

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   JOSE ERNESTO MEDELLIN, :

4                           Petitioner,                               :

5                           v.                                       :   No. 04-5928

6   DOUG DRETKE, DIRECTOR, TEXAS   DEPARTMENT:

7   OF CRIMINAL JUSTICE, CORRECTIONAL :

8   INSTITUTIONS DIVISION.                               :

9   - - - - - x

10   Washington, D.C.

11   Monday, March 28, 2005

12                   The above-entitled matter came on for oral  
13   argument before the Supreme Court of the United States  
14   at 11:01 a.m.

15   APPEARANCES:

16   DONALD F. DONOVAN, ESQ., New York, New York; on behalf  
17                           of the Petitioner.

18   R. TED CRUZ, ESQ., Solicitor General, Austin, Texas; on  
19                           behalf of the Respondent.

20   MICHAEL R. DREEBEN, DEPUTY SOLICITOR GENERAL,  
21   DEPARTMENT

22                           OF JUSTICE, WASHINGTON, D.C.; on behalf of the  
23   United

24                           States, as amicus curiae, supporting Respondent.

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1 P R O C E E D I N G S

2 [11:01 a.m.]

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in number 04-5928, Jose Medellin versus Doug  
5 Dretke.

6 Mr. Donovan.

7 ORAL ARGUMENT OF DONALD F. DONOVAN

8 ON BEHALF OF PETITIONER

9 MR. DONOVAN: Mr. Chief Justice, may it please  
10 the Court:

11 This case was exceptionally important when the  
12 Court granted it, and it's even more important now. It  
13 belongs in this Court. At the same time, Mr. Medellin  
14 requests that the Court hold the case while he goes  
15 back to Texas. I'd like to explain why, before I turn  
16 to the merits.

17 Under its decision last year in ex parte, so  
18 far, Texas has modified its longstanding two-forums  
19 rule. Court of Criminal Appeals will now entertain a  
20 subsequent application for habeas writ, even if there  
21 are proceedings pending before a Federal Court, so long  
22 as the Federal Court stays its proceedings. The Court  
23 designed that procedure so that a habeas petitioner  
24 could return to state court to exhaust an unexhausted  
25 claim without compromising his right to federal habeas

1 -

2 CHIEF JUSTICE REHNQUIST: Ordinarily do not  
3 think of that as covered in this Court.

4 MR. DONOVAN: Well, the Court of Criminal  
5 Appeals did not specify; but we find, of course,  
6 ourselves in an unusual posture, in the sense that the  
7 sequence of events here are such that even -- the Court  
8 of Appeals has decided the Avena judgement claim, the  
9 Court has --

10 JUSTICE O'CONNOR: But has this Court ever  
11 just said, "Fine, we'll hold it in abeyance and come  
12 back next term"? I can't recall that we've done that.

13 MR. DONOVAN: Well, it's an -- it is, in fact,  
14 an unusual posture. And it --

15 JUSTICE O'CONNOR: I mean, it would be more  
16 likely that we would dismiss this, improvidently  
17 granted.

18 MR. DONOVAN: Well, the case, though, has not  
19 been improvidently granted, with the greatest respect  
20 to the Court. Of course, the case was important when  
21 the Court granted it. The question, whether or not the  
22 United States will comply with an international  
23 obligation that every actor here -- the United States,  
24 Texas, and the Petitioner -- all recognize as binding,  
25 is an important question. The President has now come

1 in and said that it's even more important, by saying  
2 that, in fact, the United States will comply.

3 JUSTICE O'CONNOR: Well, it's so odd, because  
4 usually what happens, if there is something that could  
5 occur at the state court level, is the state court  
6 itself would hold off until this Court had resolved  
7 whatever the case was. So, this is a very unusual  
8 request.

9 MR. DONOVAN: We recognize that it's an  
10 unusual request, because of the unusual circumstances.  
11 And, of course, the alternative, if the Court is not  
12 prepared to stay, or, for example, vacate, in light of  
13 the presidential determination, remand to the Court of  
14 Appeals --

15 CHIEF JUSTICE REHNQUIST: Well, I think -- I  
16 think granting a stay could be seen as validating the  
17 position of the government without ever having an  
18 opinion on it.

19 MR. DONOVAN: Well, actually, I think that a  
20 stay would actually show respect to each of the  
21 relevant actors here. And so --

22 JUSTICE O'CONNOR: Well, why shouldn't we just  
23 go ahead and decide the case, if we can?

24 MR. DONOVAN: Well, we believe that there are,  
25 in fact, firm grounds on which this Court could grant -

1 - could decide the question presented, because, in  
2 fact, for the reasons -- there are really three points  
3 here -- for the reasons we've laid out, the Court,  
4 under the direct command of the Supremacy Clause, has -  
5 - can give effect to the Avena judgement as the rule of  
6 decision. The President's determination, in fact,  
7 eliminates the -- even setting aside its independent  
8 force, eliminates the basic objection of Texas to that  
9 course of action. And then, of course, there's the  
10 basic independent full force of the Supremacy Clause.

11 So if I may move to that, the Court, as I  
12 said, has recognized the importance of the United  
13 States complying with an international obligation  
14 reflected in treaties entered into by the  
15 democratically elected representatives of the American  
16 people.

17 I want to address the question presented  
18 first, because, I -- before -- setting aside the  
19 presidential determination -- and just take a look at  
20 where we stand after the briefing by the parties as a -  
21 - on the question whether or not the Avena judgement  
22 provides the rule of decision.

23 First of all, there's an extraordinary amount  
24 of agreement between petitioner and respondent.  
25 Respondent agrees that the Vienna Convention is a

1 binding legal commitment of the United States. The  
2 Respondent agrees that the Convention is self-  
3 executing. The Respondent agrees that the United  
4 States agreed to submit disputes concerning the  
5 application and interpretation of the Convention to the  
6 ICJ. He agrees that the United States agreed that any  
7 determination by the International Court of Justice  
8 would be binding.

9 CHIEF JUSTICE REHNQUIST: How about the  
10 creation of a private right of action?

11 MR. DONOVAN: Well, there is a -- there is a  
12 -- there are basically three objections that the  
13 Respondents made. One of them is the cause of action.  
14 But the Respondent confuses the creation of a cause of  
15 action with what the -- a treaty will typically do.

16 The treaty here lays out the rights, and the  
17 treaty lays out an individual right, as determined by  
18 the ICJ. The treaty will not customarily create the  
19 cause of action. For how the United States will abide  
20 by its legal obligations -- that is, how the United  
21 States will give effect to the international obligation  
22 -- we look to domestic law.

23 CHIEF JUSTICE REHNQUIST: Well, the courts --  
24 the courts usually do that, don't they?

25 MR. DONOVAN: That's exactly right. But we

1 would look -- we would look to how the United States  
2 has provided for the implication of that international  
3 obligation. Here, in the first instance, we have a  
4 direct command of the Supremacy Clause, a very  
5 fundamental choice made by the Framers --

6 CHIEF JUSTICE REHNQUIST: That doesn't speak  
7 to the private right of --

8 MR. DONOVAN: The private right of action is  
9 found here in the habeas statute itself, which provides  
10 that a person in custody in violation of laws,  
11 treaties, or the Constitution of the United States can  
12 seek --

13 JUSTICE O'CONNOR: So, presumably, that could  
14 provide some cause of action, quite irrespective of the  
15 ICJ decision.

16 MR. DONOVAN: Well, it could -- it -- the  
17 cause of action is, itself, provided by --

18 JUSTICE O'CONNOR: Yeah, I mean, you don't --

19 MR. DONOVAN: -- the rest of the --

20 JUSTICE O'CONNOR: -- you don't really have to  
21 get into whether that judgement is enforceable here. I  
22 mean --

23 MR. DONOVAN: Well --

24 JUSTICE O'CONNOR: -- we could look at -- look  
25 at it from the perspective of the habeas statute.



1 MR. DONOVAN: Well, that's right. I mean,  
2 there are three -- there are three basic questions that  
3 need to be --

4 JUSTICE GINSBURG: But is it right -- I mean,  
5 you couldn't -- you could not -- unless the ICJ  
6 decision gave a right to an individual, and you had no  
7 claim under the federal habeas statute -- and it is  
8 unusual, is it not, for a judgement of the  
9 International Court of Justice to recognize the right  
10 of an individual, as opposed to being just a judgement  
11 between nations?

