1      IN THE SUPREME COURT OF THE UNITED STATES

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3    JOSE ERNESTO MEDELLIN,                    :

4              Petitioner                      :

5         v.                                   :   No. 06-984

6    TEXAS.                                     :

7    - - - - - - - - - - - - - - - - - x

8                              Washington, D.C.

9                              Wednesday, October 10, 2007

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11            The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 10:04 a.m.

14   APPEARANCES:

15   DONALD F. DONOVAN, ESQ., New York, N.Y.; on

16      behalf of the Petitioner.

17   GEN. PAUL D. CLEMENT, ESQ., Solicitor General,

18      Department of Justice, Washington, D.C.; on behalf of

19      the United States, as amicus curiae, supporting

20      Petitioner.

21   R. TED CRUZ, ESQ., Solicitor General, Austin, Tex.; on

22      behalf of the Respondent.

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1                        C O N T E N T S

2    ORAL ARGUMENT OF                                       PAGE

3    DONALD F. DONOVAN, ESQ.

5    GEN. PAUL D. CLEMENT, ESQ.

6        On behalf of the United States, as amicus

8    R. TED CRUZ, ESQ.

10   REBUTTAL ARGUMENT OF

11   DONALD F. DONOVAN, ESQ.

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

2                                        (10:04 a.m.)

3              CHIEF JUSTICE ROBERTS:  We'll hear argument

4    this morning in Case 06-984, Medellin v. Texas.

5              Mr. Donovan.

6              ORAL ARGUMENT OF DONALD F. DONOVAN

7                 ON BEHALF OF THE PETITIONER

8              MR. DONOVAN:  Mr. Chief Justice, and may it

9    please the Court:

10             The President and the Senate entered into

11   three treaties, the Optional Protocol, the UN Charter,

12   and the ICJ Statute, by which the United States agreed

13   that it would comply with the ICJ's decision in any case

14   to which it was a party.  We now have such a decision,

15   and the President of the United States has determined

16   that the United States should comply.

17             Texas, however, tells this Court that it

18   should tell the world that the framers left us a

19   Constitution in which neither this Court nor the

20   President nor maybe even Congress could ensure that the

21   United States kept the promise that its elected

22   representatives made to its treaty partners.  Texas's

23   position is directly contrary to the constitutional

24   design.

25             JUSTICE SCALIA:  That's not such an

1  outrageous proposition.  You'd certainly acknowledge

2  that the President and the Senate could not enter into a

3  treaty that required the States to do something that was

4  unconstitutional.

5         MR. DONOVAN:  Yes.  The Constitution --

6         JUSTICE SCALIA:  So there would be the

7  situation that presents the shocking situation you've

8  just described.  There is a treaty, but nonetheless it

9  cannot be enforced domestically.

10        MR. DONOVAN:  There would be constitutional

11  -- there might be affirmative constitutional constraints

12  on the enforcement of a treaty, but there are none here.

13        CHIEF JUSTICE ROBERTS:  Who would enforce

14  those constraints?  The thing that concerns me about

15  your position is that it seems to leave no role for this

16  Court in interpreting treaties as a matter of Federal

17  law.

18        Suppose, for example, that the International

19  Court of Justice determined in this case its judgment

20  was the same, but they added:  As a matter of

21  deterrence, we think the officers who failed to give

22  consular warning should each be sentenced to 5 years in

23  jail.  That's the ICJ determination.  Would this Court

24  have a role in reviewing that judgment?

25        MR. DONOVAN:  This Court would have a role

4

1  in reviewing that judgment, and here's -- here's the

2  question.  This Court has an obligation, has the

3  authority, to say what the law is.  In this case the

4  obligation is, in fact, to comply with the judgment,

5  itself.

6              CHIEF JUSTICE ROBERTS:  Even if we determine

7  --

8              MR. DONOVAN:  And if that obligation --

9              CHIEF JUSTICE ROBERTS:  Even if we

10  determine, even if we determine that that judgment is

11  based on a legal error?

12              MR. DONOVAN:  The question -- that's the

13  basis of submitting a dispute to a third-party

14  dispute-resolution mechanism, yes.

15              CHIEF JUSTICE ROBERTS:  So if the ICJ

16  determined that the officers should each go to jail for

17  5 years, we would have no basis for reviewing that

18  judgment?

19              MR. DONOVAN:  Wel, that would be -- well,

20  that would be a -- raise a separate obstacle.  If I may

21  answer the questions in turn, first --

22              JUSTICE GINSBURG:  Does the ICJ ever issue a

23  judgment of that character?  It issues a judgment

24  between two nations, two or more nations, and it is

25  instructs the United States to do something.  I'm not

1    aware of any -- any decision of the ICJ that says what a

2    sentence should be for a particular individual.

3              MR. DONOVAN:  That is correct.  The ICJ

4    decides disputes between nations, but those disputes may

5    involve the nations' obligation as to specific

6    individuals. In this case --

7              JUSTICE KENNEDY:  Well, I'm still interested

8    in the answer to the Chief Justice's hypothetical.

9              MR. DONOVAN:  Well, as I say, there are two

10   --

11             JUSTICE KENNEDY:  Suppose the court acts

12   beyond, clearly beyond, its jurisdiction?

13             MR. DONOVAN: Well, it's -- with respect,

14   there's no suggestion here that the court has acted

15   beyond its jurisdiction.  Indeed, the President has

16   determined otherwise.

17             JUSTICE KENNEDY:  Could you answer the

18   hypothetical, please.

19             MR. DONOVAN:  But if the court, itself -- if

20   the ICJ, itself, made a determination as to a dispute

21   that is within its jurisdiction and that imposes an

22   obligation that is within this Court's provenance to

23   enforce, that is, that it determines the rights

24   attributable -- enforceable within a court of justice,

25   this Court would be enforcing the obligation to comply.

6

1          It wouldn't -- the fact that it diverged

2     from the court's own interpretation, for example, here

3     in Sanchez-Llamas, is not relevant to the treaty

4     obligation that this Court is exercising --

5               CHIEF JUSTICE ROBERTS:  I'm sorry.  I'm

6     still looking for an answer to the hypothetical.  What

7     would be the basis for this Court's reviewing the ICJ's

8     determination that officers should go to jail for 5

9     years?

10              MR. DONOVAN:  Because in that situation that

11    may be beyond the Court's -- the executive power of the

12    Court.  What the Court would be doing is determining

13    the rights attributable to --

14              CHIEF JUSTICE ROBERTS:  The Court doesn't

15    have executive power.  It has judicial power.  It's

16    already exercised that judicial power in Sanchez-Llamas

17    in determing the meaning of this treaty.

18              And I understood your position to be that we

19    have no authority to construe the treaty in this case

20    because a judgment was issued by the International Court

21    of Justice.

22              MR. DONOVAN:  The -- the question here is

23    that the --the Court would be exercising its judicial

24    authority to construe the United States's obligation to

25    comply with the judgment.  The nature of that

1    obligation, itself, could be one that would be

2    enforceable, in this Court's words, "in a court of

3    justice;" and that's the nature of this obligation.  Mr.

4    Medellin gets a review and reconsideration.

5              In the Chief Justice's hypothetical, that

6    may well be an obligation that would be enforceable by

7    other actors that would -- which would not be directly

8    enforceable in a court as here.

9              JUSTICE BREYER:  I thought --

10             MR. DONOVAN:  It depends on the nature of --

11             JUSTICE BREYER:  I thought the question --

12   and I apologize if I'm not paraphrasing it because I

13   have my own.  This has arisen frequently.  Brussels has

14   a treaty, and that treaty binds all the member nations,

15   and supreme courts of various nations have come up

16   against this problem:

17             What would happen if the Brussels court or

18   the EU court insists under the treaty that we do

19   something that violates our own Constitution?  I think

20   this is an example of that.  And the answer typically

21   has been:  Well, we'd follow our own Constitution, at

22   least if it was a violation, what the EU said, of

23   fundamental human rights or destroyed some basic

24   structural part of our Constitution.

25             And the question that I would have is,

1    doesn't that kind of approach -- not exactly but that

2    kind of approach -- satisfy whatever problem there is in

3    this respect here?

4             MR. DONOVAN:  If there were -- if an ICJ --

5             JUSTICE BREYER:  If the ICJ were to do

6    something which it had never done, like, say, put

7    everybody in jail for 50 years -- I don't know that

8    there is such a thing -- but suppose they did, if they

9    did, I guess that might violate something basic in our

10   Constitution, in which case we wouldn't enforce it.

11            MR. DONOVAN:  That's right and --

12            JUSTICE BREYER:  If we took that approach --

13            CHIEF JUSTICE ROBERTS:  Now --

14            MR. DONOVAN:  If there --

15            CHIEF JUSTICE ROBERTS:  Just to get back,

16   you're conceding, I take it, whether the ICJ has done

17   something like this before or not -- and we can debate

18   whether what they've done in this case is precisely that

19   -- there is a role for this Court in determining whether

20   or not a judgment of the ICJ should be enforced.

21            MR. DONOVAN:  There is surely because it's

22   this Court that would be enforcing the obligation to

23   comply.  And just as a treaty cannot contravene an --

24            CHIEF JUSTICE ROBERTS:  Just enforcing the

25   obligation to comply or, as we have in this case,

1     determining the legal basis for the ICJ determination?

2               MR. DONOVAN:  There are -- there are two

3     different obligations here:  There is an obligation

4     under the Vienna Convention itself, and this Court has

5     determined the dispositive effect of that obligation of

6     a matter of U.S. law.  But there's a different

7     obligation.  The President and the Senate agree to go to

8     a third party, to go to the International Court of

9     Justice, to resolve disputes.  The very premise of that

10    obligation is that we might disagree with the

11    determination -- with the interpretation of the treaty,

12    and we agreed in that circumstance to comply with the --

13              JUSTICE KENNEDY:  Suppose in this case the

14    President did the opposite -- the same facts only the

15    President said to Texas, do not comply with this

16    judgment.

17              MR. DONOVAN:  Well, it -- that would -- it

18    would be inconsistent with this Court's duty and

19    obligation to comply, to enforce a treaty that the --

20    that the --

21              JUSTICE KENNEDY:  So then the President's --

22              MR. DONOVAN:  If the --

23              JUSTICE KENNEDY: -- determination is not

24    conclusive.

25              MR. DONOVAN:  Well, the President's

10

1    determination -- what the President has determined here

2    is to enforce the treaty.  He --

3             JUSTICE KENNEDY:  My hypothetical is he's

4    coming out the other way.  He says don't follow this

5    judgment.  And you say he can't do that.

6             MR. DONOVAN:  If --

7             JUSTICE KENNEDY:  And I -- I think that

8    that's not -- not consistent with your earlier position.

9             MR. DONOVAN:  Oh, if the President here --

10   the -- if there's an obligation here to comply and, in

11   the words this Court, it's "an obligation of a nature to

12   be enforced in a court of justice," and here the

13   obligation imposed by the ICJ and the Avena judgment is

14   an -- is an obligation --

15            JUSTICE ALITO:  Isn't the obligation --

16            MR. DONOVAN:  -- which essentially --

17            JUSTICE ALITO:  Isn't the obligation that

18   the United States undertook when it signed the UN

19   Charter the obligation to undertake to comply with ICJ

20   judgments in accordance with its own constitutional

21   processes, not necessarily that any ICJ decision would

22   be regarded by any court in this country as binding

23   Federal law?

24            MR. DONOVAN:  Well, it would be -- that --

25   that's exactly right.  What the -- what the ICJ -- what

1    U.S. did is undertake to comply.  So the question is,

2    what is the nature of the obligation imposed?

3                JUSTICE GINSBURG:  If you had a --

4                MR. DONOVAN:  It might have obligations --

5                JUSTICE GINSBURG:  If you had a treaty on

6    the recognition and enforcement of judgments, mutual

7    recognition and enforcement, then we would enforce the

8    judgment that we agreed to enforce by treaty.  We

9    wouldn't look behind it to see if we agreed with it on

10   the merits.

11               Are you saying that this undertaking, this

12   agreement to submit to the compulsory jurisdiction of

13   the ICJ gives the judgment in the particular case,

14   although not precedential effect, the counterpart to

15   full faith and credit?

