

A Drubbing for Internationalists

Roberts opinion sure to fuel Court's debate over how to treat foreign law.

BY TONY MAURO

Jeffrey Pryce used to negotiate disarmament treaties at the Defense Department. Now, of counsel at Steptoe & Johnson in D.C., Pryce advises clients in international arbitrations.

When he read the Supreme Court's landmark March 25 decision in *Medellin v. Texas*, both credentials kicked in to give Pryce concern: In an international climate that is sometimes hostile to the U.S. government and American businesses, Pryce says, "this is one more piece of ammunition."

By a 6-3 vote, the Court ruled that a consular rights treaty ratified by the United States and enforced by the International Court of Justice could not, without further action by Congress, supersede the criminal procedures of Texas. Whatever else can be said of the decision, which rebuffed both the international court and the Bush administration, Pryce says the bothersome bottom line is that "it places the United States in the position of not being able to comply with its treaty obligations."

As a result, Pryce predicts the ruling "will not be helpful in the international climate, if people are skeptical of your ability to deliver on your promises." It also undercuts an important point he makes to foreign business people: that individual rights affected by treaties can be protected and enforced.

As Pryce's comments suggest, the impact of *Medellin* may be more symbolic than tangible in international dealings, at least for now. But domestically the ruling promises to continue the simmering debate among justices and within Congress over how to treat international law and court decisions in U.S. lawmaking and jurisprudence. To a greater degree than before, it also makes the 50 states important players.

Medellin was a defeat for internationalists on the Court including Justices Stephen Breyer and Ruth Bader Ginsburg. In a dissent, Breyer lamented that the decision could have the effect of "diminishing our nation's reputation abroad as a result of our failure to follow the 'rule of law' principles that we preach."

Oddly the dissent put liberals Breyer and Ginsburg on the same side as President George W. Bush, who wanted the treaty—known as the Vienna Convention and ratified in 1969—enforced.

The case began when the international court, also known as the World Court, told Texas in 2004 to review the state convictions of 51 Mexican nationals who had not been informed of their rights under the Vienna Convention to seek legal assistance from the Mexican consulate. Among the 51 was Jose Ernesto Medellin, a native of Mexico who has lived in the United States most of his life. When he was arrested in connection with the rape and murder of a Houston teenager in 1994, Medellin was not informed by police of his right to contact the Mexican consulate, as the treaty requires. He did not raise the consular issue until his post-conviction appeals. After the World Court ruled in Medellin's favor, and while his case was pending before the Supreme Court in 2005, President Bush issued a memorandum stating he would meet consular treaty obligations by "having state courts give effect" to the World Court ruling.

But the Texas Court of Criminal Appeals rejected the commands of both the World Court and Bush, ruling that the state's limits on appeals took precedence and precluded any new hearings for Medellin on the treaty issue.

As the case made its way back to the high court last year, Texas was cast in the posture of opposing the wishes of Bush, its former governor.

Chief Justice John Roberts Jr., Bush's appointee, added insult to injury and authored the *Medellin* ruling that went against both Bush and the World Court. The decision also, oddly enough, allowed Bush to portray himself as an internationalist who wanted to enforce U.S. treaty obligations but was thwarted by a Supreme Court intent on reining in executive power.

Roberts wrote that the consular treaty fit into a category of international agreements that are not "self-executing," meaning that their wording is not explicit enough to be regarded as U.S. law without further action by Congress.

Similarly, the Bush memo had no binding authority over states, the Roberts majority said.

“The President has an array of political and diplomatic means to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them,” Roberts wrote.

Joining Roberts were Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito Jr.

Justice John Paul Stevens wrote a concurrence agreeing with the majority’s bottom line, but asserting the consular treaty was self-executing. He also urged Texas to follow the wishes of both the World Court and President Bush.

“When the honor of the nation is balanced against the modest cost of compliance,” Stevens wrote, “Texas would do well to recognize that more is at stake than whether judgments of the ICJ and the principled admonitions of the President of the United States trump state procedural rules.”

Breyer in his dissent said the Court’s ruling would “threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones.”

The ruling is “a departure from the original intent of the Framers of the Constitution and over 200 years of enforcement of treaties by U.S. courts,” says Donald Donovan of Debevoise & Plimpton, who represented Medellin. Donovan called on Congress to take the necessary steps to bring the United States into compliance. “Having given its word, the United States should keep its word.”

Temple Law School’s Duncan Hollis, a former State Department lawyer, says the ruling runs counter to the Constitution, which makes treaties part of the “supreme law of the land.”

Hollis also thinks it calls into question other treaties that now might fit into the Court’s new definition of treaties that cannot be presumed to be self-executing. “A lot of looking is going on at the State Department, I would expect,” Hollis says, to determine if a range of treaties—including arms, maritime, and other commercial agreements—have the necessary language.

If they don’t, Congress could be asked to pass implementing language, which may not always be an easy sell. In the case of the consular treaty, for example, Congress may be wary of voting, in effect, to allow the Vienna Convention to dictate how local police handle foreign citizens they arrest.

If Congress balks at legitimizing the treaty, says Charles Cooper of D.C.’s Cooper & Kirk, then so be it. Some kind of check is needed to keep the World Court and the Bush administration from elbowing aside the U.S. court system and establishing the World Court as a “super-Supreme Court,” he says. “Chief Justice Roberts got it right.”

Usually a Bush ally, Cooper wrote an amicus brief on the side of Texas and says he got involved in the case because he felt the World Court decision and the Bush memorandum were “the most breathtaking assertion of international law and executive power I have ever seen.”

Tony Mauro can be contacted at tmauro@alm.com.