12 MR. DONOVAN: Well, it may be that, because of  
13 the character of the typical dispute that the  
14 International Court of Justice hears, that it does not  
15 typically address such a question. But, plainly it has  
16 jurisdiction to do so when the underlying treaty  
17 confers a right. And that's exactly one of the  
18 questions that was litigated between Mexico and the  
19 United States in the Avena judgement. And the Court  
20 held that, in fact, this treaty does provide individual  
21 rights. So --

22 JUSTICE GINSBURG: How many -- how many times  
23 has the ICJ held that, that a treaty, apart from being  
24 contract between the signers, confers individual  
25 rights?

1                   MR. DONOVAN: Well, it has, of course, held,  
2   in -- first, in LaGrand and then here in Avena. In  
3   most of the cases the ICJ has held, however -- it has  
4   dealt previously, for example, with rights in this  
5   situation. For example, rights in the nature of  
6   diplomatic protection. For example, when the United  
7   States went to the ICJ in the Tehran hostages case, it  
8   went, not only in its own behalf, but in the exercise  
9   of diplomatic protection. And in that posture, the ICJ  
10  --

11                  JUSTICE GINSBURG: But there was no individual  
12  in that case. That was a case of one nation against  
13  another. There was no individual, like the Plaintiff  
14  here.

15                  MR. DONOVAN: But, in fact, in that case the  
16  United States did assert the rights of its nationals  
17  who were held hostage. It didn't -- the case didn't  
18  come down on that point. But, likewise, the famous  
19  Barcelona --

20                  JUSTICE GINSBURG: Well, that's what I asked,  
21  if this -- I know that, certainly in the context of the  
22  Vienna Convention, there have been the series of  
23  decisions you mentioned; but I was wondering whether,  
24  outside the Vienna Convention, there has been any  
25  similar judgement of the ICJ that operates directly on

1 individuals.

2 MR. DONOVAN: Well, for example, in the  
3 Barcelona Traction case, which is another case where,  
4 again, there were rights of a particular company and a  
5 particular national decided with -- under the guise of  
6 diplomatic protection. And that's the posture which  
7 this case went forward. Mexico asserted rights not  
8 only on its own behalf, but on behalf of its nationals.  
9 And, therefore, if we think of the -- the three  
10 objections that was -- the Respondent has made to  
11 whether this Court can give us back the Avena  
12 judgement, they come down -- they include the two we've  
13 just discussed, and one more.

14 First, they've said there are no individual  
15 rights here. But, of course, the treaty, as this Court  
16 suggested in Breard, talks specifically about rights --  
17 quote/unquote, "rights." And that, of course, is what  
18 the ICJ held. If the Avena judgement is binding, if  
19 the Avena judgement informs the Vienna Convention with  
20 binding effect, then that question is not the question  
21 this Court needs to answer.

22 The second point --

23 JUSTICE SCALIA: Do you think -- do you think  
24 that the President can enter into a treaty, with the  
25 approval of Congress, that would provide that, in a

1 particular combat, the Commander in Chief will be  
2 somebody other than the President of the United States?

3 MR. DONOVAN: Well, the Court has recognized  
4 that the only limitations of the treaty-making power  
5 are affirmative litigations -- affirmative limitations  
6 within the Constitution, itself.

7 JUSTICE SCALIA: Right.

8 MR. DONOVAN: And --

9 JUSTICE SCALIA: And you think that the  
10 Constitution provides the President shall be Commander  
11 in Chief, and, therefore, that can't be given away.

12 MR. DONOVAN: Well --

13 JUSTICE SCALIA: Right?

14 MR. DONOVAN: -- no, the -- obviously, a  
15 treaty would not be able to amend the Constitution.

16 JUSTICE SCALIA: Right. Well, what if I think  
17 that the Constitution provides that all questions of  
18 federal law -- statutory, treaty, constitutional -- are  
19 to be decided, ultimately, by the Supreme Court of the  
20 United States. Can a treaty give that away?

21 MR. DONOVAN: Well, a treaty would not be --  
22 this treaty does not do that. When the --

23 JUSTICE SCALIA: It does if we're bound by the  
24 determination of Avena. It does if I have to believe  
25 that individual rights were created here, without

1 reexamining the question on my own.

2 MR. DONOVAN: Well, but the -- but the Court  
3 has -- it -- the Court has regularly -- and it has  
4 never been an objection to Article III power to give  
5 effect to a judgement that has been rendered in another  
6 sphere by another adjudicatory authority. That happens  
7 all the time with respect to --

8 JUSTICE SCALIA: Not a question concerning  
9 United States law.

10 MR. DONOVAN: But this is a question --

11 JUSTICE SCALIA: You're talking here about a  
12 question of United States law, What is the meaning of  
13 this treaty that the United States has entered into?  
14 Do you know another case where we have -- we have been  
15 bound by a judgement of a foreign court or an  
16 international court concerning the meaning of United  
17 States law?

18 MR. DONOVAN: Well, what the Court would be  
19 giving effect to is the determination by the political  
20 branches themselves to enter into the treaty.

21 JUSTICE O'CONNOR: Well, I have a question  
22 that is much along the same lines, whether this Court  
23 must apply Avena as the rule of decision, or perhaps  
24 say, "No, it does not have to do that." Then you're  
25 left with looking at the treaty itself. And does that

1 -- can that take effect as American law?

2 MR. DONOVAN: Well, the treaty does take

3 effect as American law. And --

4 JUSTICE O'CONNOR: And, can --

5 MR. DONOVAN: -- in fact --

6 JUSTICE O'CONNOR: -- is it open in this case

7 to -- for this Court to apply that, not Avena?

8 MR. DONOVAN: Well, the Court could, in fact,

9 apply the treaty. It could reach its own

10 interpretation of the treaty, in accord with the Avena

11 judgement. But we think --

12 JUSTICE O'CONNOR: Is that open in this case?

13 MR. DONOVAN: Well, it surely would be open in

14 this case, but it would not be open at this point.

15 We've suggested alternative bases by which the Court

16 could conform with Avena. But we do believe that

17 Avena, in fact, controls the decision, for this reason,

18 that, in the first instance, the political branches

19 have agreed to the substantive obligations under the

20 treaty; in the second place --

21 JUSTICE O'CONNOR: Well, suppose we think it

22 can't control? Now, then what's open to us?

23 MR. DONOVAN: Well, if the -- if the Court

24 decided that the Avena judgement did not control, then

25 it would obviously go to the terms of the treaty

1     itself. But our argument is that, in fact, by virtue  
2     of the political branches' decision and in operation of  
3     the treaty -- of the Supremacy Clause, the Court must  
4     be -- must give effect if the Court reached a decision  
5     --

6                   JUSTICE KENNEDY: Well, can the President give  
7     an interpretation of the treaty unilaterally that is  
8     binding on us? Can the President sign a treaty and  
9     then, a year later, give an interpretation of that  
10    treaty that's binding on us, insofar as what the treaty  
11    means?

12                   MR. DONOVAN: Well, the Court has --

13                   JUSTICE KENNEDY: Can he do that?

14                   MR. DONOVAN: Well, no, the treaty -- the  
15    Court has traditionally accorded deference to the  
16    Executive's determination, but has not -- has not given  
17    that --

18                   JUSTICE KENNEDY: Right. I would say that  
19    that, ultimately, is for this Court. Then, if that's  
20    so, how can he agree with the -- to confer jurisdiction  
21    on the World Court, which would do the same thing?

22                   MR. DONOVAN: Because it's not just the  
23    President that's done that; it's the treaty-makers,  
24    it's the President acting with the advice and consent  
25    of the Senate in a context in which they are empowered

1 to authorize a treaty -- enter into a treaty. And  
2 they've done --

3 JUSTICE O'CONNOR: Well, is the  
4 constitutionality of the President's action here before  
5 the Court in this case?

6 MR. DONOVAN: Well, the --

7 JUSTICE O'CONNOR: Only peripherally. Is that  
8 an issue for us to decide in this case?

9 MR. DONOVAN: The question that we'd ask --

10 JUSTICE O'CONNOR: I hadn't thought so. Do  
11 you think it is?

12 MR. DONOVAN: Well, the -- we've asked that  
13 the Court take account of the President's determination  
14 in this respect. The Vienna Convention sets out a --  
15 sets out substantive obligations. The ICJ -- we've  
16 agreed to go to the ICJ for the interpretation  
17 obligation of those obligations. The ICJ has now  
18 ruled. The only objections, in effect, that the  
19 Respondent has made is to say, "This Court can't decide  
20 that question," because it's within the power of the  
21 political branches. In effect, it said, "This Court  
22 should step back and await the permission of the  
23 Executive." And in Mr. Medellin's view, this Court  
24 does not need to do that. But if you did need to do  
25 that, which is the Respondent's essential objection,



1 the President has now said, not only should -- not only  
2 can the Court give effect to the Avena a judgement, but  
3 that it's in the paramount interest of the United  
4 States that it do so, and that it do so promptly, and  
5 that, therefore, any question about the -- about the  
6 effectiveness of the Avena judgement has, on Texas' own  
7 terms --

8 JUSTICE KENNEDY: What's the case --

9 MR. DONOVAN: -- on Respondent's --

10 JUSTICE KENNEDY: -- what's the case that  
11 you're citing for this proposition, that the President  
12 and the Senate can, in effect, confer on an  
13 international tribunal the obligation to bind this  
14 Court with reference to an interpretation of a treaty?  
15 What's the best case you've got for that?