16               MR. DONOVAN:  That's exactly the effect of

17   the judgment.

18               JUSTICE SCALIA:  It's self-enforcing.  I

19   thought you --

20               MR. DONOVAN:  It's --

21               JUSTICE SCALIA:  I thought you -- you think

22   this treaty is self-enforcing.  You don't really need

23   the President's order here.

24               MR. DONOVAN:  Well, if the -- whether or not

25   the treaty obligation is self-executing or

12

1    self-enforcing goes to the nature of the obligation.  If

2    the ICJ said -- if a treaty or an ICJ judgment said, go

3    pass a statute, that's obviously directed to Congress.

4    If it said cease hostilities, that's directed to the

5    President.  But as this Court has said, when a treaty

6    or, by extension, a treaty obligation to comply with a

7    judgment is --

8              JUSTICE STEVENS:  May I --

9              MR. DONOVAN:  -- of a nature to be enforced

10   --

11             JUSTICE STEVENS:  May ask this question?  I

12   don't think you've answered the Chief Justice's original

13   hypothetical.  It's easy, of course; they cannot compel

14   us to violate our Constitution by a judgment of their

15   kind.  But what about the hypothetical that they said

16   the sentence for this man should be 5 years, not just

17   there be an investigation to see if he's been

18   prejudiced.  Would we have to follow that judgment?

19             MR. DONOVAN:  Well, in that situation, if it

20   was a judgment rendered in a case to which we had --

21             JUSTICE STEVENS:  In this very case.

22             MR. DONOVAN:  That would be --

23             JUSTICE STEVENS:  This very case.  Supposing

24   they had said the judgment is that Medellin should spend

25   5 years in jail and no more.  Would we have to honor

1    that judgment?

2           MR. DONOVAN:  In the first instance, yes,

3    the Court would honor that judgment as an obligation to

4    comply.  But remember that there are --

5           JUSTICE GINSBURG:  Then it becomes --

6           MR. DONOVAN:  -- some constraints that --

7           JUSTICE GINSBURG:  Then it becomes a penal

8    judgment, and I thought the rule was that no country

9    forces -- enforces another country's penal judgment.

10          MR. DONOVAN:  Well, that would depend on the

11   -- if -- how you construed the obligation to comply.

12          JUSTICE GINSBURG:  But if we say --

13          MR. DONOVAN:  In this case, we have --

14          JUSTICE GINSBURG:  -- this man goes to jail

15   for 5 years, it seems to me that's a penal judgment.

16          MR. DONOVAN:  If that was the nature of the

17   dispute that the United -- that is, of course, not the

18   nature of the dispute that the United States --

19          JUSTICE ALITO:  What if they say --

20          MR. DONOVAN:  But if he --

21          JUSTICE ALITO:  -- he goes to jail for no

22   time at all?  They say that the remedy for these

23   violations, in order to deter future violations, should

24   be that the charges should be dismissed and any future

25   prosecution should be barred.  Would that be

1    automatically binding?

2            MR. DONOVAN:  Well, the question is, is it

3    binding in the first instance because the -- there's an

4    obligation to comply?   That doesn't say anything about,

5    for example, Congress's ability to repudiate that

6    obligation to comply, just like it has the obligation --

7    the authority as a last-in-time rule, pursuant to the

8    last-in-time rule, to repudiate any treaty obligation.

9    But the framers wanted treaties to be enforced in the

10   first instance when they were susceptible of judicial

11   enforcement, and if the ICJ renders a judgment pursuant

12   to our treaty obligation to submit disputes, that is of

13   a nature to be judicially enforced, then the Court --

14           CHIEF JUSTICE ROBERTS:  Is the answer to --

15           MR. DONOVAN:  -- would be exercising --

16           CHIEF JUSTICE ROBERTS:  Is the answer to

17   either my or Justice Stevens's hypothetical then, yes,

18   we do have to enforce an ICJ judgment of that sort?

19           MR. DONOVAN:  You would enforce an ICJ

20   judgment that did in fact -- that was of a nature to be

21   enforced in -- in a judicial proceeding.

22           CHIEF JUSTICE ROBERTS: But --

23           JUSTICE SCALIA:  This is not of a nature to

24   be enforced in a judicial proceeding in Texas.  Texas

25   has procedural rules that disable the Texas court from

1   complying with the ICJ judgment here.  Are you telling

2   me that the ICJ judgment empowers either Federal or

3   State courts to do things which -- which their laws do

4   not permit them to do?

5           MR. DONOVAN:  If the -- both the President's

6   determination and the Article 94 obligation which result

7   in the Avena judgment are Federal law.  The President's

8   determination pursuant to his State court authority and

9   Article II authority and the -- and the Avena judgment

10  pursuant to the treaty --

11          JUSTICE SCALIA:  And -- and do you know of

12  any other Federal law that -- that interferes in the --

13  in the procedures of State criminal courts, directs them

14  as to what -- what procedures they have to have?

15          MR. DONOVAN:  The Court has -- when there's

16  a Federal procedural rule that preempts a State

17  procedural rule, the Court allows that to preempt as a

18  Federal rule all the time.

19          JUSTICE SCALIA:  Really?

20          MR. DONOVAN:  That's a function of --

21          JUSTICE SCALIA:  Where?  I don't know what

22  you're talking about unless you're talking about

23  constitutional requirements.  Of course, those are

24  binding on the States.  But you're saying that the

25  Federal Government can prescribe State court procedures

1    and authorize State courts to do things which -- which

2    the State government does not authorize them to do?

3              MR. DONOVAN:  The Federal Government can

4    prescribe rules of decision that preempt Federal rules

5    and require the cases that other -- that would not

6    otherwise be heard to be heard. That's --

7              JUSTICE SOUTER:  Well, you're -- you're --

8    as I understand it, in order for you to prevail on that

9    point, the only -- the only conclusion that has to be

10   drawn, as I understand it, is that the Texas courts have

11   subject matter jurisdiction of this kind of -- of order,

12   and that the bar that Texas is asserting is simply, in

13   effect, a procedural bar; and, therefore, in order for

14   this Federal rule to preempt the State bar is not to

15   give the State courts jurisdiction they don't have, but

16   to remove a bar to the exercise of their jurisdiction

17   that State law, absent preemption, would impose; is that

18   correct?

19             MR. DONOVAN:  That's correct.  That's right.

20   It removes a bar by preempting that bar.

21             JUSTICE ALITO:  You just --

22             MR. DONOVAN:  If I may --

23             JUSTICE ALITO:  You just said that the Avena

24   decision is Federal law.  How is the -- how is the Avena

25   decision itself a Federal law?

17

1             MR. DONOVAN:  Well, the Avena decision --

2             JUSTICE ALITO:  It's not a statute.  It's

3    not the Constitution.  It's not a statute.  It's not

4    itself a treaty.

5             MR. DONOVAN:  The Avena decision has the

6    force of Federal law, either by virture of the treaty

7    obligation to comply with it under Article 94-1, or the

8    President's determination under his Article II authority

9    to require -- to determine that the United States should

10   comply.  And by either one of those vehicles, in effect

11   the judgment becomes the --

12            JUSTICE GINSBURG:  You didn't mention the --

13            MR. DONOVAN:  -- the instrument by which it

14   must be complied with.

15            JUSTICE GINSBURG:  You didn't mention the

16   Optional Protocol which is -- is where the United States

17   gave its promise.  It voluntarily accepted this

18   jurisdiction.  It didn't have to.

19            MR. DONOVAN:  Well, that's right.  It's the

20   combined force of the Optional Protocol and the UN

21   Charter and ICJ statute.

22            And if I may reserve the rest of my --

23            CHIEF JUSTICE ROBERTS:  Well, why don't --

24   why don't you take 5 extra minutes?  And we'll give you

25   your rebuttal time.

1                If the Avena judgment is binding as Federal

2     law, is it your position, though, that the -- this Court

3     has no authority to review the content of that Federal

4     law -- the judgment?  Our choice is simply enforce it?

5                MR. DONOVAN:  The relevant Federal law here

6     is the Federal law that says that the United States will

7     comply pursuant to its voluntary choice to submit

8     these -- this --

9                CHIEF JUSTICE ROBERTS:  So we have no --

10               MR. DONOVAN:  I'm sorry -- to the ICJ.

11               CHIEF JUSTICE ROBERTS:  We have no authority

12    to review the judgment itself, even though the judgment

13    will have the effect as Federal law of preempting the

14    State law in this instance?

15               MR. DONOVAN:  Well, you are in effect

16    applying Federal law in the form of the obligation to

17    comply.  That's different than applying the Vienna

18    Convention --

19               CHIEF JUSTICE ROBERTS:  Excuse me, but your

20    position is not that we are applying the obligation to

21    comply, because we interpreted that in Sanchez-Llamas

22    and came to the exact same conclusion as the ICG here.

23    What you're saying is it's different here because the

24    operative law is the judgment.

25               MR. DONOVAN:  The operative -- it's

1   different because on the one hand, in Sanchez-Llamoas,

2   this Court was interpreting the underlying obligation

3   under the treaty.  That is, the immediately applicable

4   instrument.  But, as with respect to any judgment, a

5   court's -- and this Court has affirmed with respect to

6   international adjudications, that it will enforce an

7   international adjudication.

8              JUSTICE KENNEDY:  Can this court interpret

9   the meaning of the Avena judgment if it's ambiguous?

10  For instance, it said that a number of Mexico nationals

11  have not received a hearing.  It didn't say all of them.

12  And I have a problem, incidentally, because I think

13  Medellin did receive all the hearing that he's entitled

14  to under the judgment anyway.

15             Can we interpret the judgment in that

16  respect if it's ambiguous, not clear?

17             MR. DONOVAN:  Wel, in this case, the court

18  would be -- a court applying the Avena judgment either

19  by virtue of the Optional Protocol in 94-1 and the

20  President's determination would be in effect applying

21  Federal law.  We think the judgments --

22             JUSTICE KENNEDY:  Can we interpret the

23  judgment?

24             MR. DONOVAN:  Well, to the extent necessary

25  to apply Federal law in the form of a judgment --

1          JUSTICE KENNEDY:  And can the President

2   displace our authority to do that?

3          MR. DONOVAN:  The President would not

4   displace the Court's authority to interpret a judgment,

5   no.  What the President has said is that the judgment

6   shall be enforced.  That's an independent source of

7   Federal law under his Article II --

8          CHIEF JUSTICE ROBERTS:  So if he determines

9   that the judgment should not be enforced and this Court

10  determines, based on our construction of the treaty and

11  the judgment that it should be enforced, which

12  determination controls?

13         MR. DONOVAN:  This Court -- to the extent

14  that this is Federal law, this Court has the ultimate

15  authority to determine whether or not it should be

16  complied with.  And this Court -- the framers have made

17  treaties supreme Federal law specification so they could

18  be judicially enforceable.

19         CHIEF JUSTICE ROBERTS:  Well, if we have the

20  authority to determine whether the treaty should be

21  complied with in the face of a presidential

22  determination, why don't we have the independent

23  authority to determine whether or not it should be

24  complied with at a matter of Federal law without regard

25  to the President's determination?

21

1          MR. DONOVAN:  You have two separate and

2     independent sources of authority here.  Without the

3     President's determination, this Court pursuant to the

4     mandate in the Supremacy Clause would apply the treaty

5     obligation to comply with the judgment because the

6     nature of the judgment is such to be enforced in a court

7     of justice.  In this instance, you have an entirely

8     independent source of authority because the President in

9     the exercise of his Article II authority has determined

10    that it's in the paramount interest of the United States

11    to comply.  That becomes a second object.

12          Of course, it would be a judicial function

13    to interpret the -- interpret those obligations,

14    interpret what the President meant.  But in this case

15    it's crystal clear.  The Avena judgment is mandatory and

16    prospective.  The President is determined that it be

17    enforced, and that would be the result even had the

18    President not acted pursuant to the mandate of the

19    Supremacy Clause, which makes treatise enforceable

20    Federal law.

21          CHIEF JUSTICE ROBERTS:  Thank you,

22    Mr. Donovan.  We'll give you 5 minutes for your

23    rebuttal.

