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Medellin's Clear Statement Rule: A Solution for International Delegations

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INTRODUCTION

The U.S. Supreme Court's 2008 decision in *Medellín v. Texas*[1] raised many fascinating structural constitutional issues about the relationship between federal courts and international courts, the delegation of federal power to international organizations, and the role of the President in the enforcement of international court judgments against the states. Yet, Chief Justice John G. Roberts's opinion for the Court managed to avoid direct discussion of any of these issues. Instead, it focused almost exclusively on the doctrine of non-self-execution. The Court's determination that the relevant treaties were non-self-executing lies at the heart of its decision.

The focus on non-self-execution, however, does not mean that the complicated structural problems raised by *Medellín* do not exist. Rather, in this short essay, I argue that the problem of international delegations is crucial to understanding and justifying Chief Justice Roberts's application of the non-self-execution doctrine in *Medellín*.

As I will explain, the *Medellín* Court required a clear statement of an intent to delegate powers to an international tribunal. This approach, I argue, has the functional benefit of limiting and controlling (but not prohibiting) the delegation of judicial power to international tribunals. In this essay, I do not consider questions such as *Medellín*'s consistency with past precedent or with the original meaning of the text of the U.S. Constitution. Although such questions are important, I focus here on providing pragmatic justifications for the *Medellín* Court's application of the non-self-execution doctrine. My goal is to establish that the "delegation" problem lay at the heart of the *Medellín* case and to explain how non-self-execution provides the best functional solution to this problem.

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

I. *MEDELLÍN*, DELEGATION, AND SELF-EXECUTION

What is an "international delegation"? For the purposes of this essay, an international delegation is the "transfer" of a sovereign governmental power to an international institution or organization. *Medellín* is only one powerful example of this ongoing and important phenomenon.[2]

What are sovereign governmental powers? In the United States, such powers are allocated by the Constitution to particular branches of the federal government. The "legislative power," whatever that is, is allocated to the Congress.[3] The "executive power" is allocated to the President.[4] The "judicial power," at least the federal judicial power, is allocated to the federal courts.[5]

In the United States context, the delegation discussion often centers on the delegation of legislative power to independent agencies. The concern there is that the structural separation of powers set up by the Constitution is undermined when Congress transfers its power to another branch. But other kinds of delegation problems are raised when executive or judicial powers are transferred around. For instance, the U.S. Sentencing Commission is a delegation of judicial power from the federal courts to an independent agency.[6] Although the decision to delegate is made by Congress, the power being delegated is a judicial one.

This U.S. constitutional framework is still relevant when we talk about "international delegations." We might simply talk about delegation of U.S. sovereign power in general to international organizations. But because all such sovereign powers are already allocated by the Constitution, any international delegation will also implicate the domestic separation of powers framework.

In my lexicon, "international delegations" occur when international institutions are authorized to exercise a sovereign power of the United States directly. This might range from the power to impose a treaty obligation on the United States by, say, amending a treaty regime against the will of the United States.[7] Or it might be the power to conduct "enforcement" proceedings by, for instance, conducting inspections and

2. I have discussed and defined the term "international delegations" elsewhere. *See generally* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000).

3. U.S. CONST. art. I.

4. *Id.* art. II.

5. *Id.* art. III.

6. *See* Mistretta v. United States, 488 U.S. 361, 361 (1989).

7. *See* Agreement Establishing the World Trade Organization art. IX, § 2, Dec. 15, 1993, 33 I.L.M. 9 ("The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. . . . The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members."); *see also id.* art. X, § 3 ("The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.").

raids under color of U.S. federal law.[8] Or it might be to adopt new substantive rules under a treaty protocol. Or it might be the power to resolve the rights of individuals in a particular case by issuing a judicial determination that all U.S. courts and government agencies must enforce.

In these situations, the power to make substantive governmental decisions is no longer held by the three branches of government designated by the Constitution. Whether or not the decisions are good or bad, the "delegation" problem is that the Constitution intended for that decision to be exercised by a particular institution pursuant to a particular process.

In all of these instances, the international organization has allocated to itself some sovereign power of the United States. Not all of such delegations are equally problematic. But the delegation framework is useful for analyzing this allocation and reallocation of sovereign governmental powers.

II. *MEDELLÍN* AND DELEGATIONS

Medellín represents the first time the Supreme Court has directly confronted the challenge of an international delegation. The petitioner, seeking to enforce the International Court of Justice (ICJ) judgment in U.S. courts, invoked two treaties as the source of the ICJ's authority: the Optional Protocol to the Vienna Convention on Consular Relations[9] and Article 92 of the United Nations (U.N.) Charter.[10] The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice."[11] Article 92, in turn, obligates each member of the U.N. to "undertake[] to comply with the decision of the International Court of Justice in any case to which it is a party."[12]

Jose Medellín argued that the Optional Protocol's grant of "compulsory jurisdiction" to the ICJ over disputes arising under the Vienna Convention on Consular Relations, combined with the U.S. obligation under Article 92 to "undertake[] to comply" with ICJ decisions, required U.S. courts to give effect to ICJ judgments.[13] Analogizing this legal framework to treaties requiring the enforcement of foreign court or arbitral judgments, Medellín argued that the Court here was merely being asked to enforce a foreign judgment, which U.S. courts do all the time.