16 MR. DONOVAN: Well, it goes to the Supremacy  
17 Clause itself, Justice Kennedy. It's --

18 JUSTICE KENNEDY: So you're telling me you  
19 don't have a case.

20 MR. DONOVAN: Well, I'm not suggesting that  
21 there is direct precedent in this Court for this  
22 circumstance. We recognize that the circumstances  
23 presented in these particular --

24 JUSTICE BREYER: Were you saying "binding," or  
25 are you saying that we "show deference to" the

1 President's own interpretation of the treaty, as  
2 applied to this 51-case set? In respect to that  
3 deference, I suppose, he interprets the treaty in such  
4 a way that the Avena decision, in his opinion, as  
5 applied to this 51-set --  
6 -case set is what the treaty means.

7 MR. DONOVAN: Well, he has, in fact, come --

8 JUSTICE BREYER: Is that right, or not?

9 MR. DONOVAN: Well, that's right. He has --  
10 he has, in fact, endorsed the notion that the United  
11 States should comply.

12 JUSTICE BREYER: Well, if it is -- what I'm  
13 wondering is if this is similar to that insurance case  
14 out of California, where, in fact, we gave considerable  
15 deference to Mr. Eisenstat's interpretation of the  
16 relationship of the treaty to the insurance laws of  
17 California.

18 MR. DONOVAN: Well, it -- that is true. And  
19 the Garamendi --

20 JUSTICE SCALIA: That was not an  
21 interpretation that ousted this Court of jurisdiction  
22 over the matter, though, was it?

23 MR. DONOVAN: Well, the --

24 JUSTICE SCALIA: Don't you think that's a  
25 little bit different?

1                   MR. DONOVAN: But the Garamendi case did, in  
2 fact, endorse the President's power. It's similar to  
3 the Dames & Moore case --

4                   CHIEF JUSTICE REHNQUIST: Yes, but in that  
5 case it was overseeing arrangements that were made by  
6 our government, not -- they didn't have that much local  
7 authority.

8                   MR. DONOVAN: Well, that's -- that is a  
9 distinction in the cases, but they still come down to a  
10 notion that -- both Garamendi and Dames & Moore -- to  
11 the President's authority to give effect to  
12 international obligations.

13                  CHIEF JUSTICE REHNQUIST: Well, but --

14                  MR. DONOVAN: And here we have --

15                  CHIEF JUSTICE REHNQUIST: -- doesn't the  
16 President, in Dames & Moore, enter into an agreement  
17 with Iran?

18                  MR. DONOVAN: Well, that's right. But that's  
19 -- that situation doesn't really distinguish the cases,  
20 because in Dames & Moore v. Regan there was, in fact,  
21 an agreement, and the President acted pursuant to that  
22 agreement. But here we have --

23                  CHIEF JUSTICE REHNQUIST: But we decided, in  
24 Dames & Moore, that he was acting pursuant to the  
25 agreement.

1 MR. DONOVAN: Well, they did act pursuant to  
2 the agreement, and that's what the Court decided, but  
3 that's precisely what the President is doing here. The  
4 President is giving effect to commitments made by the  
5 United States in the Vienna Convention, in the Optional  
6 Protocol, in the ICJ statute and in the United Nations  
7 charter.

8 CHIEF JUSTICE REHNQUIST: But we didn't --

9 MR. DONOVAN: So if --

10 CHIEF JUSTICE REHNQUIST: -- we didn't decide  
11 it on the basis that President Reagan says, "This is  
12 what in particular the agreement affected." We  
13 examined it for ourselves.

14 MR. DONOVAN: That's true, but -- and the  
15 Court looked at the -- the Court did not reexamine the  
16 terms of the agreement. What the Court decided in that  
17 case was that it was within the President's foreign-  
18 affairs authority to enter into an agreement that would  
19 essentially required American claimants to go to the  
20 Iranian-United States Claims Tribunal.

21 JUSTICE SCALIA: That doesn't -- that doesn't  
22 involve an interpretation of the treaty that is  
23 rendered by somebody else and that is binding upon this  
24 Court. I mean, it's just a matter of different  
25 magnitude. To say that there can be private claims,

1 fine; but that doesn't say that the interpretation of a  
2 treaty entered into the by the United States is subject  
3 to a court, other than this Court.

4 MR. DONOVAN: The treaty itself is what the  
5 United States has committed itself to. It's the treaty  
6 in addition --

7 JUSTICE BREYER: We have to look beyond the  
8 President's interpretation of the treaty. It happens  
9 that the President is interpreting it, for reasons  
10 related to what the ICJ said. But that doesn't make us  
11 have to look beyond the reason for the President  
12 interpreting it the way he wants. I mean, do we have  
13 to defer to the ICJ, or do you -- is it not sufficient  
14 to defer to the President, who is operating within his  
15 foreign-affairs power for whatever set of reasons he  
16 deems sufficient?

17 MR. DONOVAN: Well, that's precisely why we've  
18 said, in fact, what -- there are two independent  
19 sources of authority here, because, by operation of the  
20 Supremacy Clause, the ICJ, the interpretation and  
21 application of the Avena judgement would be given  
22 effect. Now we have an independent source of right in  
23 the form of the President's determination.

24 JUSTICE SCALIA: Except that the President  
25 doesn't think that the remedy is in federal habeas.

1 The President thinks that the remedy is within the  
2 states.

3 MR. DONOVAN: Well, the President has said  
4 that it should be given effect, and hasn't -- and  
5 hasn't said that it shouldn't be in federal habeas. To  
6 the contrary, the President has indicated that, in  
7 fact, habeas would be available.

8 JUSTICE SOUTER: Well, your position, I take  
9 it, is that if somehow we follow your suggestion so  
10 that the President's suggestion may be put into effect  
11 in the state courts, that there would still be a habeas  
12 jurisdiction, ultimately, over the result if you're  
13 dissatisfied with what happens in Texas. Do I  
14 understand you correctly?

15 MR. DONOVAN: That's right, there would be --

16 JUSTICE SCALIA: Now, that --

17 MR. DONOVAN: -- there would surely be habeas  
18 jurisdiction.

19 JUSTICE SCALIA: -- that's an interesting  
20 question. Let's turn from the more cosmic questions  
21 into how you overcome the impediment that in order to  
22 get a Certificate of Appealability here, you have to  
23 show that there was -- you have to make a substantial  
24 showing of the denial of a constitutional right. What  
25 constitutional right has been denied here?

1 MR. DONOVAN: Well, at this point, of course,  
2 the Court need not address that question on this -- on  
3 this petition. The question that the Court granted  
4 was, Will the United States abide by the Avena  
5 judgement? And that --

6 JUSTICE SCALIA: No, I take --

7 MR. DONOVAN: -- question would be answered --

8 JUSTICE SCALIA: -- that question to be a  
9 jurisdictional question, as far as the lower court is  
10 concerned; and, therefore, I think it's a  
11 jurisdictional question for us.

12 MR. DONOVAN: Well, of course, for the reasons  
13 we've laid out in our brief, we do not regard it as  
14 jurisdictional for this Court. The Court clearly has  
15 jurisdiction under the petition to decide the questions  
16 on the basis that they should decide the question  
17 presented.

18 JUSTICE KENNEDY: No, no.

19 MR. DONOVAN: But even if it --

20 JUSTICE KENNEDY: No. No. We can't forego  
21 limits on our jurisdiction simply by granting the  
22 question.

23 MR. DONOVAN: No, but --

24 JUSTICE KENNEDY: You don't say, "Oh, you've  
25 granted a question; therefore, you have to decide

1 whether you have jurisdiction or not."