24          General Clement.

25          ORAL ARGUMENT OF GEN. PAUL D. CLEMENT.

1                    ON BEHALF OF THE UNITED STATES AS

2                    AMICUS CURIAE SUPPORTING THE PETITIONER

3                    GENERAL CLEMENT:  Mr. Chief Justice, and may

4       it please the Court:

5                    JUSTICE SCALIA:  You don't agree with the

6       last statement.

7                    GENERAL CLEMENT:  I don't think I do agree

8       with that and there's a couple of the issues here where

9       we take a slightly different take.  Obviously we feel

10      the President's determination here that we will comply

11      with the Avena judgment is a critical element in why

12      there's an enforceable obligation --

13                    JUSTICE SCALIA:  We would have no --

14      according to you, we would have no obligation to enforce

15      this judgment but for the President's action?

16                    GENERAL CLEMENT:  That's correct, Justice

17      Scalia.  Now, obviously, Mr. Donovan and his clients

18      could get here and ask you to enforce the judgment of it

19      own force without the President's determination and that

20      would ultimately be a question for this Court.  We of

21      course --

22                    JUSTICE SCALIA:  We could decide to go back,

23      too.  But would we have any authority to do it?

24                    GENERAL CLEMENT:  I hope that you wouldn't

25      and we would be up here saying don't, because if you

1    look at Article 94 of the UN Charter as a whole, it has

2    two components and I think it makes clear why the

3    President's intervening role here is important.  94-1

4    says that we undertake to comply with our obligations,

5    with our obligations to comply with the judgment.  But

6    94-2 says what happens when a country doesn't do that.

7    It's a matter for the Security Council.  And that, of

8    course, I think necessarily implies that countries do

9    retain the option to put themselves out of compliance

10   with an International Court of Justice judgment.

11                   JUSTICE GINSBURG:  But that would take an

12   action by somebody in the country.

13                   GENERAL CLEMENT:  Exactly, Justice Ginsburg,

14   and I think that --

15                   JUSTICE GINSBURG:  Here that hasn't -- that

16   hasn't happened.  94 would never be triggered because we

17   haven't said we're breaking our promise, we're not going

18   to comply.

19                   GENERAL CLEMENT:  Absolutely, and that's why

20   we're supporting Mr. Donovan.

21                   JUSTICE SCALIA:  Wait a minute.  In order to

22   get it to the Security Council, you have to take some

23   affirmative action not to comply?  It's just not enough

24   simply not to comply?

25                   GENERAL CLEMENT:  Whether it's an omission

24

1    or a commission I don't think is the point, Justice

2    Scalia.  My point --

3              JUSTICE SCALIA:  I thought that was tte

4    point of Justice Ginsburg's comment, that there had been

5    no decision not to comply.  Don't you need an

6    affirmative decision to comply?

7              GENERAL CLEMENT:  I didn't take that to mean

8    --

9              JUSTICE GINSBURG:  If you don't -- if you

10   don't comply, you don't comply.  But we -- certainly not

11   -- in that situation here, the President said the United

12   States agreed that it would submit to the binding

13   jurisdiction for one case only, and we are bound by that

14   judgment and I'm going to enforce it.

15             GENERAL CLEMENT:  I agree, i think the

16   omission-commission --

17             JUSTICE SCALIA:  I know you agree, but it

18   depends on whether it's up to the President to make that

19   call.  Usually when we have treaties that are not self-

20   enforcing the judgment of whether that international law

21   obligation shall be made domestic law is a judgment for

22   the Congress.

23             Congress passes a law to enforce the treaty,

24   and you're telling us that, well, we don't need the

25   Congress; the President can make a domestic law by

1    writing a memo to his attorney general.

2           GENERAL CLEMENT:  Well, Justice Scalia, let

3    me take that in turn.  Let me just first close the

4    discussion of what happened here by saying the reason I

5    think the commission-omission distinction doesn't have

6    much purchase here is because the President did make a

7    determination that we would comply.  And I think if you

8    ask the question who makes the determination as to

9    whether we're going to default on our international law

10   obligations or comply, especially vis-a-vis the UN, the

11   answer to that question is quite clear:  It's the

12   President, and Congress has acquiesced in that with the

13   UN Participation act at 22 U.S.C.  287.

14          CHIEF JUSTICE ROBERTS:  What if the

15   President had said, we're going to comply with this

16   judgment, but in a different way than the ICJ

17   determined.  We're going to comply by examining in each

18   case whether there's already been a determination of

19   prejudice, and if there has then there's no further

20   review, but if there hasn't then there'll be further

21   review.  Would that be binding as a matter of Federal

22   law?

23          GENERAL CLEMENT:  It depends exactly what

24   form that would take.  I think part of the problem --

25   I'm stumbling with that question --

26

1            CHIEF JUSTICE ROBERTS:  It's the same as a

2   memorandum just like -- it's a memorandum just like the

3   one we have here.

4            GENERAL CLEMENT:  And what does it suggest

5   that is supposed to be done with tne end product of that

6   determination?

7            CHIEF JUSTICE ROBERTS: It says that if there

8   has already been -- the State courts are to determine if

9   there's already been a determination of prejudice in the

10  case, and if there has there's to be no further review.

11  But if they determine there hasn't, there is to be

12  further review.  That's different than the ICJ's

13  judgment, which suggests there should be a new

14  determination in every case.

15           Is that -- does that have the same status as

16  the memorandum here?

17           GENERAL CLEMENT:  I would say that it

18  wouldn't -- I would say that it wouldn't, as you

19  suggest, not fully comply and not fully discharge with

20  our obligation.

21           But the extent to which we did and purported

22  to be doing that under compliance with the judgment, it

23  would have the same force as providing the rule of

24  decision, which, to get back to Justice Scalia's

25  question, especially in a context like this, is not so

27

1   unprecedented.  It is not materially different from when

2   the President supplies the rule of decision in the

3   pre-FSIA practice by making a determination, binding on

4   the courts State and Federal, that somebody has

5   sovereign immunity.

6            JUSTICE ALITO:  If we agree with you, would

7   the effect be that the President can take any treaty

8   that is ratified on the understanding that it's not

9   self-executing and execute the treaty and give it force

10   under domestic law?

11           GENERAL CLEMENT:  No, Justice Alito, I don't

12   think the theory would sweep that broadly, and I think

13   that --

14           JUSTICE ALITO:  Well, why would it not?

15           GENERAL CLEMENT:  Well, first of all,

16   there's obviously a limiting principle in our theory,

17   which is to say that the President can't take any action

18   pursuant to this which is inconsistent with other

19   constitutional obligations.

20           CHIEF JUSTICE ROBERTS:  But he can -- he can

21   take action that's inconsistent with the determination

22   of Federal law by this Court?

23           GENERAL CLEMENT:  No, Mr. Chief Justice, I

24   don't think that's true.

25           CHIEF JUSTICE ROBERTS:  I thought we

1    determined in Sanchez-Llamas that the treaty did not

2    mean what the ICJ said it means in this case.

3                GENERAL CLEMENT:  That's exactly right as to

4    the Vienna Convention.  But this case raises a question,

5    not about the proper interpretation of the Vienna

6    Convention, because as you remember we were four-square

7    with this Court on its interpretation of the Vienna

8    Convention in Sanchez-Llamas.  The relevant treaties

9    here the Optional Protocol and the UN Charter, and the

10   question here is not the force of -- of the Avena

11   judgment as precedent --

12               CHIEF JUSTICE ROBERTS:  Do you doubt that

13   the judgment here is based on a determination of the

14   Vienna Convention that's exactly the opposite of what we

15   determined last year?

16               GENERAL CLEMENT:  No doubt at all, Mr. Chief

17   Justice.  And we think with respect to anyone but the 51

18   individuals that are covered by the judgment that of

19   course this Court has the final word on the

20   interpretation of the Vienna Convention.

21               JUSTICE SCALIA:  They were not

22   parties to it.  What do you mean, "covered by the

23   judgment?"  Is this some -- some new kind of new kind of

24   jurisdiction?  If you're named in a suit by somebody

25   else, you somehow acquire rights under that suit?  I

1    don't know of any such principle.

2              GENERAL CLEMENT:  Justice Scalia --

3              JUSTICE SCALIA:  These people were not

4    parties to the -- the countries were parties to the

5    judgment.

6              GENERAL CLEMENT:  Of course the countries

7    were parties, but these 51 individuals' claims were

8    specifically adjudicated.  Why were they specifically

9    adjudicate?  Because they were effectively -- the claims

10   were espoused by the Mexican Government.  That system --

11             JUSTICE GINSBURG:  General, can we just

12   clarify something which I think is important?  Justice

13   Scalia suggested that this wasn't self-executing.  The

14   State Department with respect to the Vienna Convention

15   itself told Congress very clearly:  You don't have to do

16   anything; this is self-executing.  And then the protocol

17   says:  We the United States agree to accept the

18   jurisdiction of the ICJ in a certain class of cases.

19   And Congress ratified that, too.  So I don't think that

20   self-executing has anything to do with this case.

21             GENERAL CLEMENT:  Well, Justice Ginsburg, I

22   think that reflects that self-executing is one of those

23   words that people use to cover a lot of different

24   meanings; and I think in its most correct sense, you're

25   right to say that the Vienna Convention is

30

1    self-executing.

2              So there didn't have to be legislation

3    before Texas and its local officials were obligated to

4    provide notice in this case; and of course, it's their

5    default on that treat obligation by the State and local

6    officials that has us in this predicament in the first

7    place.

8              Now, there's another meaning of

9    "self-executing", or maybe it's a misuse of the term, to

10   say whether it gives rise to individually enforceable

11   rights in court without more.  And we do take the

12   position that if the President had done nothing, and

13   certainly if the President had said we're not going to

14   comply, we're going to respond to this ICJ judgment the

15   way we did with the Nicaragua judgment, we don't think

16   that this judgment would be enforceable as of its own

17   terms.

18             JUSTICE GINSBURG:  But in Nicaragua the

19   United States took the position from day 1 that the ICJ

20   had no jurisdiction over the case.  So the absence of

21   jurisdiction is always an exception to the obligation,

22   even within the United States, to give full faith and

23   credit.  If the court had no jurisdiction, another State

24   doesn't have to give full faith and credit.  But if it

25   does have jurisdiction, then the obligation kicks in.

1           GENERAL CLEMENT:  That's absolutely right,

2    and that gets back to the basic principle of reviewing

3    foreign judgments; and it's not that this Court is

4    disabled from its judicial role.  It's just the judicial

5    role here is not a straight-up question of the

6    interpretation of the Vienna Convention.  It's a

7    question of what effect to give the judgment that's been

8    effectively validated by the executive branch.  And

9    there's two things --

10          JUSTICE STEVENS:  You're arguing it's just

11   the normal choice of law problem, that even though the

12   judgment's clearly wrong on the matter of international

13   law, if the court had judgment -- had jurisdiction to

14   enter the judgment, we must treat it as binding?

15          GENERAL CLEMENT:  That's -- that's right,

16   Justice Stevens.  As Justice Ginsburg put it --

17          JUSTICE STEVENS:  That's provided that we

18   regard these individuals as though they're tantamount to

19   the parties to the judgment itself.

20          GENERAL CLEMENT:  I think that's right, and

21   certainly our obligation under that judgment as the

22   executive branch sees it is to these 51 individuals as

23   their claims have been espoused by --

24          JUSTICE KENNEDY:  Suppose the President had

25   reached the contrary conclusion, a hypothetical we put

1  earlier.  Supposed the President had told Texas, do not

2  follow this judgment?

3         GENERAL CLEMENT:  Then I'd be on that side

4  of the podium, Your Honor.  I mean, we would take the

5  position that the President's authority here is, in his

6  view of this, is a necessary step; and that seems to be

7  --

8         JUSTICE KENNEDY:  I agree that we should

9  give that determination great weight, but that's

10  something quite different from saying that he can

11  displace the authority of this Court on that issue of

12  law.

