body of the United Nations), claiming the United States had violated his and the others' Vienna Convention rights by failing to contact their consulates. In 2004, the ICJ ruled in a case called *Avena* that the United States had in fact violated the Vienna Convention, and that the 51 sentences needed to be subject to "review and reconsideration" in the U.S. courts. And then—here comes the really odd part—President Bush jumped into the middle of the dispute in 2005, issuing a weird little back-of-the-napkin "Memorandum for the Attorney General" to the state courts where these 51 guys had been sentenced. In this missive, he asserted that, based on his executive authority and apparently his abiding affection for international treaties, he was ordering the state courts to enforce the ICJ's *Avena* decision.

The Texas Court of Criminal Appeals—not to put too fine a point on this one—told the president to eat his shorts. Bush, the court said, "has violated the separation of powers doctrine by intruding into the domain of the judiciary." So there you have it: One team consists of the Imperial President and the unrepentant rapist; the other is Texas, a state that has never met a death-row candidate it can kill fast enough.

This would be an easy case were it not for Bush upending the world order by siding with the humanitarians and internationalists. And perhaps because of that, the justices spend [much of the oral argument](#) wishing the executive powers problem away. The court's more conservative members—who might ordinarily look favorably on expanded presidential authority—question Medellin's lawyer about why uppity foreigners should be able to tell U.S. courts what to do. The more liberal justices work extra hard to avoid taking the position that the president should be afforded sweeping new powers to conduct foreign policy. In sum, we get a broad-ranging discussion about the self-enforcing nature of international treaties, rather than a referendum on President Bush.

Donald F. Donovan argues for Medellin, and within seconds he's blasting Texas for trying to tell the world, the

court, the Congress, and the president that Texas answers to none of them. It quickly becomes plain that neither Justices Antonin Scalia and Samuel Alito, nor Chief Justice John Roberts is really offended by this proposition. Roberts asks whether the ICJ could also have forced Texas to jail the state officials who failed to give Medellin access to his consulate. Donovan struggles with this hypo until Justice Stephen Breyer lets him know that foreign courts can't actually force us to violate our own Constitution.

Justice Anthony Kennedy—neurons imploding at the prospect of having to choose between international goodwill and the supremacy and independence of the U.S. Supreme Court—asks what would have happened if Bush had ordered the U.S. courts *not* to enforce the ICJ verdict. When Donovan says the courts would have had to comply with the international tribunal, Kennedy pounces: That means the president's action is not what decides the case.

The chief justice offers Donovan five extra minutes if he can just clear up a few more things, like what the Supreme Court is left to interpret if they are required to simply sign off on the judgment of the world court. "Can we interpret the judgment?" wonders Kennedy. "Did the president displace our authority to do *that*?"

Solicitor General Paul Clement has 10 minutes to argue the president's side, and he tries awfully hard to put some green between himself, Medellin, and the notion that international treaties are hugely significant. He instantly takes the position that the ICJ judgment is not what decides this case. The president's issuance of an order on top of that judgment? That's where the real constitutional alchemy kicks in.

Scalia disagrees. Only Congress can pass laws demanding the enforcement of a treaty. He shudders at the notion that "the president can make domestic law by writing a memo to the attorney general." He doesn't even understand how Medellin and the other 50 Mexicans named in *Avena* are entitled to relief in the first place; *Avena* was a fight between Mexico and the United States.

Kennedy asks again what Clement would be arguing if the president had ordered Texas to defy the ICJ judgment. "Then I'd be on *that* side of the podium," confesses the SG.

Scalia is still bothered by this casual memo the president wrote to his attorney general. How can a mere memorandum have legal effect, he wonders: "What if the president just wrote a memo to himself?" The memo needn't be a formal legal document, replies Clement. It's enough that the president directed the courts to abide by the ICJ. It does make you wonder whether the president's Christmas lists and the doodles beside his phone also carry the force of law.

When it's his turn, Texas Solicitor General Ted Cruz is confronted by Justice David Souter, who wants to know if the case can be decided on some basis other than the president's power. Then Breyer reads the supremacy clause of the Constitution: "[a]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State," he stops to observe, "I guess that was meant to include Texas ... 'shall be bound thereby.'" You have a treaty ratified by Congress, plus a judgment from international tribunal. "That is the law," he says.

Cruz argues that Congress wanted disputes over treaties and conventions to be resolved diplomatically, not in the courts. To do otherwise is to give away the courts' constitutional power.

Scalia continues to object to giving the ICJ authority to determine U.S. federal law. "I am rather jealous of that authority," he admits.

Ginsburg is incredulous in the opposite direction. The United States submitted to the ICJ's jurisdiction. If the court accepts Texas' argument, then "unlike the rest of the world, the United States can't get the advantage of reciprocal guarantees that our judgments will be respected and in turn we will respect your judgments." And isn't that why the United States pushed for this convention in the first place? To protect Americans accused of crimes abroad?

But only Ginsburg and Breyer seem worried today about keeping promises we've made to the world. Kennedy, like Scalia, seems to care more about hanging on to the court's promise to *Marbury v. Madison*. Either way, I can't count five votes today for the position that President Bush gets to scrawl a note to Al Gonzales and call it a legal directive the courts must enforce. Memo to the Congress from Texas: Try saying "no" to the president. It may just work for you, too.

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