2 MR. DONOVAN: But this --

3 JUSTICE KENNEDY: See? And, as Justice Scalia  
4 indicates, the COA is a jurisdictional requirement.

5 MR. DONOVAN: But the COA is a jurisdictional  
6 requirement for an appeal in the Court of Appeals.  
7 This comes to this Court as -- on the denial of a  
8 Certificate of Appealability --

9 JUSTICE SCALIA: Yes, but --

10 MR. DONOVAN: -- and on a petition from that.

11 JUSTICE SCALIA: Do you know of any --

12 MR. DONOVAN: And so, the question raised by -

13 -

14 JUSTICE SCALIA: -- do you know of any case in  
15 which a lower court did not have jurisdiction, but we  
16 do have jurisdiction on appeal from in a -- from a  
17 court that didn't have jurisdiction?

18 MR. DONOVAN: But the Court -- the Court of  
19 Appeals had jurisdiction to entertain an application  
20 for Certificate of Appealability. And this Court, in  
21 turn, has jurisdiction to grant a petition from the  
22 denial of the Certificate of Appealability.

23 JUSTICE SCALIA: Well, if the --

24 MR. DONOVAN: And in that posture --

25 JUSTICE SCALIA: -- had jurisdiction to --



1 MR. DONOVAN: -- the Court can decide the  
2 question presented.

3 JUSTICE SOUTER: You're simply saying that any  
4 court has jurisdiction to determine its jurisdiction.  
5 We grant you that. But, granted that, if we reach it,  
6 what is your answer to the claim that the COA requires  
7 a showing of substantial infringement of  
8 constitutional, as distinct from other sources of,  
9 rights?

10 MR. DONOVAN: Well, first of all, we believe  
11 that in the posture that this case comes to this Court,  
12 there has been a substantial denial of a constitutional  
13 right, even in the terms that Texas defines the  
14 statute, because what we have here is a claim based on  
15 the Avena judgement -- I mean, the ICJ's interpretation  
16 and application of the Avena judgement that the Court  
17 of Appeals held in effect that had been defaulted prior  
18 to its coming into existence. Because the effect of  
19 the Court of Appeals judgement that the Avena --  
20 dismissing the -- or denying the Avena -- deciding the  
21 Avena judgement claim -- was to say -- was to give  
22 effect to a procedural default of the Avena judgement  
23 when it had not yet --

24 JUSTICE SOUTER: So you're saying the --

25 MR. DONOVAN: That is --

1 JUSTICE SOUTER: -- the constitutional  
2 violation is the violation of the Supremacy Clause.

3 MR. DONOVAN: Well, in that --

4 JUSTICE SOUTER: Is that what you're saying?

5 MR. DONOVAN: Well, it's a violation here of  
6 both the Due Process Clause and the Supremacy Clause.  
7 Due process --

8 JUSTICE SOUTER: Due Process Clause because?

9 MR. DONOVAN: Because it was an arbitrary  
10 denial of a forum in which to hear the Avena judgement  
11 claim, not simply the -- a different source of right.  
12 In other words, although the Avena judgement claim  
13 comes up on Texas as a proposition as a -- under a  
14 treaty, the action of the Court of Appeals was to deny  
15 that claim without giving it a forum. That is to say,  
16 without -- that -- before it had been raised itself,  
17 before it even existed -- because the effect of the  
18 Court of Appeals was to give effect to a procedural  
19 default of a right that hadn't come into effect. And,  
20 therefore, in that context, it's effectively a due  
21 process claim.

22 JUSTICE GINSBURG: How do you answer --

23 MR. DONOVAN: In addition --

24 JUSTICE GINSBURG: -- the related -- the  
25 related question that -- well, assuming the Vienna

1 Convention is certainly law, and treaty stands on the  
2 same footing as law, but I believe that the -- Texas  
3 and the Government have said the AEDPA statute is the  
4 later-in-time provision, and when you have two  
5 provisions with a statute treaty, the later-in-time  
6 prevails. So why did -- why isn't the AEDPA  
7 controlling, and not the Vienna Convention?

8 MR. DONOVAN: With respect to this claim,  
9 AEDPA itself would be, in our view, ousted by The  
10 Charming Betsey Principle. But in the particular  
11 context here, you don't have -- you don't have a  
12 conflict with respect to the constitutional claims  
13 themselves; you have a constitutional claim based on a  
14 denial a right that did not exist, and you also have a  
15 constitutional claim based on the Supremacy Clause  
16 itself.

17 CHIEF JUSTICE REHNQUIST: And you're talking  
18 about denial of a right that didn't exist. That seems  
19 perfectly rational, the way you put it.

20 MR. DONOVAN: Well, that's --

21 CHIEF JUSTICE REHNQUIST: If the right didn't  
22 exist, it should have been denied.

23 MR. DONOVAN: And perhaps -- but the effect of  
24 that -- and perhaps a more prudent way to put it is  
25 that the effect of that is to deny Mr. Medellin a

1 forum, an -- arbitrarily deny him a forum on the effect  
2 of the Avena judgement, because the effect was to deny  
3 the Avena judgement claim based on a procedural default  
4 before the Avena judgement had been rendered.

5 If I may save the remaining -- my remaining  
6 time for rebuttal?

7 CHIEF JUSTICE REHNQUIST: Very well, Mr.  
8 Donovan.

9 Mr. Cruz, we'll hear from you.

10 ORAL ARGUMENT OF R. TED CRUZ

11 ON BEHALF OF RESPONDENT

12 MR. CRUZ: Mr. Chief Justice, and may it  
13 please the Court:

14 At the outset, two issues bear emphasis.  
15 First, the Court need not, and should not, address the  
16 many interesting issues of international law and  
17 constitutional law that swirl about this case.

18 JUSTICE SCALIA: They really are interesting,  
19 you know.

20 [Laughter.]

21 MR. CRUZ: They are, indeed. And this may  
22 launch a thousand law-review articles. But with  
23 respect to the question before the Court, there is a  
24 simple and straightforward statutory basis to resolve  
25 this case; namely, that Section 2253 of the AEDPA does

1 not allow a Certificate of Appealability for  
2 nonconstitutional claims.

3 JUSTICE BREYER: Before we --

4 JUSTICE O'CONNOR: Can that --

5 JUSTICE BREYER: -- before we --

6 JUSTICE O'CONNOR: -- be waived? Can that be  
7 waived? And did Texas raise that issue in the Fifth  
8 Circuit at all?

9 MR. CRUZ: Justice O'Connor, Texas did not  
10 explicitly waive this ground before the Fifth Circuit -  
11 -

12 JUSTICE O'CONNOR: But it wasn't raised in the  
13 Fifth Circuit by Texas, was it?

14 MR. CRUZ: That's correct, it was not. But --

15 JUSTICE O'CONNOR: And I assume, although we  
16 haven't so decided, that that can just be waived.

17 MR. CRUZ: Well, this Court has characterized  
18 the standards for a COA as jurisdictional in a  
19 threshold inquiry.

20 JUSTICE BREYER: But this is also a  
21 jurisdictional. They decided it on a jurisdictional  
22 ground. They decided that no COA lay, for the reason  
23 that they said. Now, I guess, though we wouldn't  
24 necessarily have to, we could simply say they're either  
25 right on that or they're wrong on that. And if they're

1 wrong on it, send it back, and then you can argue  
2 whether there are other grounds; in which case, they  
3 could go into waiver, they could go into whether  
4 "constitutional" means to embrace "treaty," and all  
5 those other interesting arguments that we could write  
6 law-review articles about that were not, in fact --  
7 they swirl around in this case, and you would not, in  
8 fact, be able to -- you wouldn't, in fact, have to  
9 pronounce on them now, here, when they really haven't  
10 been thoroughly gone into, below.

11 MR. CRUZ: Justice Breyer, there are  
12 alternative jurisdictional grounds this Court could  
13 address, but the COA ground is straightforward. It  
14 flows from the direct text. And Petitioner has given  
15 this Court no reason to disagree with every Court of  
16 Appeals that has looked at this question, all of whom  
17 have determined that "constitutional" means  
18 "constitutional." It doesn't mean "treaty," it doesn't  
19 mean "statute." And that's every Court of Appeals  
20 that's looked at that. Given that that ground is  
21 direct and straightforward, there is no need for this  
22 Court to venture into the difficult constitutional  
23 areas, the difficult questions of international law,  
24 when there is a straightforward statutory --

25 JUSTICE SOUTER: Well, of course, we wouldn't

1 even have to venture into -- possibly have to venture  
2 into this issue of law if Texas were interested in  
3 following the determination of the President. I take  
4 it that the suggestion that your brother has made,  
5 that, in fact, we take no action at this point so that  
6 they may return to Texas with the President's  
7 determination, is not appealing to you.