13         GENERAL CLEMENT:  Oh, but the -- the

14  President can't displace the role of this Court.  It's

15  just that the role of this Court in a situation where

16  there's been a judgment and the executive branch has

17  viewed that judgment as something we should comply with,

18  then the role of this Court is limited to deciding

19  whether there was jurisdiction to issue that judgment in

20  the first place; and then the secondary role of this

21  Court would to be to say, does the rule of law embodied

22  by that judgment violate the Constitution.  And that's

23  why the answer to the Chief Justice's original

24  hypothetical, about a sentence to 5 years for guards

25  that had no notice -- that's a different case.

1          But here there's no colorable argument that

2    the -- that the judgment here and what's embodied in it

3    lies outside the power of the Federal Government as a

4    whole to adjudicate and to put as an obligation on the

5    States.

6          JUSTICE SOUTER:  Mr. Chief Justice, may I

7    ask a further - may I ask a further question?

8          CHIEF JUSTICE ROBERTS:  Yes.

9          JUSTICE SOUTER:  Let me try one other

10   variation to make sure that I understand your argument.

11   What if the President of the United States had said this

12   judgment, the Avena judgment, will not be enforced, and

13   this Court interpreted the Avena judgment as binding, as

14   providing a rule of decision and a rule of decision

15   which was entitled to respect by Texas?

16          Would this Court's authority to make that

17   declaration and issue a judgment to that effect be

18   displaced by the President's determination that it would

19   not be that the Avena judgment would not be enforced?

20          GENERAL CLEMENT:  Of course not, Justice

21   Souter.  That would just be like cases that

22   unfortunately happen, where we would take a position

23   that the judgment on its own is not binding and you

24   would reject that position and that would be the law of

25   the land.

1              JUSTICE SOUTER:  Okay.

2              GENERAL CLEMENT:  We don't suggest that we

3    wouldn't comply with a judgment of this Court, accepting

4    Mr. Donovan's first theory that the President's role

5    here is unimportant.

6              JUSTICE SOUTER:  So --

7              GENERAL CLEMENT:  -- but we do think, we

8    stick to our view that the President's role here makes

9    this an easier case and is in our view dispositive.

10             JUSTICE SOUTER:  But it does follow then

11   from what you've said that if we take exactly the

12   position that I outlined in my hypo, we could avoid the

13   entire question of presidential authority.

14             GENERAL CLEMENT:  You could.  I think

15   another route, of course, that would be available to you

16   is to simply say:  Here we have a judgment and we have

17   the President effectively espousing the judgment, and in

18   those cases we don't have to worry about what would

19   happen if we didn't have one or the other.

20             JUSTICE SOUTER:  That's in effect a judicial

21   version of one of the variants in Justice Jackson's hypo

22   in the Steel case --

23             GENERAL CLEMENT:  Exactly.

24             JUSTICE SOUTER:  He's talking about the

25   President and Congress; we're talking about the

1    President and the Court.

2                GENERAL CLEMENT:  Right.

3                JUSTICE SOUTER:  Yes.

4                JUSTICE SCALIA:  The President espousing the

5    judgment -- Texas takes the position that this

6    memorandum has -- has no legal effect; it's a memorandum

7    from the President to the -- to his attorney general.

8    It's not a directive to the States.  In fact, it even

9    refers to pursuant to the principles of comity, which

10   suggests, you know, do it if you want to be cooperative,

11   don't do it if you don't want to be cooperative.

12               What is your response to that?  And would it

13   be enough if the President simply wrote a memorandum to

14   himself saying that, I think this is the way that the --

15   that the judgment of the ICJ should be enforced?  He

16   doesn't have to tell Texas.  He can just tell his

17   attorney general?

18               GENERAL CLEMENT:  Well, Justice Scalia, I

19   think there's two questions there.  I'd like to try to

20   answer them both.  One is, what degree of formality is

21   required?  And we would say that if you look to

22   historical practice, this is not something where you a

23   need a high degree of formality.  So look to the

24   executive agreement that this case -- this Court gave

25   its positive effect to in Belmont and Pink.  It was an

1    exchange of diplomatic letters, nothing more.  Look to

2    the executive determination that this Court give

3    dispositive effect to, dismissed the lawsuit completely

4    in Ex Parte Peru.  It was a letter from the

5    undersecretary of state to the attorney general.

6              Going back to the very beginnings of the

7    nation, look at the extradition of Thomas Nash.  What

8    was the form of the President's determination we would

9    extradite him?  A letter from the secretary of state to

10   Judge Bee in South Carolina.

11             CHIEF JUSTICE ROBERTS:  In none of those

12   cases were we talking about a determination contrary to

13   a legal determination by this Court concerning the scope

14   of powers under the treaty.

15             GENERAL CLEMENT:  Well, with respect --

16             JUSTICE KENNEDY:  And in Nash he was being

17   held under Federal custody.  So Nash is just

18   inapplicable here.

19             GENERAL CLEMENT:  Well, I don't think Nash

20   is inapplicable, Justice Kennedy; I think it is on all

21   fours.

22             JUSTICE KENNEDY:  Of course, Nash is just a

23   wonderful speech by Marshall anyway; it's not an

24   opinion.

25             GENERAL CLEMENT:  But it is a wonderful

37

1    speech, and I really do think you should take a look at

2    that speech.  If you want to find it, it's actually

3    appended to volume 18 of the U.S. Reports.  And I think

4    you should look at that speech before rejecting our

5    position here, because it really is on all fours in that

6    there you had a treaty obligation duly approved by the

7    Senate, and there was a question:  Do we need an act of

8    Congress before the executive can extradite somebody?

9    And Marshall I think put the law exactly right in that

10   case when he said:  Sure, Congress can make a

11   determination and if it does, that's the end of matter;

12   but absent the congressional determination, the

13   President has the authority to extradite Nash.

14              Now, that's a situation where somebody's

15   personal liberty was at stake.  So I would say that in

16   some respects it's a fortiori that in this case what's

17   at issue is simply recognizing that there's binding

18   Federal law here, that I think if the Texas court had

19   recognized that it was binding Federal law, it would

20   have applied under their own State procedural default

21   law.

22              Now, just to finish up, and then I will sit

23   down, there's a second part of your question, Justice

24   Scalia, which was addressed to what does the reference

25   to comity mean.  Obviously, from the very beginning in

1    this case we have taken the position in this Court that

2    the President's memorandum directs the State courts, in

3    its words, to give effect to the Avena judgment -- not

4    decide whether you want to give it effect based on your

5    State law of comity, but give effect to the judgment.

6              I think if you actually look at the law of

7    comity, one of the things that it talks about is comity

8    is really what the courts should do in the absence of a

9    controlling view from one of the political branches.

10   Here the President has made clear, it's clear to me what

11   the answer is applying comity, which would be to give

12   effect to the judgment.

13             Thank you.

14             CHIEF JUSTICE ROBERTS:  Thank you, General.

15             Mr. Cruz, by my count we'll give you an

16   extra 10 minutes.

17               ORAL ARGUMENT of R. TED CRUZ,

18                ON BEHALF OF THE RESPONDENT

19             MR. CRUZ:  Mr. Chief Justice, and may it

20   please the Court:

21             The entirety of the United States's argument

22   is predicated on the idea that the President's

23   two-paragraph memorandum is in and of itself binding

24   Federal law.

25             JUSTICE SOUTER:  Well, that's the -- that's

1    the argument, but your brother the Solicitor General has

2    conceded that if we take the position in this case that

3    there is a -- a rule of decision that should be

4    respected in this Court and, hence, the subject of a

5    judgment to Texas that, among other things, would

6    suspend Texas's procedural bar law -- that that would

7    obviate the question of presidential power.

8             MR. CRUZ:  There's no doubt, if the Court

9    decided it on the ground that Avena was a binding

10   judgment, the President's order would be unnecessary.

11            I would note the United States strenuously

12   disagrees with that proposition.  And, indeed, the

13   United States explicitly disclaims these treaties as the

14   source of his authority; in fact, expressly agrees with

15   this Court's decision in Sanchez-Llamas.

16            JUSTICE BREYER:  Maybe you could spend a

17   minute explaining that, because, as I read the

18   Constitution, it says all treaties made, or which shall

19   be made, under the authority of the United States shall

20   be the supreme law of the land, and the judges in every

21   State -- I guess it means including Texas --

22            (Laughter.)

23            JUSTICE BREYER:  -- shall be bound thereby,

24   anything in the constitution or laws of any State to the

25   contrary notwithstanding.

1          Now, as I understand it, the United States

2     entered into a treaty.  That treaty said we will follow

3     the interpretations and the judgments of the

4     International Court of Justice in respect to the Vienna

5     Convention.

6          And that Court did make a judgment in that

7     respect, in respect to this client, and it said:  Our

8     judgment is that Texas, or someone in the United States,

9     must redo the procedural hearing simply to see whether,

10    in deciding whether there's prejudice or whether there's

11    a procedural default, full account is taken of the

12    importance of the Vienna rights.  That's what we're

13    talking about.

14          It's a judgment of the court.  The United

15    States has promised to follow that judgment of the

16    court.  The Constitution says, since it promised by

17    treaty, that is the law; and the law binds the States.

18          That may be simple-minded, but I'd like to

19    hear what the answer to that, rather, chain of logic is

20    -- chain of law.

21          MR. CRUZ:  Certainly, Justice Breyer.

22    Texas, of course, does not dispute that the

23    Constitution, laws, and treaties are the supreme law of

24    the land.  And Texas statutes must give way to any of

25    these three.

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1                The President's memorandum is none of those

2        three.

3                JUSTICE BREYER:  I was not talking --

4                MR. CRUZ:  And, with respect --

5                JUSTICE BREYER:  -- about the President's

6        memorandum at the moment.  And to be -- to disclose

7        fully what I'm thinking, I'm thinking that maybe if a

8        president disagreed in such a thing, some kind of a

9        question -- I'm not sure what -- would be presented.

10               But whatever "what," I don't worry about

11       that "what" here, because the President, too, agrees.

12               MR. CRUZ:  Justice Breyer, the -- the answer

13       to your question is the Avena decision is not a judgment

14       in the sense we recognize judgment in U.S. courts for

15       six separate reasons.

16               JUSTICE BREYER:  No, forget whether we

17       recognize it this way as a judgment.  I'm saying we

18       promised in the treaty to follow that thing.  Call it

19       whatever name you want.  We promised to follow that

20       thing, which I have in front of me -- excerpts of which

21       -- called an Avena something.  And we know what that

22       says.  I'm just looking to see what they call it.  They

23       call it -- well, you tell me what they call it.  They

24       call it -- it is not called the word "judgment."  It's

25       called: "The appropriate reparation in this case

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1    consists of the obligation of the United States to" --

2    and then they listed it.

3              So I take it we have promised to carry out

4    that obligation by treaty.

5              MR. CRUZ:  Except that when the Senate

6    ratified the Optional Protocol, it made clear that the

7    Optional Protocol was not self-executing.  Indeed, a

8    point Mr. Donovan made in his argument --

9              JUSTICE BREYER:  What are the words that the

10   Senate said?  Because, when you say "self-executing,"

11   the easiest way for me to understand that is the

12   Constitution means what it says.

13             But there happened to be a few instances

14   where the nature of the obligation or the intent of the

15   party makes it very difficult to enforce it as a binding

16   judgment of a court.  That is not this case.

17             MR. CRUZ:  This -- this Court has made clear

18   for 200 years the Senate can ratify a treaty and yet

19   leave it not self-executing in the sense that it is not

20   enforceable in U.S. domestic courts.

21             JUSTICE BREYER:  Oh, and so if they did

22   that, now, will you quote the words or give me the

23   reference where the Senate said:  Although we entered

24   into this and although we ratify it, we're not going to

25   do it --

1          MR. CRUZ:  Well --

2          JUSTICE BREYER:  -- unless you --

3          MR. CRUZ:  The text of the treaty, itself,

4    is the first place to look.  The text of Article 94 of

5    the UN Charter provides that the remedy is that the

6    party may have recourse to the Security Council.