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8. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. No. 21 (1993), 32 I.L.M. 800; *see also* Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. §§ 6701–6771 (Supp. IV 1999).

9. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, 292 [hereinafter Optional Protocol].

10. U.N. Charter art. 92.

11. Optional Protocol, *supra* note 9, art. I.

12. U.N. Charter art. 94, para. 1.

13. Brief for Petitioner at 28, Medellín v. Texas, 128 S. Ct. 1346 (2008) (No. 06-984), 2007 WL 1886212.

But the character of Medellín's claim was more than a mere enforcement action. He argued that the Supreme Court was bound by the ICJ's judgment despite the fact that the Court had previously interpreted the same treaty provision differently.[14] In other words, the Court was essentially being asked to disregard its own past interpretations of the same legal provision due to the authority granted to the ICJ by the Optional Protocol and the U.N. Charter.

This aspect of the plaintiff's claim thus transforms itself from a mere foreign judgment enforcement action into a much stronger claim of judicial power. Unlike the enforcement of a foreign judgment, the plaintiff here argued that federal statutes required enforcement without exception whether or not there were public policy ramifications to enforcement. In a typical foreign judgment enforcement proceeding, U.S. courts have the discretion to invoke public policy or constitutional norms to reject the enforcement of foreign judgments.[15] Instead, like a higher court, the judgment of the ICJ bound the Supreme Court and all lower federal and state courts regardless of domestic public policies.

Hence, the most accurate way to conceive of the plaintiffs' argument is as a "delegation" of the judicial power granted to the federal courts under Article III of the Constitution. The ICJ's authority to order U.S. courts to follow its judgments is akin to the authority of the Supreme Court to order state courts to enforce federal law regardless of local state policies and conflicting state law.[16]

Although the Court's opinion did not explicitly call this argument a "delegation" argument, it did note the remarkable and extraordinary consequences of agreeing with the petitioner's position:

> Moreover, the consequences of Medellín's argument give pause. An ICJ judgment, the argument goes, is not only binding domestic law but is also unassailable. As a result, neither Texas nor this Court may look behind a judgment and quarrel with its reasoning or result. . . . Medellín's interpretation would allow ICJ judgments to override otherwise binding state law; there is nothing in his logic that would exempt contrary federal law from the same fate. And there is nothing to prevent the ICJ from ordering state courts to annul criminal convictions and sentences, for any reason deemed sufficient by the ICJ. Indeed, that is precisely the relief Mexico requested.[17]

The Court did not complete this analysis, however, by analyzing the constitutional concerns created by Medellín's argument. What, precisely, would be the problem with preventing Texas or the Supreme Court from "quarrel[ing] with [the ICJ judgment's] reasoning and result?"[18] Or

14. *Id.* at 19.

15. Unif. Foreign Money Judgments Recognitions Act, § 3, 13 (pt. 2) U.L.A. 39 (2002); Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971).

16. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

17. *Medellín*, 128 S. Ct. at 1362 (citations omitted).

18. *Id.* at 1350.

allowing the ICJ to "order[] state courts to annul criminal convictions and sentences?"[19] The Court does not say. Yet, the most obvious understanding of its expressions of concern is that such a grant of power would undermine both the federal judiciary's power to give definitive interpretations of federal law (treaties) and state courts' abilities to do the same for state law. With respect to the diminution of federal judicial power, it could be understood as a violation of Article III's exclusive grant of the federal judicial power to federal courts.

Still, the Court does not go so far as to suggest that Medellín's argument creates constitutional problems. On the other hand, it emphasizes that the unusual consequences of this argument require heightened attention to the intent of the ratifying parties. "Given that ICJ judgments may interfere with state procedural rules, one would expect the ratifying parties to the relevant treaties to have *clearly stated* their intent to give those judgments domestic effect, if they had so intended."[20] Justice John Paul Stevens, in his concurring opinion, concluded that there was no such clear statement in the text of either the Optional Protocol's grant of "compulsory jurisdiction" or Article 92's language requiring the U.S. to "undertake to comply" with ICJ judgments.[21]

It is this analysis that is both the doctrinal weakness and functional strength of the majority opinion. If, as the opinion suggests, the case is simply a plain-vanilla treaty interpretation case, then the doctrine of self-execution would be applied. But, although some scholars have argued for a clear statement rule before finding a treaty self-executing, it is far from settled that a clear statement of intent is required to find a treaty self-executing. Indeed, the *Third Restatement of the Foreign Relations Law of the United States* implies the opposite rule: First, the Restatement declares that "[c]ourts in the United States are bound to give effect to . . . international agreements of the United States" unless the agreement is non-self-executing.[22] But non-self-execution only occurs if an agreement "manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation."[23] In other words, unless there is a manifestation of an intent toward non-self-execution, the background presumption is that all treaties are self-executing.