8 MR. CRUZ: We do not believe the Court should  
9 stay this action, because whatever the resolution of  
10 the subsequent proceedings that are now filed in Texas,  
11 the resolution of that question will not control the  
12 federal-law questions here.

13 JUSTICE SOUTER: Well, but does Texas have a  
14 position in response to the President's determination?

15 MR. CRUZ: Our first position would be, as  
16 Justice O'Connor said, that that question is not  
17 presented in this case. That will surely be litigated  
18 in the Texas state courts.

19 JUSTICE GINSBURG: You said -- you said that  
20 something has started in the Texas courts. We have the  
21 motion to stay this case, and your response that it  
22 shouldn't be stayed, that we should decide this case.  
23 But what is going on, at this moment, in the Texas  
24 courts?

25 MR. CRUZ: Justice Ginsburg, this weekend,

1 Medellin filed a subsequent state habeas application  
2 with the Court of Criminal Appeals, in which he asked  
3 the Court of Criminal Appeals to stay its hand, pending  
4 this Court's decision whether this Court should stay  
5 its hand, pending the Court of Criminal Appeals --

6 [Laughter.]

7 MR. CRUZ: And so, that is a 50-page filing  
8 that they just filed this weekend in which --

9 JUSTICE GINSBURG: And after the Texas court  
10 stays its hand, then what action is asked?

11 MR. CRUZ: Well, what it asks for is to  
12 authorize a subsequent state habeas proceeding based  
13 upon the President's determination, which he  
14 characterizes as the predicate for a new claim. And if  
15 that is correct, then there is yet another problem to  
16 his getting relief here, which is that he has failed to  
17 exhaust what he claims is now the predicate.

18 JUSTICE SOUTER: Well, but we don't -- we may  
19 not reach that, if Texas says, "Well, yes, you're  
20 right, it is a claim, and we'll entertain it." Does  
21 Texas have a position on that question yet?

22 MR. CRUZ: With respect to whether the  
23 presidential determination is authorized, any -- that  
24 matter will be resolved in subsequent state court  
25 litigation. Any responsible state attorney --



1 JUSTICE SOUTER: Well, I'm sure it will be,  
2 but does Texas have a position on that, at this point?

3 MR. CRUZ: We would respectfully submit, as  
4 would any responsible state attorney general, that  
5 there are significant constitutional problems with a  
6 unilateral Executive determination displacing generally  
7 applicable criminal laws. But whatever the resolution  
8 of that question, that would ultimately be reviewable  
9 by this Court, on certiorari review.

10 JUSTICE KENNEDY: Well, that was my next -- my  
11 question, and it follows on the question Justice Souter  
12 asked. Does the attorney general concede, or do you  
13 not, or acknowledge that there are Texas procedures in  
14 which these questions can be litigated?

15 MR. CRUZ: There absolutely are Texas  
16 procedures in which the question of the validity of the  
17 President's determination can be litigated. And we  
18 would anticipate that that would be litigated --

19 JUSTICE BREYER: But that --

20 MR. CRUZ: -- and resolved --

21 JUSTICE BREYER: Yeah, that's what I'm trying  
22 -- I'm trying to get to, which is, What is actually the  
23 practical thing to do now? Should we stay it, with a  
24 short per curiam, which says, "Texas, go ahead," or  
25 should we do something else? Suppose we just dismiss

1 this, as you say, on the alternative ground. Well,  
2 then what happens if Texas objects to the President's  
3 order and turns out to be right, legally? See, if that  
4 were true and then the review showed that it was true -  
5 - I don't know that it is true, but if it were, then we  
6 should turn to the Fifth Circuit claim, and there are  
7 51 cases that depend on it. But if we've dismissed it,  
8 by that time it's gotten mixed up in the very issue you  
9 raise. The question is, Does "constitutional" embrace  
10 "treaty"? And I think there is one case that says it  
11 does, actually; or a treatise, anyway. So that's an  
12 issue. And then they might refuse a COA on that  
13 ground. And then there might -- and we'll never get  
14 this basic question decided. I'm trying out on you the  
15 argument for actually staying it, rather than digging  
16 it.

17 MR. CRUZ: Whatever the resolution --

18 JUSTICE BREYER: What do you think? What do  
19 you --

20 MR. CRUZ: I do not believe the Court should  
21 stay it. Digging it would be an option. I also  
22 believe -- I believe the most correct --

23 JUSTICE O'CONNOR: Well, why do you believe we  
24 shouldn't stay it? I mean --

25 MR. CRUZ: I don't believe the Court should --

1 JUSTICE O'CONNOR: -- as an opinion, it's  
2 based on what?

3 MR. CRUZ: Because whatever the resolution in  
4 the State Court litigation, the resolution of that  
5 question will not impact the legal question before this  
6 Court now, which is, on first federal habeas, a claim  
7 that was filed that did not rely on Avena when it was  
8 filed, did not rely on the presidential determination -  
9 -

10 JUSTICE STEVENS: Yes, but is it not true that  
11 it's entirely possible that the Texas proceeding would  
12 make this issue moot --

13 MR. CRUZ: That is true.

14 JUSTICE STEVENS: -- and, therefore, avoid the  
15 necessity for deciding a lot of very difficult  
16 questions?

17 MR. CRUZ: That is true. That is frequently  
18 the case, that in a -- in a case that is being  
19 litigated, there are other proceedings that have the  
20 potential to make something moot.

21 JUSTICE KENNEDY: And is it also true that, in  
22 the Texas proceedings, they necessarily would involve a  
23 federal question on which this Court could, if it  
24 chose, grant certiorari on direct review?

25 MR. CRUZ: Absolutely. And the difficult

1 questions about the constitutional authority for the  
2 Executive determination may come back to this Court,  
3 but they're not presented by the case right now before  
4 the Court.

5           The most direct avenue, I would submit, for  
6 this Court is to resolve this decision by affirming the  
7 Fifth Circuit judgement, and by affirming it on the  
8 grounds that a COA could not issue because this was not  
9 a constitutional claim. And that would necessarily  
10 entail affirming Breard to the extent that Breard noted  
11 that a subsequently enacted statute, the AEDPA, to the  
12 extent of a conflict, superceded the Vienna Convention.

13           JUSTICE BREYER: Is the question -- how  
14 difficult is the question? The President of the United  
15 States has issued a document where he says, "Exercising  
16 my foreign-affairs power, in my opinion the treaty, as  
17 I -- I accept the meaning of the treaty as set forth by  
18 the ICJ and apply it to these 51 cases." So he's  
19 deciding that. And why doesn't he have the authority  
20 to decide what that treaty means in these  
21 circumstances? That's his decision. And Texas is  
22 bound by the Constitution.

23           MR. CRUZ: We would agree that the fact that  
24 the President has acted underscores the point made by  
25 both Texas and the United States, that the

1 responsibility for determining the remedy to the Avena  
2 judgement is found in the political branches. And the  
3 fact that the President is acting underscores this,  
4 that there is no precedent for an ICJ judgement being  
5 judicially enforceable. Indeed, Respondent is aware of  
6 no country in the world that accords binding effect to  
7 ICJ judgements in their own domestic courts. And --

8 JUSTICE O'CONNOR: Well, Mr. Cruz, maybe the  
9 treaty becomes part of federal law if it's properly  
10 ratified and signed, as this one was. Now, it's  
11 possible that the treaty itself gives certain  
12 individually enforceable rights to Mr. Medellin. And  
13 we can disregard the question of whether the Avena  
14 judgement is enforceable.

15 MR. CRUZ: Justice O'Connor, that's --

16 JUSTICE O'CONNOR: Isn't that right?

17 MR. CRUZ: -- that's absolutely correct, that  
18 this Court --

19 JUSTICE O'CONNOR: I mean, it would be open to  
20 this Court, presumably, to say, that treaty became part  
21 of federal law when it was ratified, and Congress can  
22 enact subsequent laws. But, in any event, the treaty  
23 could give rise to individual enforceable rights. Is  
24 that correct?