7          JUSTICE GINSBURG:  That's after there's a

8    breach, but we -- let's stick to the protocol, the

9    Optional Protocol -- optional.  The protocol says:

10         We accept the compulsory jurisdiction of the

11   ICJ.  "Jurisdiction" means power.  We agree that in

12   cases of this character, Vienna Convention violation

13   cases, we submit to the jurisdiction of X tribunal, the

14   ICJ.

15         What is there that needs execution about

16   that?  Congress said yes, the United States, the

17   Executive Branch of the United States decides that it's

18   a good idea to submit to the -- to the jurisdiction of

19   the ICJ.  We ratify that.

20         And I don't see anything left for Congress

21   to do.  It said  the United States can submit to the

22   jurisdiction of the ICJ.

23         MR. CRUZ:  "Jurisdiction" in that sense is

24   not "jurisdiction" in the sense of a U.S. court.

25   Rather, it is an international obligation that is to be

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1    resolved through political and diplomatic avenues.  And

2    the best example of that --

3              JUSTICE SCALIA:  It just means we agree that

4    the case can go before the court.

5              MR. CRUZ:  Exactly.

6              JUSTICE SCALIA:  And we will be a party

7    before the court.  Isn't there some doubt whether the --

8    the Senate and the President, together, can -- can take

9    away from this Court the power and responsibility to

10   decide what the treaty obligations of the United States

11   are?

12             MR. CRUZ:  Justice Scalia, I --

13             JUSTICE SCALIA:  Isn't there some problem

14   there?

15             MR. CRUZ:  I would go further than some

16   doubt, and I would say that if the treaty purported to

17   give the authority to make binding adujudications of

18   Federal law to any tribunal other than this Court, that

19   it would violate Article III of the Constitution.

20             JUSTICE BREYER:  Fine.  Then, are you

21   saying there are -- there are 112, I believe, treaties

22   in which we've entered into promises that we're going to

23   follow what an international tribunal said.  Somebody

24   looked up, I saw on the Internet, that at this moment

25   there are approximately 116 regulatory entities in the

1    world where we've entered, or others have entered into,

2    regimes, where there are various adjudicatory tribunals

3    of different kinds, mostly commercial, that bind us.

4              And is your view:  All of these thousands,

5    perhaps, or hundreds, anyway, of treaties are unlawful,

6    and that our promises are not enforceable, because

7    there's a constitutional question?

8              MR. CRUZ:  There are hundreds of treaty

9    obligations that this nation is committed to that are

10   not self-executing, that don't immediately have force --

11             JUSTICE BREYER:  No.  No.  I'm thinking that

12   are self- executing.  I'm thinking that there are --

13   like WTO, NAFTA.  We can go down a long list of

14   instances where the United States has promised to follow

15   the decisions of tribunals that are not Article III

16   courts and to put them into effect at once.

17             MR. CRUZ:  If -- if --

18             JUSTICE BREYER:  And I wonder, without

19   further ado, now, are you saying that all those are

20   unconstitutional?

21             MR. CRUZ:  In -- in those instances --

22             JUSTICE BREYER:  "Yes" or "no"?  I'd

23   appreciate a "yes" or "no" answer.

24             MR. CRUZ:  No.  No, we are not saying that.

25             JUSTICE BREYER:  Okay.

1              MR. CRUZ:  In those instances, the bodies in

2    question are not making definitive interpretations of

3    what Federal law is.  The best illustration of this is

4    the example Mr. Donovan used in his opening argument

5    where he said, if the ICJ said to the United States

6    cease hostilities, that would be directed to the

7    President.

8              Now, under Mr. Donovan's argument, that's a

9    clear directive.  The United States is bound by treaty,

10   and apparently the Federal courts could order the

11   President to cease hostilities if that was the

12   instruction of the ICJ.

13             JUSTICE BREYER:  I'm sorry.  What I don't

14   understand about this is that I thought that the ICJ in

15   this case interpreted the treaty.  That's not Federal

16   law.  That's the treaty.  And it said that the treaty --

17             MR. CRUZ:  The treaty is Federal law,

18   Justice Breyer.

19             JUSTICE BREYER:  Oh, then I don't understand

20   you because the WTO interprets a treaty.  It interprets

21   a treaty that binds the United States, just like the ICJ

22   is interpreting a treaty that binds the United States.

23   So what's the difference?

24             MR. CRUZ:  The nature of this treaty,

25   every -- every position -- the United States State

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1    Department at the time it was introduced, the Senate,

2    and every member of the Senate who discussed it,

3    understood that the decisions of the ICJ would not have

4    binding effect in U.S. courts.  And that is identical to

5    the understanding of every single nation --

6                 JUSTICE KENNEDY:  And what you are saying --

7    and this has been the law --

8                 JUSTICE STEVENS:  May I ask a question,

9    please?

10                JUSTICE KENNEDY:  Go ahead.

11                JUSTICE STEVENS:  It's critical to me to

12   understand the effect of the judgment, and you said

13   there are six reasons why it's not an ordinary judgment.

14   I really would like to hear what those reasons are

15   without interruption from all of my colleagues.

16                (Laughter.)

17                MR. CRUZ:  I would be happy to provide

18   those, Justice Stevens.  The first reason is because the

19   Optional Protocol is not self-executing, so it does not

20   have force in United States courts.

21                The second reason is, if it was a binding

22   judgment, that would violate Article III.  It would give

23   to a tribunal other than this Court the authority to

24   determine Federal law.

25                The third reason is in Sanchez-Llamas a

1    majority of this Court rejected this argument and

2    provided explicitly, quote, "nothing in the structure or

3    purpose of the ICJ suggests that its interpretations

4    were intended to be conclusive on our courts.

5              The fourth reason is the parties in Avena

6    were the United States and Mexico.  Neither is a party

7    to this proceeding.  The argument as to why it is

8    binding in this case is that Texas is vicariously part

9    of the United States.  That was equally true of Oregon

10   in Sanchez-Llamas.  In both cases, there's one State who

11   is in some sense one of the parties.

12             The fifth reason is the Breard case was in

13   many senses equally a judgment, in that you had the ICJ

14   issuing an order to this Court concerning Breard,

15   concerning his specific case, to stop his execution, and

16   this Court concluded that that could not trump U.S. law.

17             And the sixth and final reason that it is

18   not a judgment is to treat it as a binding judgment

19   would be to cut out the President's authority not to

20   comply.  Everyone agrees, for example in the Nicaragua

21   case, that the President retains the authority to say

22   no, we're not going to comply.

23             Which is why the entire purpose of this

24   adjudication is not to resolve something finally in a

25   court of law, but it is rather a diplomatic measure,

1    much as -- much like when the United States sued Iran

2    during the hostage crisis.  We didn't believe the

3    Ayatollah was going to listen to the ICJ and suddenly

4    let the hostages go.  We didn't -- we didn't expect that

5    Iranian courts would give force to it, but it was

6    helpful diplomatically to bring it to that tribunal to

7    then put international pressure.  That --

8              JUSTICE KENNEDY:  Then this is consistent

9    with what you've been explaining to Justice Breyer in

10   your answer, that for 200 years we have had some

11   treaties that are very important, but they're not

12   self-executing; their violation may put us in violation

13   of international law; but it is for us to determine how

14   we are going to comply with the international

15   obligation; and there is no obligation on the part of

16   the State to comply with that law because it's not

17   self-executing.

18             MR. CRUZ:  Justice Kennedy, that is exactly

19   correct.

20             JUSTICE KENNEDY:  At some point I think in

21   the course of your argument, we may get back to whether

22   the Vienna Convention itself is or is not

23   self-executing.  I think the Solicitor General was

24   correct in saying that that's a difficult word.  I think

25   it is self-executing in that the State has to comply

1    with it.

2            I'm not sure that it is self-executing in

3    that the State has to accept whatever procedural

4    framework the foreign national demands.

5            MR. CRUZ:  I would agree with the

6    characterization you suggest, which is that the Vienna

7    Convention was self-executing in the sense that it

8    didn't require legislation to go into effect, but it was

9    not self-executing in the sense that it provided

10   judicially cognizable rights.

11           But let me add a caveat to that, which is in

12   both Breard and Sanchez-Llamas, this Court assumed the

13   Vienna Convention created individual rights, and

14   although Texas maintains that it did not create

15   individual rights and the United States maintains that

16   it did not create individual rights, we don't have to

17   win on that proposition to prevail in this case.  Even

18   assuming it created individual rights in this case,

19   Medellin defaulted on that claim and this Court held

20   with Sanchez-Llamas that procedural default is

21   consistent with the treaty.

22           And the real question here in this case,

23   particularly with respect to the President's order, is

24   whether the Optional Protocol is self-executing, the

25   decision of the Avena court, or, as a subsequent matter,

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1    whether the President has some sort of independent

2    authority to make Federal law.

3              And in this respect --

4              JUSTICE GINSBURG:  Well, I still -- I would

5    like to get back to that Optional Protocol.  It -- was

6    it submission to jurisdiction?  My understanding is that

7    any two parties that can agree, can have a formed

8    selection clause, can agree that we accept the authority

9    of this tribunal, and then it follows from that that if

10   you accept their authority to adjudicate, you are bound

11   to follow its decisions.  And that that seems to be

12   understood in the world community because, is it not so

13   that even though there are cases like Nicaragua and

14   Iran, most ICJ judgments are indeed complied with by the

15   nations that agree to submit to the jurisdiction of that

16   tribunal?

17             MR. CRUZ:  Justice Ginsburg, that is correct

18   as a political and diplomatic matter, but in my judgment

19   it speaks volumes that of the 166 nations that signed on

20   to the Vienna Convention and of the 50 nations that

21   signed on to the Optional Protocol, zero -- not a single

22   nation -- treats ICJ judgments as binding in their

23   domestic courts.

24             What Petitioners are arguing here is for an

25   interpretation of this treaty that no other nation

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1  gives.  And in fact, if I found myself in the nation of

2  Mexico and arrested without consular notification, I

3  could not raise this claim in Mexico.  The Mexican

4  courts would not treat it as a defense to my criminal

5  prosecution.

6          And so --

7          JUSTICE GINSBURG:  Do you have a case that

8  says that?  A Mexican case that says that?

9          MR. CRUZ:  I do not have a case that says

10  that, but neither Petitioner nor their many amici have

11  been able to point to a single instance.

12          JUSTICE GINSBURG:  Maybe it hasn't come up.

13          MR. CRUZ:  Given that these treaties are

14  four decades old, that that speaks volumes that no -- no

15  nation has accorded binding force to ICJ --

16          JUSTICE BREYER:  Maybe these other nations

17  have an inquisitorial system where an investigating

18  judge collects a dossier and the fact is noted in the

19  dossier and the investigating judge and the prosecution

20  give it such weight as it's entitled to.

21          MR. CRUZ:  Justice --

22          JUSTICE BREYER:  You know that doesn't

23  happen?

24          MR. CRUZ:  Justice Breyer, I -- I think you

25  could well be right, but I think that also speaks to the

1    peculiar nature of this.  Procedural default only --

2                 JUSTICE BREYER:  In an --

3                 MR. CRUZ:  -- matters in system like the

4    United States' where habeas allows a second bite at the

5    apple.  Most other countries don't allow criminal

6    defendants to relitigate criminal matters, in which case

7    procedural default matters.  The other countries simply

8    deny it altogether.

9                 JUSTICE BREYER:  Of course it matters.  But

10   the -- of course it matters.  That's why when I read the

11   -- the ICJ opinion, I read it as saying that they're not

12   telling you to set aside a procedural default rule.

13   What they've asked you to do is to provide, by means of

14   the United States' own choosing, review and

15   reconsideration of the convictions and sentences by

16   taking account of the violation of rights.

17                 And throughout they ask -- when you decided

18   whether the person was really prejudiced, when you

19   decided whether there had been forfeiture of the rights,

20   at that time, did you ask yourself that the reason he

21   might not have raised them was because he knew nothing

22   about them and his lawyer knew nothing about them,

23   because nobody ever told either about them?  In which

24   case there might be a causal connection.

25                 As I read it, the ICJ left all that up to

1    you but just asked you, please, look at it again having

2    read our opinion and keeping this in mind.

3              MR. CRUZ:  But the ICJ's decision -- I think

4    your question goes back to Justice Ginsburg's question

5    about the effect of an ICJ decision.