In this sense, Justice Stephen Breyer's dissent justly attacked the majority for adopting a "new" clear statement rule for self-execution.[24] In any event, if the Court was adopting a new clear statement rule, can such a requirement be justified? In the concluding section, I argue that, at least in

19. *Id.* at 1364.
20. *Id.* at 1363–64 (emphasis added).
21. *Id.* at 1373–74 (Stevens, J., concurring).
22. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1987).
23. *Id.* § 111(4)(a).
24. *Medellín*, 128 S. Ct. at 1376 (Breyer, J., dissenting).

the special context of international delegations, a resort to a clear statement rule for self-execution is both justified and necessary.

III. THE FUNCTIONAL CASE FOR NON-SELF-EXECUTION

It is a well-accepted canon of statutory interpretation that a court should, whenever possible, adopt an interpretation that avoids a finding of unconstitutionality. As a number of scholars have observed, this prudential doctrine has become the primary mechanism by which constitutional doctrines like nondelegation are applied.[25] In other words, rather than apply the nondelegation doctrine to find a statute unconstitutional, courts are more likely to seek an interpretation that avoids an excessive delegation. Indeed, a number of influential scholars have argued that, in the statutory context, the emphasis on avoiding a finding of unconstitutionality has led courts to require a clear statement before interpreting a statute to delegate. The application of this prudential doctrine acts as a constitutional constraint, although not as a constitutional bar, to excessive delegations.

As I have argued elsewhere,[26] the clear statement requirement for statutes can be adapted to the treaty context through the doctrine of non-self-execution. By requiring a clear statement before interpreting a treaty to result in an international delegation, courts can place constitutional constraints on treaty makers while avoiding the complications of an actual finding of unconstitutionality.

Medellín provides an excellent example of the benefits of this prudential clear statement approach. Interpreting the U.N. Charter provisions and the Optional Protocol as non-self-executing does not create a constitutional bar to future U.S. cooperation with the ICJ or with international dispute resolution systems in general. Instead, it shifts the decision-making locus to Congress and requires full congressional cooperation over how and whether to incorporate international decision makers into the U.S. legal system. It not only gives the House of Representatives an opportunity, but it also forces the House (along with the Senate and the President) to consider the consequences of an international delegation on domestic law and policy. In other international dispute resolution schemes, the House and Senate have done just that and clearly stated a desire to delegate such authority to an international tribunal. In other situations, most notably the World Trade Organization (WTO) system, Congress has decided to retain control over compliance with WTO judgments.[27]

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25. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 330–37 (2000) (discussing how courts use nondelegation canons to impose constraints on administrative power).

26. *See* Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1 (2006).

27. *See* Uruguay Round Trade Agreements Act, 19 U.S.C. § 3512(b)(2)(A) (2000) (barring anyone other than the United States from challenging U.S. or state action or inaction based on its consistency with the Uruguay Round Agreements); H.R. REP. NO. 103-316, at 675–77, 1043–44 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4054–56, 4327.

Allowing Congress the power to determine whether and how to comply with international obligations makes sense from a functional perspective. Mediating between various U.S. obligations and commitments in a particular foreign policy circumstance is difficult for courts. They are unable to take into account particular information or factors. For instance, the Supreme Court in *Sanchez-Llamas v. Oregon*[28] couldn't consider the nonlegal factors such as the overall relationship between the United States and Mexico, the problems of the death penalty, etc. But Congress, the President, or the states could take those matters into account when considering those obligations.

There are further benefits to a presumption of non-self-execution in the context of international delegations. By guaranteeing full consideration by Congress (or forcing a clear statement by the Senate), this prudential approach should reduce fear and uncertainty about entering into long-term cooperative arrangements with international organizations. If ambiguous treaty language would be enough to transfer broad authority to international organizations, the Senate might be less inclined to enter into such a treaty in the first place. Non-self-execution creates a safe harbor for Senate treaties ensuring that, absent a clear statement, no international delegation will take place.

CONCLUSION

Some might read *Medellín* as a significant alteration in the non-self-execution doctrine for all treaties, whether they involve international delegations or not. Indeed, the decision might very well be criticized from this perspective as departing from existing understandings of the non-self-execution doctrine and imposing a new clear statement requirement.

I deliberately avoid addressing that larger dispute here. Rather, my purpose is simply to offer a narrower understanding and defense of the new *Medellín* clear statement rule. Unlike many treaties that have less clear language but that have nonetheless been interpreted as self-executing, *Medellín* involved the delegation of judicial power to an international tribunal in tension with Article III. This tension, obliquely acknowledged by the *Medellín* Court, helps to explain and justify its clear statement requirement. Indeed, it represents a salutary effort to mediate the need to enter into deeper and more elaborate mechanisms of international dispute resolution with continuing concerns about the dangers of transfers of power to international institutions.

28. 548 U.S. 331 (2006).