25 MR. CRUZ: To be sure, this Court could

1 certainly determine that the Vienna Convention gives  
2 rises to the individual rights. That interpretation,  
3 however, would conflict with the express language of  
4 the preamble to the treaty, and would also conflict  
5 with the consistent position of the Executive Branch  
6 since 1969, when this treaty was ratified. For those  
7 36 years, the State Department has consistently  
8 answered the question, that the Vienna Convention does  
9 not give rise to individual rights. And, indeed --

10 JUSTICE GINSBURG: Did the Breard case speak  
11 to that issue?

12 MR. CRUZ: The Breard case simply made  
13 reference to -- that there was, arguably, individual  
14 rights. It didn't purport to resolve that. It said,  
15 even if there were, it is barred by AEDPA. So I don't  
16 believe the Breard case answers it, one way or the  
17 other; but, given the United States' consistent  
18 position -- and, indeed, it uses very similar language  
19 in later treaties, such as the two terrorism treaties  
20 that are cited in the United States' brief.

21 It is worth underscoring that on every  
22 question currently before this Court in this  
23 proceeding, the United States agrees entirely with  
24 Texas, that this Court's resolution of this case should  
25 be to affirm the judgement of the Fifth Circuit because

1 a COA should not have issued.

2 CHIEF JUSTICE REHNQUIST: Well, if we came to  
3 the conclusion that the treaty, by its own force, did  
4 not create enforceable individual rights, then we would  
5 have to get to the question of whether the President's  
6 proclamation changes that result.

7 MR. CRUZ: Only in the most threshold sense;  
8 because, on its face, the President's proclamation, or  
9 determination, is focused only on state courts, and  
10 what the President says is that he has determined that  
11 the Avena decision will have binding effect in state  
12 courts. So, according to the Executive determination,  
13 that does not have a binding effect on this proceeding;  
14 but, rather, on a subsequent -

15 CHIEF JUSTICE REHNQUIST: But that seems to be  
16 topsy-turvy, that a treaty would have effect in state  
17 courts but not in federal court.

18 MR. CRUZ: We don't disagree that the  
19 Executive could have chosen other avenues.  
20 Nevertheless, Medellin's argument that, given the  
21 Executive has said, "This should have effect in some  
22 other proceeding," we should disregard what the  
23 Executive has said about this proceeding and apply it  
24 here, notwithstanding the President's express  
25 determination it wouldn't apply here.

1 JUSTICE GINSBURG: But isn't what the  
2 President's memorandum says exactly what the Avena  
3 judgement said? That is, the President said, "Well,  
4 the ICJ said that these people are entitled to review  
5 and reconsideration of their guilt and of their  
6 punishment. And so, I think that's what should happen.  
7 I agree with the judgement, or at least I think it  
8 should be enforced, and the only place it can be  
9 enforced is in the state court that rendered the  
10 judgement, because the ICJ said what the United States  
11 has to implement is, they have to give a review and  
12 reconsideration."

13 Now, I suppose, as far as the ICJ is  
14 concerned, they don't care if it's done by some federal  
15 tribunal, or state, but within our system, it must be  
16 the state, mustn't it?

17 MR. CRUZ: Well, certainly under the terms of  
18 the President's order, where the President said that  
19 he's determined it shall -- should be given effect,  
20 quote, "By having state courts give effect," by the  
21 express terms of the order, particularly as explained  
22 in the United States' brief, where that is conjoined  
23 with the position of the United States, that in this  
24 proceeding, on appeal from the first federal habeas  
25 proceeding, that there is no effect to the Avena



1 judgement. That's the position the United States has  
2 articulated. And so, to the extent this Court gives  
3 deference to the Executive's position -- and in matters  
4 of foreign affairs, this Court has historically given  
5 great deference to that position -- that position  
6 states that that should have no effect upon this  
7 proceeding.

8 JUSTICE STEVENS: But, Mr. Cruz, let me just  
9 make a suggestion. Assume you lose -- I'm not  
10 suggesting you will, but assume you do -- the net  
11 result of the proceeding, in your adversary's favor,  
12 would be that they would get a hearing in the state  
13 court, which is what -- the President's order says,  
14 "Let them have that right away." So the whole purpose  
15 of having a lot of federal litigation to decide what  
16 you can address right away by honoring the President's  
17 request, at least litigating it in the state court  
18 right away, we may be engaged in a lot of useless  
19 activity.

20 MR. CRUZ: Respectfully, if we were to lose,  
21 and if Medellin were to prevail, his position could  
22 potentially open the door to the reconsideration of the  
23 over 100 foreign nationals that are on death row across  
24 this country, and, beyond that, to thousands --

25 JUSTICE STEVENS: Well, so could the

1 President's order, the same thing.

2 MR. CRUZ: But the President's order is, by  
3 its term, confined to the 51 Mexican nationals.  
4 Medellin's theory is not. Medellin's theory is not  
5 even confined to those on death row; but, rather, would  
6 potentially extend to the thousands of foreign  
7 nationals --

8 JUSTICE GINSBURG: But that can't be, in light  
9 of the United States' most recent action. I mean, we  
10 have a judgement. The judgement concerns how many  
11 people? Fifty-one? Forty-nine?

12 MR. CRUZ: Fifty-one.

13 JUSTICE GINSBURG: Okay. There is no  
14 judgement concerning anybody else.

15 MR. CRUZ: That's true with respect to the  
16 Executive determination. But the ICJ's decision went  
17 beyond its authorizing statute and explicitly -- even  
18 though its authorizing statute says the ICJ has  
19 jurisdiction only to speak to the matter directly  
20 before it, in paragraph 151 the ICJ said it wasn't  
21 speaking just to the matter before it.

22 JUSTICE GINSBURG: But this -- but if there's  
23 a claim here based on the Avena judgement, it is that  
24 the United States agreed to the ICJ's jurisdiction in  
25 Vienna Convention cases. And so, pursuant to that

1 agreement, there was an adjudication. The United  
2 States is no longer agreeing, so there will never be  
3 another adjudication. This adjudication concerns 51  
4 people or -- and there are no others.

5 MR. CRUZ: But Medellin's theory that Avena  
6 should be applied as a binding rule of judgement, even  
7 without subsequent proceedings before the ICJ, could be  
8 taken to support granting habeas relief in other  
9 proceedings for individuals whose cases weren't  
10 litigated, particularly given that the ICJ in Avena  
11 purports --

12 JUSTICE GINSBURG: Well, you have to -- you  
13 have to recognize that there is a distinction between  
14 this case, which is, in large part, based on a  
15 judgement of the ICJ, and other cases that would not  
16 have the benefit of that judgement.

17 MR. CRUZ: Surely. Although the terms of the  
18 ICJ decision purport to apply more broadly than to  
19 these 51, and they explicitly say that this cannot be  
20 taken to imply that this does not apply to other  
21 foreign nationals, notwithstanding its jurisdictional  
22 statute that prevents it from doing that.

23 JUSTICE GINSBURG: Why isn't this -- the  
24 United States did consent to the jurisdiction of the  
25 ICJ in these Vienna Convention cases, and that tribunal

1 issued a judgement. Why doesn't it get the same  
2 recognition and enforcement of any judgement of any  
3 court with jurisdiction?

4 MR. CRUZ: Under the terms of the applicable  
5 treaties, the ICJ has jurisdiction to determine, as a  
6 matter of international law, if there is a treaty  
7 breach. But those treaties also specify the remedy for  
8 any judgement of the ICJ, and that remedy, under  
9 Article 94 of the U.N. charter, is recourse to the  
10 Security Council. That was explicitly adopted as a  
11 political remedy, because it is the prerogative of the  
12 President and the political branches to determine how  
13 to respond.

14 One of the responses open to the political  
15 branch, as the United States has articulated, is to  
16 decline to respond. And with respect to the Nicaragua  
17 case, that's exactly what the United States did. In  
18 that situation -- and that matter was ultimately  
19 litigated; Judge Mikva, for the D.C. Circuit, wrote a  
20 compelling opinion laying out that decisions of the ICJ  
21 are not judicially enforceable in U.S. courts; they  
22 are, rather, matters sovereign-to-sovereign. That same  
23 reasoning applies here. It is a matter for the  
24 Executive to determine how to apply.