6              The legal -- legal adviser to the State

7    Department told the Senate, when it was ratifying the UN

8    Charter, that decisions of the ICJ are "a moral

9    obligation" and there is "no provision" for the

10   enforcement of such decisions.  And one fascinating

11   example of this is the entire debate over the Connally

12   Amendment.  One can look in the entire course of

13   legislative history, and it's an argument back and forth

14   about whether it is wise to require the United States to

15   cast a veto in the Security Council over an attempt to

16   enforce an ICJ.  And not a single senator of the entire

17   U.S. Senate suggested the proposition that ICJ decisions

18   might be independently enforceable.  Nobody discussing

19   that understood it that way.

20             JUSTICE SCALIA:  Once again, there is a

21   constitutional problem, is there not, if they are

22   automatically enforceable?

23             MR. CRUZ:  Absolutely.

24             JUSTICE SCALIA:  That is conferring upon the

25   ICJ the responsibility to decide the meaning of a United

1  States treaty which is United States law.

2              MR. CRUZ:  And --

3              JUSTICE SCALIA:  I'm rather jealous of that

4  power.

5              (Laughter.)

6              JUSTICE SCALIA:  I think it belongs in this

7  Court.  And when you have a non-self-executing treaty,

8  there is no problem.

9              It becomes U.S. law when the Senate and the

10 House pass a law which the president -- it doesn't

11 become U.S. law because the President writes a

12 memorandum to his Attorney General, but it does become

13 U.S. law when a law is enacted.

14             MR. CRUZ:  And that --

15             JUSTICE SCALIA:  That solves the

16 constitutional problem, but in the situation we're

17 talking about here, I don't know on what basis we can

18 allow some international court to decide what is the

19 responsibility of this Court, which is the meaning of

20 the United States law.

21             MR. CRUZ:  Justice Scalia, that's absolutely

22 correct.

23             JUSTICE BREYER:  And how does the WTO

24 differ?

25             MR. CRUZ:  The imperative --

1           JUSTICE BREYER:  How does the WTO and NAFTA

2    and all our trade agreements differ?

3           MR. CRUZ:  The WTO and NAFTA -- I mean NAFTA

4    is not a treaty.  It's a congressional agreement, but it

5    is also adjudicating specific factual questions that

6    deal with the application of facts to a particular

7    circumstance.  It's not interpreting the treaty and

8    purporting to bind the United States on this is what the

9    underlying Federal law means.

10          JUSTICE KENNEDY:  And the United States

11   apparently accepts the verdict of those --

12          MR. CRUZ:  Right.  Right.  And it could

13   choose not to.

14          JUSTICE KENNEDY:  You have three different

15   things that you have to tell us about today:  That the

16   President's authority, the effect of the ICJ, and -- and

17   the Avena judgment, and ultimately, the force of the

18   Vienna Convention itself.

19          And the only question I have that I need

20   your help with is as to the last, and I hope that it

21   doesn't interrupt the train of your argument.

22          I think the ICJ -- pardon me, the Vienna

23   Convention is self-executing, in that it requires the

24   States to conform to the consular notification

25   provision.

 1              MR. CRUZ:  And we don't disagree with that.

 2              JUSTICE KENNEDY:  Suppose you have a judge

 3    who has control over a defendant who's being held in

 4    custody pending trial, and the defendant says I want to

 5    see my -- my foreign counsel.  The judge says no.  Can

 6    you mandate that -- assuming State procedures allow him

 7    in, couldn't you mandate that judge to require him to

 8    allow the notification to take place?

 9              MR. CRUZ:  The consequence of the argument

10    that it doesn't create individual rights would mean that

11    that individual defendant could not raise it in that --

12              JUSTICE KENNEDY:  You see where I'm going?

13              MR. CRUZ:  Yes.

14              And so in that circumstance, it would mean,

15    if a judge declined to comply with that obligation, the

16    individual defendant would not have an appealable legal

17    error.

18              JUSTICE KENNEDY:  If I thought he did, would

19    I still have to rule against you?

20              MR. CRUZ:  No, not at all.  In fact, just as

21    this Court did in Breard and Sanchez-Llamas, it assumes

22    that the Vienna Convention created individual rights.

23    And so we don't need to prevail on that to reach the

24    identical outcome.  Because even assuming we are

25    incorrect concerning individual rights, the

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1  Sanchez-Llamas holding is that procedural default

2  respects those rights just as fully as it respects

3  constitutional rights.

4           JUSTICE GINSBURG:  But --

5           JUSTICE KENNEDY:  Could I make a distinction

6  between failing to let him see the counsel at all in my

7  hypothetical and a demand that the procedural framework

8  be altered?  Isn't there a distinction between those two

9  cases, do you think?

10          MR. CRUZ:  I think that's right.  I think

11  also in your hypothetical, your hypothetical assumes a -

12  a deliberate violation of the law which no one suggests

13  here rather than inadvertence.  And inadvertence

14  complied with, as you suggested earlier, no prejudice

15  whatever so.  And there has -- both the Federal and

16  State courts that looked at this concluded that there

17  was no even arguable prejudice from the violation.

18          JUSTICE GINSBURG:  Mr. Cruz --

19          JUSTICE STEVENS:  Mr. Cruz, could I go back

20  to your discussion of whether this is a judgment or not?

21  It seems to me some of your reasons actually go to

22  whether the -- whether it was a correct interpretation

23  of the treaty. And if it were a judgment, would you

24  agree that this Court would have to accept it, even if

25  this Court disagreed with its legal analysis?

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1             MR. CRUZ:  Justice Stevens, I would not,

2    because I do not believe consistent with Article III

3    this Court's authority can be given away by treaty.

4             JUSTICE STEVENS:  How is it given away to a

5    treaty if it just says one State court must honor a

6    judgment of a sister State even if it thinks it's dead

7    wrong?  Is it giving away its judicial authority by

8    obeying the Full Faith and Credit Clause?

9             MR. CRUZ:  That is provided by the

10   Constitution.  And in this instance, giving any other

11   entity, the authority to make a conclusive determination

12   of Federal law, that goes to the heart of the Article

13   III power.

14            JUSTICE GINSBURG:  Are you saying that even

15   --

16            JUSTICE STEVENS:  Even if it was agreed by

17   treaty to give it conclusive effect?

18            MR. CRUZ:  If the Senate agreed that this

19   was self-executing, then you would have the height of

20   the Presidency and Congress working together.  But even

21   in that situation, I would submit as a matter of

22   separation of powers, they could not give this Court's

23   essential role, under Marbury, to say what the law is to

24   another body.

25            JUSTICE GINSBURG:  Then we couldn't have a

1    treaty with another country on the mutual recognition

2    and enforcement of judgment, because the other country

3    might get it wrong, we might disagree with its

4    interpretation of the law, and, therefore, unlike the

5    rest of the world, the United States can't get the

6    advantage of a reciprocal guarantee that our judgments

7    will be respected, and in turn we will respect your

8    judgment.

9            MR. CRUZ:  In enforcing foreign judgments,

10   the foreign court is not purporting to make a definitive

11   determination of U.S. law.

12           JUSTICE GINSBURG:  It may be that if the

13   case turns on a question of U.S. law, and we may think,

14   as many think about the ICJ, that they got that question

15   wrong.  Still, it's always been if you don't look behind

16   the judgment.  You say in the next case I'm certainly

17   not going to apply that wrong interpretation. But here

18   I'm bound by a judgment.

19           And that's why I questioned your use -- your

20   heavy use of Sanchez-Llamas.  I agreed with the court in

21   that case because it was a question of interpretation.

22   We don't have to agree with the ICJ.  We were not faced

23   with a decision, a binding adjudication, which we accept

24   for that case only.  So there's a difference between

25   Sanchez-Llamas and this case that you appear not to

1    recognize in your brief.

2            MR. CRUZ:  Justice Ginsburg, it has been the

3    consistent position of the United States for over four

4    decades from the day this treaty was ratified that the

5    Optional Protocol was not self-executing, was not

6    enforceable in U.S. courts.  So it is not a judgment

7    that has -- were this Court to treat it as -- as a

8    judgment, it would be making that treaty self-executing.

9    And the power to transform a non- --

10            JUSTICE GINSBURG:  I thought you said

11   that -- oh, you said that this is a matter of goodwill

12   or that most ICJ judgments -- ICJ judgments, they're not

13   binding but people comply -- nations comply with them as

14   a matter of goodwill?

15            MR. CRUZ:  Justice Ginsburg, that's exactly

16   correct.  And the President had a number of

17   constitutional means at his disposal to comply, had he

18   chosen.  The --  but --

19            JUSTICE GINSBURG:  What could -- other

20   than -- I mean, the most logical place to have this go

21   on is the court that rendered the judgment.  It's always

22   better for the court that rendered the judgment than

23   some foreign court or another State court.

24            So what else could the President do?  The

25   ICJ did say U.S., as a matter of your own choosing.  And

1    the President chose the most logical forum, but what

2    else could he have done?

3              MR. CRUZ:  There are three avenues that the

4    President could have chosen that would have been

5    constitutional.  The first of which he could have gone

6    to Congress and proposed a statute amending the AEDPA to

7    allow Federal habeas review.

8              The second is he could have negotiated a

9    treaty, submitted it --

10             JUSTICE GINSBURG:  Let's start with the

11   first one.  Why should this case be in Federal court?

12   It's a state judgment that's in question.

13             MR. CRUZ:  This Court has made clear that

14   the Federal Government cannot expand the jurisdiction of

15   the State courts.  There is a State --

16             JUSTICE GINSBURG:  But you can have the

17   Federal court overseeing the State court and telling the

18   State what to do?  That seems to me practically much

19   more of an encroachment on State authority than to say,

20   State courts, you do it.

21             MR. CRUZ:  Well, and --

22             JUSTICE GINSBURG:  -- or to say Federal

23   courts, you do it.

24             MR. CRUZ:  A corollary --

25             JUSTICE SCALIA:  A lot of people think

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1    that's exactly right, that really we expanded Federal

2    habeas jurisdiction quite improperly.  But it happens

3    every day, doesn't it?

4                MR. CRUZ:  It does.  And a corollary to this

5    is if Congress could pass a statute creating a Federal

6    right to review, and that Federal right to review under

7    the principles of Testa versus Katt would have to be

8    respected in the State court.

9                JUSTICE GINSBURG:  Who would be doing the

10   review?

11               MR. CRUZ:  Well, if it were a Federal right

12   to review, under Testa versus Katt, both the State and

13   Federal courts would give review.  Interestingly enough,

14   if it were a new Federal right, it would clear the

15   jurisdictional bar because the Texas jurisdictional bar

16   allows an exception for a new law.  So if Congress

17   passed a new law that would be jurisdiction to raise --

18               JUSTICE GINSBURG:  A law passed by Congress

19   saying Texas dispense with your procedural bar rules?

20               MR. CRUZ:  A law passed by Congress saying

21   in order to give effect to the Avena judgments the 51

22   Mexican nationals at issue shall be entitled to review

23   and reconsideration of whether there was prejudice from

24   the denial of the Vienna Convention. That law would be

25   respected equally.

1            I would suggest that Testa versus Katt,

2    which Petitioner uses, is a case which powerfully

3    supports Texas, because the principle of Testa versus

4    Katt was there is one Federal law that must be applied

5    equally in Federal courts and State courts.  And the

6    State courts are not at liberty to ignore Federal law.

7            This is a very curious assertion of

8    presidential power.  Because the presidential power is

9    not directed at the Federal courts.  It is directed at

10   the State courts,and the State courts alone.  And I

11   would submit is the only instance I'm aware of, of a

12   Federal mandate that falls only on the states, singles

13   out the states, and commandeers those judges.

14           In over 200 years of our nation's history

15   I'm not aware of any other directive from the President

16   directly to the State courts and State judges.