25 I would note that Medellin also presents an

1 argument -- two arguments as to why he's presented  
2 constitutional claims. One, a due-process claim. Due  
3 process was not in the questions presented, as he  
4 authored. It was not in the brief that he wrote to the  
5 Fifth Circuit asking for a COA. The words "due  
6 process" do not appear in his merits briefs. And,  
7 indeed, under the sections -- the constitutional  
8 sections cited, he does not include the Due Process  
9 Clause.

10 JUSTICE SOUTER: Well, what difference does  
11 that make, since this -- the issue to which it is  
12 addressed has not been raised either? I mean, it's a  
13 new issue, and I presume, to the extent that it may be  
14 considered at all, his response -- he can make a  
15 response to it.

16 MR. CRUZ: He might conceivably have brought a  
17 due-process claim. And if he had brought a due-process  
18 claim, the Court of Appeals could have considered if  
19 that due-process claim met the substantive standards of  
20 the AEDPA. He didn't bring a due-process claim. He  
21 brought a treaty claim. And that's the question upon  
22 which he sought certiorari review by this Court.

23 JUSTICE SOUTER: Well, I can understand the  
24 argument, that he shouldn't be allowed to raise due  
25 process here if the argument also goes to your -- the

1 permissibility of your raising 2253.

2 MR. CRUZ: But 225- --

3 JUSTICE SOUTER: What's sauce for the goose --

4 MR. CRUZ: -- but 2253 is a jurisdictional bar  
5 to this Court.

6 JUSTICE SOUTER: Okay. Then I don't see why  
7 it isn't also a jurisdictional gate for him to make a  
8 response to it.

9 MR. CRUZ: Because he didn't bring that case.  
10 Sure, there are dozens of constitutional claims he  
11 could have brought that would have satisfied 2253. He  
12 didn't bring those claims. So that's not presented by  
13 that proceeding. He's not entitled, in his reply  
14 brief, to say, "Well, you know, we could have brought  
15 this constitutional claim," given that he did not, in  
16 fact, bring that -- this constitutional claim.

17 If Medellin's theory is adopted, it would  
18 embrace a standard beyond Fay versus Noia.

19 Thank you.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cruz.

21 Mr. Dreeben, we'll hear from you.

22 ORAL ARGUMENT OF MICHAEL R. DREEBEN

23 ON BEHALF OF UNITED STATES,

24 AS AMICUS CURIAE, SUPPORTING RESPONDENT

25 MR. DREEBEN: Mr. Chief Justice, and may it

1 please the Court:

2 For the reasons articulated in the brief for  
3 the United States and by the State of Texas, this Court  
4 should conclude that there was no jurisdiction in the  
5 lower court to issue of Certificate of Appealability;  
6 and, therefore, the Court should not reach the many  
7 questions that Petitioner has raised in this case about  
8 the effect of the Avena judgement.

9 JUSTICE KENNEDY: Have there been any cases in  
10 the Circuits holding that the state can waive the  
11 jurisdictional limitation on COA?

12 MR. DREEBEN: There have been cases in the  
13 Circuits, Justice Kennedy, that have held that once a  
14 COA has issued, the Court of Appeals may consider a  
15 claim that would otherwise be beyond the jurisdiction  
16 of the courts. But this is a case where a COA has not  
17 been issued, and there is a plain procedural obstacle  
18 to its issuance that this Court can determine and,  
19 therefore, obviate the need to consider the very  
20 sensitive and delicate questions that Petitioner has  
21 raised.

22 JUSTICE O'CONNOR: But is their whole question  
23 of the COA waivable?

24 MR. DREEBEN: I don't think so, Justice  
25 O'Connor, because a COA is a jurisdictional

1 requirement. And just as a notice of appeal is a  
2 jurisdictional requirement and the prerequisites for  
3 proper notice of appeal have to be satisfied, the  
4 prerequisites for a proper Certificate of Appealability  
5 should be satisfied before this Court goes on to reach  
6 the merits of a question, which, as Justice Stevens has  
7 pointed out, may never need to be reached at all if the  
8 Texas courts recognize the President's determination  
9 with respect to the Avena decision or apply the Avena  
10 decision itself.

11 And I think it's very noteworthy that the  
12 filing that Petitioner made at the end of last week in  
13 the Texas Court of Criminal Appeals seeking a  
14 successive petition for a writ of habeas corpus under  
15 Texas law specifically, at page 25, says that  
16 Petitioner is relying on the Avena judgement and he's  
17 relying on the President's determination, which are two  
18 new sources of law that were not available at the time  
19 the Texas courts previously addressed the matter and  
20 that now are available, which constitutes a ground for  
21 a second petition under Texas law, and that,  
22 accordingly, the Texas courts should allow this claim  
23 to be developed in the state courts and to be litigated  
24 there.

25 To me, those statements are almost an



1 admission that the claims that Petitioner has brought  
2 here are barred by failure to exhaust available state  
3 remedies.

4 JUSTICE GINSBURG: Mr. Dreeben, could this  
5 question of the effect of the Avena Treaty be brought  
6 before the Court? Mr. Donovan raised, I think, the All  
7 Writs Act, and he also raised original writs in this  
8 court. If the COA doesn't work, then treat this -- I  
9 think that's what he's saying -- treat it as though it  
10 were an application under the All Writs Act or an  
11 original writ.

12 MR. DREEBEN: I do think that the Court would  
13 have the option of availing itself of extraordinary  
14 jurisdiction, but, as the Court made clear in the  
15 Felker case, its exercise of extraordinary original  
16 writs would be informed by the limitations that the  
17 AEDPA imposes upon the grant of habeas corpus relief;  
18 and, therefore, the Court should look to at least the  
19 additional jurisdictional obstacle that the United  
20 States and Texas has raised; and, namely, that is that  
21 the decision that the Texas courts raised -- issued in  
22 this case is not contrary to any Supreme Court decision  
23 or a misapplication of any clearly established federal  
24 law.

25 JUSTICE BREYER: So all those are -- there are

1 a lot of reasons. Does that counsel in favor of our  
2 holding this? Here we have a case that went on a  
3 jurisdictional ground. And if we affirm or reverse  
4 that jurisdictional ground from the Court of Appeals,  
5 we'll decide a lot of issues that will create guidance.  
6 We might not have to decide it, because Texas may deal  
7 with it; or we may decide, if they come out the other  
8 way, they're wrong. But we might. And that's why I  
9 was thinking perhaps we should hold it rather than dig  
10 it, particularly because that other issue does have  
11 some authority the other way.

12 I take it there's a treatise in the Fifth  
13 Circuit case which does say that the word  
14 "constitutional" here encompasses "treaty."

15 MR. DREEBEN: Justice Breyer, I do not think  
16 that the Court should hold the case, pending the  
17 outcome of the Texas proceedings.

18 JUSTICE BREYER: Because?

19 MR. DREEBEN: The Texas proceedings can  
20 consider the Avena claim and the claim in reliance --

21 JUSTICE BREYER: Yeah, but suppose you lose --  
22 see, I'm thinking, suppose you lose in the Texas  
23 proceeding, it comes here, and, for whatever reason,  
24 suppose you lost again -- you might not, but you might  
25 -- in which case, then what do we do?

1 MR. DREEBEN: Well, the Supreme Court would  
2 have the option of granting cert to review whatever the  
3 Texas courts --

4 JUSTICE BREYER: No, no, but suppose we  
5 thought they were right? See, suppose you lost across  
6 the board? That would be the argument for holding it -  
7 - holding it because then you'd have another vehicle to  
8 get to these questions.

9 MR. DREEBEN: I think it would be close to  
10 issuing an advisory opinion for the Court to decide an  
11 important issue of federal law in which there is a  
12 clear jurisdictional bar to the issuance of a  
13 Certificate of Appealability, and I don't think that a  
14 treatise creates enough of a doubt that  
15 "constitutional" in the AEDPA, means "constitutional"  
16 for this Court to embark on a wide-ranging exploration  
17 of potentially very significant issues with  
18 constitutional overtones.

19 The Avena decision is not a freestanding  
20 source of law that can be administered by this Court  
21 wholly apart from the President's determination. What  
22 the President did was to determine not that the treaty  
23 has a particular meaning that favors Petitioner's case,  
24 but that, as a matter of compliance with the obligation  
25 of the United States, under international law, to

1     comply with a judgement of the International Court of  
2     Justice -- or to determine not to -- but that, in the  
3     interest of the rule of law and the obligations that  
4     were taken on, the President would create a new source  
5     of law, in effect, that would enable the enforcement of  
6     that particular judgement, without respect to the  
7     validity of the underlying merits determination that  
8     the ICJ made.

9                     But if this Court were to treat the ICJ  
10    judgement as a freestanding source of law, it would  
11    frustrate the Executive's ability to determine, in a  
12    particular case, this determination by an international  
13    tribunal should not be enforced and it should not be  
14    given effect; rather, that the President might, in a  
15    particular case, choose to -- not to comply with that  
16    determination. And it would rob the President of that  
17    freedom in international affairs were this Court to  
18    treat a determination by the International Court of  
19    Justice as a freestanding --

20                    JUSTICE O'CONNOR: Well, is, though, a treaty  
21    that's been duly ratified and signed enforceable as  
22    part of our federal law, as this one is drafted?

23                    MR. DREEBEN: It is, Justice O'Connor, but it  
24    should -- properly construed as not conferring  
25    privately-enforceable rights on a criminal defendant in

1 a criminal case. It has not one word about private  
2 enforceability in a criminal case in its language. The  
3 backdrop of the Vienna Convention was that no country  
4 had ever provided notice of rights to a criminal  
5 defendant that would then form a basis, in the event of  
6 a violation, of an attack on a criminal conviction.  
7 State practice since the Vienna Convention has not  
8 recognized, here or abroad, a privately-enforceable  
9 right --

10 JUSTICE SCALIA: Mr. Dreeben, how many -- how  
11 many states are we talking about for these 51  
12 individuals involved in the case? How many different  
13 states?

14 MR. DREEBEN: I'm not sure of the exact  
15 number, Justice Scalia. I think it's five or six  
16 states that have defendants that are at issue in those  
17 proceedings.

18 And what the President determined was, with  
19 respect to those 51 individuals, observance of the ICJ  
20 judgement was warranted, as a matter of United States  
21 foreign policy, not because the United States agrees  
22 with the ICJ's rulings.

23 JUSTICE SCALIA: It's conceivable that those  
24 five or six states could say, "The President has no  
25 authority to do this," ground one. Ground two, "Even

1 if he did, on the merits, we reexamine." So the whole  
2 thing could go away.

3 MR. DREEBEN: That is absolutely correct. And  
4 I think that's an additional reason why this Court  
5 should not rush ahead and overlook jurisdictional  
6 obstacles that may not have been apparent to it at the  
7 time that it granted certiorari, and certainly the  
8 Court did not have the benefit of the fact that the  
9 President would make a determination that state courts  
10 should provide the review and reconsideration that the  
11 ICJ had determined was appropriate. And the Court, of  
12 course, didn't know that Petitioner would then file a  
13 petition for successive writ in the Texas courts that  
14 could provide him the review and reconsideration that  
15 he now seeks this Court to announce in a ruling that  
16 would have extraordinarily broad and detrimental  
17 foreign-policy consequences for the United States'  
18 freedom to respond to the decisions of international  
19 tribunals in a manner that the President sees fit in  
20 accordance with his foreign-policy judgement.

21 If the Court has no further questions --

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
23 Dreeben.

24 Mr. Donovan, you have five minutes remaining.

25 REBUTTAL ARGUMENT OF DONALD F. DONOVAN

1                   ON BEHALF OF PETITIONER

2                   MR. DONOVAN: Thank you, Mr. Chief Justice.

3                   The Respondent came to this Court saying that  
4 he agrees with Mr. Medellin that America could keep her  
5 -- should keep her word. Here's the situation we have.  
6 Everybody agrees that these treaties are binding.  
7 Everybody agrees now that the President has determined  
8 that Mr. Medellin should get exactly what he came to  
9 this Court asking for, which is review and  
10 reconsideration from the state courts.

11                  The -- as Mr. Dreeben has pointed out, and as  
12 we advised the Court last week, in order to protect  
13 against any statute of limitations bar, we have, in  
14 fact, filed in Texas, in order to make these claims,  
15 pending the disposition here. And Mr. Medellin is  
16 prepared to go forward in state court, making exactly  
17 these claims, which the state courts have never had an  
18 opportunity to occasion.

19                  The question here is, How does this Court  
20 fulfill its function of ensuring that the United States  
21 complies with its international obligations that the  
22 President has now confirmed he will comply with? And,  
23 of course, the question here is not whether this --  
24 whatever this Court does with respect to the question  
25 presented here -- that is, Does the Avena judgement

1   having binding effect under the Supremacy Clause? -- in  
2   this case, would no in any way constrain the  
3   President's determination at some future point, because  
4   here we have a situation where the President has said  
5   "comply."

6                   And so, this case does not raise questions --  
7   if it operated directly under the Supremacy Clause --  
8   does not raise a question about what would happen if,  
9   in some future case, the political branches made a  
10   different determination once an ICJ judgement came to  
11   this country. Here, we have the President saying, "You  
12   should do exactly what -- the United States -- what the  
13   ICJ said to do."

14                   So the question is, How does one proceed? We  
15   have proposed a means of going forward that, in our  
16   view, is respectful to the authority of this Court,  
17   that is respectful to the Texas courts, and that's  
18   respectful to the President; and that is, to go forward  
19   on the subsequent application in the Texas courts,  
20   giving them two issues that they've never had a chance  
21   to address, the Avena judgement claim and the claim  
22   under the President's determination.

23                   What should not happen is, that application  
24   should not be compromised by any adverse action on this  
25   Court, and the suggestion of a dismissal might have



1 compromising effects. At a minimum, it might be  
2 perceived as leaving in place a judgement that this  
3 Court has already said warranted review and is now, in  
4 our view, fatally undermined by the President's  
5 determination, as it has been previously fatally  
6 undermined by the plain command of the Supremacy  
7 Clause.

8 In addition, we would, no doubt -- we're  
9 already hearing arguments from the opposition to the  
10 motion to stay -- we would no doubt hear arguments  
11 that, on some subsequence habeas which the United  
12 States says is -- would be available, that that would  
13 be a second or successor habeas, even though Mr.  
14 Medellin has never had a chance to bring the --  
15 otherwise, to bring these claims to the Court. And,  
16 therefore, the Court might, at some point -- at this  
17 point, the best thing to do, if we are going to achieve  
18 expeditious compliance with the President's  
19 determination -- is, in fact, to stay; not to deal with  
20 any of the questions that have been raised here, but to  
21 let the Texas courts deal with them in the first  
22 instance. If it comes back to this Court in the  
23 posture of a direct -- for example, request for  
24 certiorari review from a judgement of the Texas courts  
25 -- there should be no adverse impact from anything this

1 Court did at this posture, simply because Mr. Medellin  
2 came here. And, indeed, it was Mr. Medellin's case  
3 that presumably prompted the President to act. That  
4 would be unfair, and it would complicated the Court's  
5 own disposition.

6 What do we have Texas saying before this  
7 Court? Effectively, Texas has come into this courtroom  
8 and said neither the President nor this Court can  
9 effect -- can give effect of the Avena judgement,  
10 because Texas has opposed the Court's authority under  
11 the direct operation of the Supremacy Clause, and now  
12 Texas has told the Court that the President can't do  
13 this either. And in the face of that suggestion, Mr.  
14 Medellin has every hope and expectation that the Texas  
15 courts will see their obligations under the Supremacy  
16 Clause in a form of both the Avena judgement  
17 interpreting and applying the Vienna Convention and the  
18 President's determination, differently than the Texas  
19 authorities have so far announced. But if it does not,  
20 this Court should have the full complement of means at  
21 its disposal in order to ensure that the United States  
22 complies with its international obligations.

23 Mr. Dreeben has, himself, just suggested that  
24 there may be circumstances if it were not otherwise  
25 achievable. It's hard to think of a more important

1 case for the exercise of this Court's extraordinary  
2 writs. But none of that should be in any way  
3 compromised by a dismissal, at this point, simply  
4 because the President came in in the midst -- in fact,  
5 concurrently -- into Mr. Medellin's own case before  
6 this Court and made this determination. Instead, as  
7 we'd suggest, the appropriate thing would be -- to do  
8 is to stay the case, to allow it to go forward in the  
9 Texas courts. But if the Court does not wish to stay,  
10 we would respectfully suggest that, at this point,  
11 under direct command of the Supremacy Clause endorsed  
12 by the President's determination, as well as the  
13 President's determination itself, the Court should give  
14 effect to the United States' promises.

15 Thank you very much.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
17 Donovan. The case is submitted.

18 (Whereupon, at 12:01 p.m., the case in the  
19 above-entitled matter was submitted.)  
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