17           JUSTICE GINSBURG:  So what's absent in your

18   view is Congress.  You say that all of this could have

19   been done --

20           MR. CRUZ:  Absolutely --

21           JUSTICE GINSBURG:  -- and Texas could have

22   been ordered, but the President doesn't have the

23   authority to do it just on the basis of the ICJ,

24           MR. CRUZ:  And Justice Ginsburg, I think a

25   powerful parallel is the decision of this Court last

1    near in Hamdan.  In Hamdan the President was at the

2    height of his war powers authority.  And nonetheless,

3    this Court concluded that he could not act contrary to

4    the will of Congress.

5              Here his interests are far less than

6    prosecuting war, and yet he is asserting the authority

7    to go it alone, despite a consistent stream of

8    congressional disapproval, both in ratifying these

9    treaties and saying they're not self-executing and also

10   in passing the AEDPA.

11             JUSTICE GINSBURG:  The not self-executing in

12   the position of the State Department, wasn't there -- in

13   the parallel proceedings in Oklahoma, wasn't there a

14   letter from the current -- the then current legal

15   adviser telling Oklahoma that this is a judgment that's

16   binding on all courts in the United States, State and

17   Federal, and that the President has directed Oklahoma to

18   comply?  I think that was sent both to the governor and

19   the other officials.

20             MR. CRUZ:  This letter was sent out to all

21   affected States, but it is -- the United States is quite

22   candid in what they are doing.  The department to its

23   credit describes it as "unprecedented," and it goes

24   further, if I may read a portion of page 5 of the memo,

25   or memo page 6, rather:  The President's memorandum is

1    sufficient to create a binding legal rule.

2              The department is not hiding what they're

3    arguing.  They're not arguing the treaties require it.

4    They're not arguing any statutes requiring it.  They're

5    saying a two-paragraph memorandum from the President to

6    a member of the cabinet is binding Federal law.

7              JUSTICE GINSBURG:  Which -- which letter are

8    you quoting?  Are you quoting --

9              MR. CRUZ:  I'm quoting the United States'

10   brief in this proceeding, page 6 of the brief.  On page

11   5 it also describes the President's power as

12   "establishing binding rules of decisions that preempt

13   contrary State law."

14             If that is correct, there is no reason why

15   the President could not have directed his memorandum to

16   the Federal district courts or even to this Court, and

17   that is an extraordinarily broad power to be asserted on

18   behalf of the executive.

19             JUSTICE SOUTER:  Mr. Cruz, you have

20   frequently emphasized the non-self-executing character

21   of the optional protocol.

22             Is there any rule, any positive rule in

23   existence today either of international law or domestic

24   law that precludes this Court from being the

25   implementing authority as opposed to the executive or

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1    the executive and the Senate?

2              MR. CRUZ:  This Court has the final

3    authority to determine what Federal law is, and so if

4    this Court determines that that's what the treaty

5    requires, then that be federal law.  Now I would suggest

6    that would require overruling --

7              JUSTICE SOUTER:  These treaties including

8    the optional protocol.

9              MR. CRUZ:  In my judgment, if the Court

10   reached that conclusion it would be error.  But --

11             JUSTICE SCALIA:  I think you misunderstood.

12   I thought he was asking whether if it is -- assuming it

13   is not self-executing, this Court can execute it.

14             JUSTICE SOUTER:  That's right.  Yeah.

15             MR. CRUZ:  In my judgment it would be wholly

16   illegitimate for the Court to do so.

17             JUSTICE SOUTER:  Why?

18             MR. CRUZ:  Because --

19             JUSTICE SOUTER:  What's the rule -- what is

20   the positive rule of international and domestic law that

21   precludes it?

22             MR. CRUZ:  The rule is a constitutional

23   rule, that the President makes treaties the Senate

24   advises and consents.  And the limitation --

25             JUSTICE SOUTER:  They've made the treaty.

1    We have got the optional protocol.  Whatever the

2    optional protocol means is Federal law.

3                MR. CRUZ:  The limitations the Senate put on

4    are it as much a part of the treaty as the treaty

5    itself, and the consequences --

6                JUSTICE SOUTER:  But you're -- my point is,

7    my -- I'm accepting as premise of the question the

8    limitation which you assert, i.e., non-self-executing;

9    and my question is, may the execution, if you will, be

10   made by this Court?  Is there an independent rule that

11   precludes this Court from that role?

12               MR. CRUZ:  If this Court did so, in my

13   judgment it would be usurping the role of Congress.  All

14   right?  Because the essence of the decision --

15               JUSTICE SOUTER:  I don't mean to be

16   disrespectful of your judgment but what do you base it

17   on -- tradition?

18               MR. CRUZ:  The essence of the decision by

19   the Senate to say something is non-self-executing is to

20   say if something in this treaty is going to change U.S.

21   domestic law, you have to come back to us.

22               JUSTICE SOUTER:  You're saying by -- by

23   non-self-executing, they mean you have to come back to

24   us?  The terms --

25               MR. CRUZ:  That's exactly what it means.  If

1    you want to change U.S. law, come to Congress.

2              JUSTICE SCALIA:  They mean it does not

3    automatically become part of United States law.

4              MR. CRUZ:  Indeed.

5              JUSTICE SCALIA:  And it follows from that,

6    that you have to change United States law?

7              MR. CRUZ:  Exactly.

8              JUSTICE SCALIA:  And it is not the function

9    of this Court to change United States law.

10             MR. CRUZ:  That's precisely correct.

11             JUSTICE BREYER:  If you assume it is

12   self-executing, just for one second, I'd like to find

13   out -- you said that the President was unreasonable in a

14   sense of saying Texas do that over again --

15             I assume the reason he asked Texas to have

16   the hearing is because the ICJ knew -- and I guess maybe

17   he knew -- that the only hearing they'd had on this

18   subject -- as far as I can see; I looked at it, there

19   didn't seem to be any evidence in respect to their

20   finding that there was no prejudice.  They said well, he

21   had a lawyer, but that lawyer later got into quite a lot

22   of trouble, I think.

23             MR. CRUZ:  He had two lawyers.

24             JUSTICE BREYER:  He had two lawyers.  One

25   got into trouble, and the other didn't?

1              MR. CRUZ:  And they vigorously defended him.

2              JUSTICE BREYER:  Okay, they vigorously

3    defended him.

4              MR. CRUZ:  The only argument --

5              JUSTICE BREYER:  Fine.  Fine.  My point is

6    there's no evidence of that.

7              MR. CRUZ:  With respect, Justice Breyer,

8    there actually is.

9              JUSTICE BREYER:  There is?  In the first

10   habeas hearing?

11             MR. CRUZ:  The evidence there is --

12             JUSTICE BREYER:  I read the whole thing.

13             MR. CRUZ:  In our appendix there is an

14   affidavit from the Mexican Consulate.  Once the Mexican

15   Consulate started assisting Medellin, they prepared an

16   affidavit, and the affidavit said if we had been

17   contacted, we would have told you not to confess; and we

18   would have told you to get a lawyer.  The problem with

19   that is Medellin confessed within about three hours of

20   being arrested, and even the ICJ in Avena said that

21   notification had to occur within 72 hours.

22             JUSTICE BREYER:  What I'm thinking of is the

23   evidence at the first habeas hearing that led the

24   district judge to reach his conclusion that there was no

25   prejudice and that the procedural default was not

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1    excused -- it's in that hearing that I didn't see what

2    that finding was based on; and I suppose the reason that

3    the President wanted Texas to do it is it would be

4    easiest for Texas to go back to that.

5              MR. CRUZ:  Justice Breyer -- it was part of

6    the State court record, and it was the basis for saying

7    there was no prejudice.

8              JUSTICE BREYER:  It was in the first

9    hearing.

10             MR. CRUZ:  I believe it was.  And it's

11   included in our appendix four.

12             JUSTICE BREYER:  So you think there was no

13   reason for the ICJ to ask the President --

14             MR. CRUZ:  It is difficult to explain.

15             CHIEF JUSTICE ROBERTS:  Was the basis for

16   the determination of no prejudice the fact that the

17   Petitioner in this case had received full Miranda

18   warnings, which went beyond what the consulate was going

19   to tell him?

20             MR. CRUZ:  That is completely correct, and

21   he waived those in writing.

22             JUSTICE SCALIA:  And he had lived in this

23   country for how long?

24             MR. CRUZ:  Practically his entire life.

25   Wrote and read English and was educated in American

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1    public schools.

2              JUSTICE BREYER:  And what did happen to the

3    lawyers Texas gave him?

4              MR. CRUZ:  Both of them vigorously defended

5    him, and in Medellin we devoted several pages of our

6    brief to going through in considerable detail the many

7    motions they filed.  It was a vigorous defense, and yet

8    they failed to raise this particular --

9              JUSTICE STEVENS:  And so they have -- the

10   Texas Court of Criminal Appeals didn't adopt a simple

11   solution of the case, to say He got all the protection;

12   that there's no prejudice and therefore there's no

13   treaty violation.

14             MR. CRUZ:  The Texas Court of Criminal

15   Appeals didn't have it as option to say, it would have

16   been easier, one might say, to just go along.  The

17   President is asking you to do this, make the whole thing

18   go away; just go along.  The problem is the Texas Court

19   of Criminal Appeals had a statute, and a statute that

20   divested of jurisdiction unless there is new Federal

21   law.

22             JUSTICE STEVENS:  Yes, but that statute

23   really would not have divested -- if I understand he

24   Texas law correctly -- if you did agree -- which you

25   don't, I know -- that there was a preexisting Federal

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1    obligation to honor judgments of the ICJ, then under

2    Testa v Katt principle and Howlett opinion and others,

3    the Texas court would have had jurisdiction.

4                MR. CRUZ:  Although that holding would be, I

5    would suggest, in considerable tension if not directly

6    contrary to Sanchez-Llamas.

7                JUSTICE STEVENS:  Well, but Sanchez-Llamas

8    doesn't deal with the judgment.  And It says a separate

9    Federal obligation --

10               MR. CRUZ:  Oregon is as much a part of the

11   United States as Texas.

12               JUSTICE STEVENS:  Then I think the Texas --

13   there would be jurisdiction in the Texas court to

14   entertain this claim.  I think you -- you agree with

15   that?

16               MR. CRUZ:  I do not, because it has to be a

17   new claim, and if this were a judgment, the judgment --

18               PLAINTIFF'S CO-COUNSEL:  It would be a new

19   claim based on a new judgment which was after Sanchez --

20   the Chief Justice's opinion in that case.

21               MR. CRUZ:  Let me point out one consequence

22   of -- of the President's assertion of authority.

23               JUSTICE STEVENS:  Well, I'm -- you just

24   -- for -- putting the President's assertion to one side,

25   it seems to me if you did agree -- and I know you

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1       vigorously don't -- that there were a pre-existing

2       Federal obligation -- an obligation of the United States

3       to respect the judgment of the ICJ, which is -- which we

4       think is wrong as a matter of international law; we have

5       previously construed the treaties to the contrary -- but

6       if there were an independent obligation to expect --

7       Federal obligation -- respect that judgment, it seems to

8       me that that obligation could be enforced in Federal

9       court.

10              MR. CRUZ:  I don't disagree with that,

11      Justice Stevens.

12              JUSTICE STEVENS:  You don't.

13              MR. CRUZ:  If -- although I disagree with

14      the premise.

15              JUSTICE STEVENS:  Yes.

16              MR. CRUZ:  But if the premise were true, I

17      don't disagree with the conclusion.

18              The statute allows jurisdiction where there

19      is a new legal basis that was not previously

20      availability.  The only two potential sources of that

21      are Avena, which we submit is a non-self-executing

22      international law obligation, or the President's order;

23      and, in fact, it is worth underscoring if the United

24      States' theory is correct, there's no reason why the

25      President needed to wait for a decision from the ICJ.

1    If the President has the authority to take a

2    non-self-executive international law treaty and order it

3    to be implemented and set aside any State law to the

4    contrary --

5              JUSTICE GINSBURG:  Yes, there is.  We have

6    interpreted the law, and we have said as far as what

7    Article 36 means, we disagree with the ICJ.

8              MR. CRUZ:  I agree with you, Justice

9    Ginsburg, but the United States does not.  The United

10   States believes that the President has the authority to

11   make decisions and to implement treaties -- an

12   independent authority to create new binding law, even

13   though the obligation is not self-executing.

14             CHIEF JUSTICE ROBERTS:  Thank you.

15             JUSTICE KENNEDY:  How many parties to

16   Avena -- there were 51 -- are being held in the State of

17   Texas?

18             MR. CRUZ:  There are 51.  There were 15 in

19   the State of Texas.  There are now 14 because 1 was

20   under the age of 18, so is now off of death row; 51 in 9

21   States across the country.

22             JUSTICE GINSBURG:  And Oklahoma has taken

23   the opposite position, and they -- they did give the

24   review and reconsideration?

25             MR. CRUZ:  That's correct.

1            JUSTICE GINSBURG:  And has any other State

2  acted?

3            MR. CRUZ:  Not that we're aware of, no.

4  There have -- the 51 -- my understanding is it's down to

5  44.  For various reasons these individuals are not on

6  death row but, other than Oklahoma, not related to the

7  Avena decision.

8            CHIEF JUSTICE ROBERTS:  Well, the fact that

9  they're on -- on death row isn't at all significant

10  because the judgment of the ICJ purports to vacate the

11  convictions as well; isn't that correct?

12            MR. CRUZ:  That's exactly right; and, in

13  fact, in Paragraph 34 of Avena it asserted the authority

14  to annul U.S. criminal convictions.  So some of the

15  hypotheticals coming from bench, under the ICJ --

16            JUSTICE GINSBURG:  I thought the ICJ flatly

17  refused Mexican -- Mexico said ICJ annulled the

18  judgment.  The ICJ said no, and it didn't vacate it,

19  either.  It just said that it did a reconsideration to

20  see whether there was prejudice.

21            MR. CRUZ:  Justice Ginsburg, you're correct

22  they did not order the annulment.  But in paragraph 34

23  they asserted they could order the annulment.  They

24  simply were choosing --

25            CHIEF JUSTICE ROBERTS:  I'm looking at page

1    --

2              MR. CRUZ:  -- not to in this case.

3              CHIEF JUSTICE ROBERTS:  I'm looking at page

4    186.  They require review and reconsideration of the

5    conviction and sentence.

6              MR. CRUZ:  That's correct.  So it is not

7    just the sentence;  and, in fact, they, despite the fact

8    that their statute does not allow them to have precedent

9    in any other cases, they said in paragraph 151:

10             The fact that the Court's ruling  concerned

11   only Mexican nationals cannot be taken to imply the

12   conclusion reached in the present judgment do not apply

13   to other foreign nationals finding  themselves in

14   situations.  They were in an unprecedented act recording

15   the authority to bind U. S. Courts in a way, to the best

16   of my knowledge, no --

17             JUSTICE GINSBURG:  Their very own statute,

18   the statute setting up the ICJ, makes it clear that is

19   not the case.  They can issue a binding judgment in the

20   particular case.  It has no precedential effect for

21   other cases, not even within the ICJ.

22             MR. CRUZ:  But they can issue a decision

23   that can be enforced by the Security Council.  And had

24   they issued --

25             JUSTICE GINSBURG:  Has that ever happened?

1              MR. CRUZ:  It has gone -- for example, in

2      the Nicaragua case, there was an effort to take it to

3      the Security Council there.

4              JUSTICE GINSBURG:  And the U.S. exercised

5      its veto.

6              MR. CRUZ:  Correct.  And that's part of a

7      diplomatic treaty, where it's between nations is -- is

8      that it is not binding in the sense that the domestic

9      courts will enforce it.

10             Indeed, if the ICJ had asserted the power it

11     claimed to annul U.S. convictions, under the U.S.'s

12     theory the President presumably could have issued an

13     order effectively pardoning State prisoners despite the

14     fact that the Constitution limits its pardon authority

15     to Federal crimes.

16             CHIEF JUSTICE ROBERTS:  Thank you, Mr. Cruz.

17             Mr. Donovan, you have five minutes.

18             REBUTTAL ARGUMENT BY DONALD F. DONOVAN

19                  ON BEHALF OF THE PETITIONER

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

21             First, there is nothing in the ratification

22     history that suggests that Avena made any assumptions

23     about whether or not the Optional Protocol would be

24     self-executing.  The Connally Amendment went to the

25     compulsory jurisdiction of the ICJ, and the discussion

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1    to which Texas has referred is entirely about the

2    international ramifications.

3              In fact, the Senate specifically declined to

4    apply the Connally Amendment to the Optional Protocol.

5    So that gets to the question that we have been

6    discussing here, which is:

7              What is the scope of the enforceability of

8    an ICJ judgment?  There are obviously constraints to

9    that.  One is illustrated by the Chief Justice's

10   hypothetical.  That is, there are affirmative

11   constraints in the Constitution, itself.

12             The second is illustrated by a point I made,

13   but Mr. Cruz misunderstood, which is that the nature of

14   the obligation emanating from the judgment is directed

15   at a constitutional branch such as the obligation to

16   enforce an active statute.  Obviously, that is not

17   enforceable in court.

18             If the nature of the obligation is to cease

19   hostilities, that is obviously directed to the President

20   and is not enforceable in court.  And that's illustrated

21   by the Nicaragua case in which the ICJ issued a

22   judgment.  Congress passed a statute that said it wasn't

23   going to comply; and the President said he wasn't going

24   to comply.

25             That, in turn, applies to the third

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1  constraint, which is the political constraint, itself.

2  The Nicaragua case illustrates that if the ICJ issues a

3  judgment that the United States does not want to comply

4  with, Congress can pass a statute to say we repudiate

5  the obligation.

6          So the obligations that we are talking about

7  here in which the ICJ judgment would be enforceable by

8  an individual fall squarely in the class of cases that

9  this Court has decided for two centuries where an

10 individual has a right conferred by the statute.

11          And he walked into a court, and he asked

12 that court to enforce that right, and he invokes that

13 right in -- as in the Caffa core case, the Roucher case,

14 cases going back to the founding.

15          And this Court has said when the right is of

16 a nature to be enforced in a court of justice, this

17 Court will enforce it.  And that is all Mr. Medellin is

18 asserting here:  The right to enforce a right that is

19 eminently suitable for judicial enforcement because it

20 goes to the judicial process, itself.

21          The second point with respect to Article

22 III:  It cannot be the case that this Court can never

23 enforce -- gives away its Article III authority when

24 somebody else enforces a judgment.  We know from the

25 Comegys and the Abba cases that we have cited that the

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1    Court has in fact said that when the U.S. submits a case

2    to international adjudication that international

3    adjudication is binding and it's not reexaminable in a

4    U.S. court.

5              CHIEF JUSTICE ROBERTS:  I read the Comegys

6    case, however you say it, to be for the exact opposite

7    proposition.  There they were saying, this is an

8    international arbitration, there's no reason to go

9    behind it.

10             But the question of whether or not that

11   arbitration is binding in the bankruptcy proceeding that

12   was at issue there was very much one for the U.S.

13   Supreme Court to make.

14             MR. DONOVAN:  But that's because that was

15   not part of what the court had actually decided, or

16   rather that the international adjudication had actually

17   decided.  You think about, if the proposition is that

18   nobody else but an Article III court can decide a

19   Federal question, this Court could not have decided

20   Mitsubishi.  In Mitsubishi the Court sent Federal

21   statute antitrust claims to an arbitration panel in

22   Tokyo and said that the result would be everyone

23   forcible so long as the panel actually took cognizance

24   of the claim and actually decided it.

25             This Court if it evaluated the claim that

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1    Mr. Medellin is entitled to review and reconsideration

2    as a result of the treaty obligation under 94-1 and the

3    President's determination that that treaty obligation

4    will be given effect, this Court would be performing a

5    supremely judicial function, that is it would be

6    interpreting and applying Federal law in the form of a

7    statute, which is exactly what the Supremacy Clause

8    requests the Court to do.

9                With respect to --

10               JUSTICE SCALIA:  Put precisely, it would be

11   making it Federal law and then applying it.  If you

12   assume it's not self-executing, somebody has to make it

13   to domestic law.  Now, Congress can obviously do it by

14   passing a law.

15               But you're saying the Court can do it, can

16   make it dmestic law and then enforce it.

17               MR. DONOVAN: That assumes thatit is not

18   self-executing, yes.  But the whole question here is --

19               JUSTICE SCALIA:  Yes, yes, ys.

20               MR. DONOVAN:  -- when we're talking about

21   self-executing here we're saying what branch is the

22   obligation directed to.  And what the Court has said

23   time and time again is when the obligation is of a

24   nature to be enforced in a court of justice it is

25   directed to the judicial authority.

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1              JUSTICE SOUTER:  Then what you are saying if

2    I understand you is that Justice Scalia was wrong when

3    he said that would be making it Federal law.  I think

4    you were saying that would be a -- the branch that was

5    responsible for determining how to execute, i.e., to

6    apply, Federal law.  Is that your point?

7              MR. DONOVAN:  That's exactly right.  The

8    thing that makes the treaty Federal law is not the

9    Court; it's the Supremacy Clause, which makes it supreme

10   Federal law.

11             CHIEF JUSTICE ROBERTS:  What is the

12   authority -- I get back to where I started.  I

13   understood you to concede that we would have authority

14   to construe the judgment if it provided, for example,

15   for a punitive sanction against the officers.  What is

16   the basis under your theory for that authority?

17             MR. DONOVAN:  Well, it's settled that a

18   treaty cannot contravene an affirmative constitutional

19   obligation.  There would be -- if there was -- if the

20   ICJ --

21             CHIEF JUSTICE ROBERTS:  But it can -- it can

22   contravene our interpretation of the treaty as a matter

23   of Federal law.

24             MR. DONOVAN:  There are two different treaty

25   obligations.  There's a treaty obligation under the

84

1    Vienna Convention, which this court has now

2    dispositively interpreted, and there's a treaty

3    obligation to comply.  And it's the very nature of an

4    obligation to put a dispute to a third party that you

5    may not agree with the result, and that does not in any

6    way compromise this Court's Article III authority to

7    rest that judgment on an obligation committed to by the

8    political branches, three treaties ratified by the

9    President and Senate that said when this country commits

10   itself to do something we're going to do it.  Now we

11   have the President of the United States saying that it's

12   in the paramount interests of the United States for

13   purposes of enforcing --

14            CHIEF JUSTICE ROBERTS:  Do we have the

15   authority to interpret the judgment of the ICJ?

16            MR. DONOVAN:  The courts in enforcing that

17   judgment would.  Of course that would be part of the

18   judicial enterprise.  The applicable instrument is now

19   the Avena judgment, pursuant to the treaties and the

20   President's determination, independent sources.  In

21   applying that judgment, there may well be interpretive

22   questions because the Avena judgment lays down standards

23   and requires obligations and that would be part of the

24   judicial enterprise.

25            CHIEF JUSTICE ROBERTS:  So we have the

1    authority to interpret it, we have the authority to

2    construe whether it's carry to the Constitution, but we

3    do not the authority to consider whether it's consistent

4    with Federal law?

5                MR. DONOVAN:  That's right, because that's

6    the very nature of enforcing a judgment:  You do not

7    re-examine the merits.  You take the judgment and you

8    enforce the judgment.  And it's the judicial enterprise

9    to construe what that -- it may be a question about

10   construing that -- what that instrument requires, what

11   that judgment requires.  But it's the judicial function

12   in enforcing that judgment that calls upon this Article

13   -- the Court's Article III authority, and does not in

14   any way compromise it, which in turn goes to the

15   question about what the judgment requires.  It requires

16   prospective review and reconsideration.  The Texas court

17   didn't suggest that Mr. Medellin had received review and

18   reconsideration.  The ICJ made it clear that it had to

19   be prospective, and one of the fundamental reasons for

20   that is because the judgment says that the treaty rights

21   have to be determined on it own.  Mr. Medellin is

22   entitled to show that the violation of the treaty

23   standing on its own two feet and not filtered through a

24   constitutional right affected -- that he is entitled to

25   show prejudicie.

1          CHIEF JUSTICE ROBERTS:   Thank you,

2     Mr. Donovan.

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

4          CHIEF JUSTICE ROBERTS:   The case is

5     submitted.

6          (Whereupon, at 11:30 a.m., the case in the

7     above-entitled matter was submitted.)

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