1    IN THE SUPREME COURT OF THE UNITED STATES

2  - - - - - - - - - - - - - - - - - x

3  JOSE ERNESTO MEDELLIN,                    :

4             Petitioner                     :

5      v.                                     :   No. 06-984

6  TEXAS.                                     :

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

8                          Washington, D.C.

9                          Wednesday, October 10, 2007

10

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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# C O N T E N T S

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 treaties' 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

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 it's that obligation --

9                CHIEF JUSTICE ROBERTS:  Even if we

10   determine that that judgment is based on a legal error?

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

12   basis of submitting a dispute to a third-party

13   dispute-resolution mechanism, yes.

14               CHIEF JUSTICE ROBERTS:  So if the ICJ

15   determined that the officers should each go to jail for

16   5 years, we would have no basis for reviewing that

17   judgment?

18               MR. DONOVAN:  Well, that would be --

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

20   answer the questions in turn, first --

21               JUSTICE GINSBURG:  Does the ICJ ever issue a

22   judgment of that character?  It issues a judgment

23   between two nations, two or more nations, and it

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

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

1    sentence should be for particular individuals.

2             MR. DONOVAN:  That is correct.  The ICJ

3    decides disputes between nations, but those disputes may

4    involve the nation's obligation as to specific

5    individuals. In this case --

6             JUSTICE KENNEDY:  Well, I'm still interested

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

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

9    --

10            JUSTICE KENNEDY:  Suppose the court acts

11   beyond -- clearly beyond its jurisdiction?

12            MR. DONOVAN: Well, it -- with respect,

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

14   beyond its jurisdiction.  Indeed, the President has

15   determined otherwise.

16            JUSTICE KENNEDY:  Could you answer the

17   hypothetical, please.

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

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

20   that is within its jurisdiction and that imposes an

21   obligation that is within this Court's provenance to

22   enforce, that is, that it determines the rights

23   attributable -- enforceable within a court of justice,

24   this Court wouldn't be enforcing the obligation to comply.

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

1   from the Court's own interpretation, for example, here

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

3   obligation that this Court is exercising --

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

5   still looking for an answer to the hypothetical.  What

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

7   determination that officers should go to jail for 5

8   years?

9               MR. DONOVAN:  Because in that situation that

10  may be beyond the Court's determination -- the executive

11  power of the Court.  What the Court would be doing is

12  determining the rights attributable to --

13              CHIEF JUSTICE ROBERTS:  The Court doesn't

14  have executive power; it has judicial power.  It's

15  already exercised that judicial power in Sanchez-Llamas

16  in determining the meaning of this treaty.

17              And I understood your position to be that we

18  have no authority to construe the treaty in this case

19  because a judgment is issued by the International Court

20  of Justice.

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

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

23  authority to construe the United States' obligation to

24  comply with the judgment.  The nature of that

25  obligation, itself, could be one that would be

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

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

3    Medellin gets review and reconsideration.

4              In the Chief Justice's hypothetical, that

5    may well be an obligation that would be enforceable by

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

7    enforceable in a court as here.

8              JUSTICE BREYER:  I thought --

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

10             JUSTICE BREYER:  I thought the question --

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

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

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

14   and supreme courts of various nations have come up

15   against this problem:

16             What would happen if the Brussels court or

17   the EU court insists under the treaty that we do

18   something that violates our own Constitution?  I think

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

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

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

22   fundamental human rights or destroyed some basic

23   structural part of our Constitution.

24             And the question that I would have is

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

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

2    this respect here?

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

4              JUSTICE BREYER:  If the ICJ were to do

5    something which it's never done, like, say, put

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

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

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

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

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

11              JUSTICE BREYER:  If we took that approach --

12              CHIEF JUSTICE ROBERTS:  Now --

13              MR. DONOVAN:  If there --

14              CHIEF JUSTICE ROBERTS:  Just to get back,

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

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

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

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

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

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

21    this Court that would be enforcing the obligation to

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

23              CHIEF JUSTICE ROBERTS:  Just enforcing the

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

25    determining the legal basis for the ICJ determination?

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

2    different obligations here:  There is an obligation

3    in the Vienna Convention itself, and this Court has

4    determined the dispositive effect of that obligation as

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

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

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

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

9    obligation is that we might disagree with the

10   determination -- with the interpretation of the treaty,

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

12          JUSTICE KENNEDY:  Suppose in this case the

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

14   President said to Texas, do not comply with this

15   judgment.

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

17   would be inconsistent with this Court's duty and

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

19   that the --

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

21          MR. DONOVAN:  If the --

22          JUSTICE KENNEDY: -- determination is not

23   conclusive.

24          MR. DONOVAN:  Well, the President's

25   determination -- what the President has determined here

1    is to enforce the treaty.  He --

2              JUSTICE KENNEDY:  My hypothetical is he's

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

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

5              MR. DONOVAN:  If --

6              JUSTICE KENNEDY:  And I -- I think that

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

8              MR. DONOVAN:  No, if the President here --

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

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

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

12   obligation imposed by the ICJ and the Avena judgment is

13   an -- is an obligation --

14             JUSTICE ALITO:  Isn't the obligation --

15             MR. DONOVAN:  -- which essentially --

16             JUSTICE ALITO:  Isn't the obligation that

17   the United States undertook when it signed the UN

18   Charter the obligation to undertake to comply with ICJ

19   judgments in accordance with its own constitutional

20   processes, not necessarily that any ICJ decision would

21   be regarded by any court in this country as binding

22   Federal law?

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

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

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

1    what is the nature of the obligation imposed?

2              JUSTICE GINSBURG:  It is --

3              MR. DONOVAN:  Here, you might have

4    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

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  in a court --

11             JUSTICE STEVENS:  -- 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:  It's 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:  But then it becomes --

6              MR. DONOVAN:  -- still constraints --

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  submitted --

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

14

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' 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             JUSTICE SOUTER: But you would --

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 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?  Why?

20             MR. DONOVAN:  That's the 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 not--

8    if 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 right.  That's right.

20   It removes a bar by preempting that bar.

21             JUSTICE ALITO:  Well, you just --

22             MR. DONOVAN:  If I may --

23             JUSTICE ALITO:   -- said that the Avena

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

25   decision itself Federal law?

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 virtue of a 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   apply.  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 itself, because the relevant --

19            CHIEF JUSTICE ROBERTS:  Excuse me, but your

20   position is not just that we are applying the obligation

21   to comply, because we interpreted that in Sanchez-Llamas

22   and came to the exact opposite conclusion of the ICJ

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

24   operative law is the judgment.

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

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

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 Mexican 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:  Well, in this case, the Court

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

19   by virtue of the Optional Protocol in Article 94(1) and

20   the President's determination would be in effect applying

21   Federal law.  We think the judgment is --

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 authority --

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 specifically 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 as a matter of Federal law without regard

25 to the President's determination?

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, to

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 has 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 treaties 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,

2                   AS AMICUS CURIAE,

3                SUPPORTING THE PETITIONER

4              GENERAL CLEMENT:  Mr. Chief Justice, and may

5    it please the Court:

6              JUSTICE SCALIA:  You don't agree with the

7    last statement.

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

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

10   we take a slightly different take.  Obviously we feel

11   the President's determination here that we will comply

12   with the Avena judgment is a critical element in why

13   there's an enforceable obligation --

14             JUSTICE SCALIA:  We would have no --

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

16   this judgment but for the President's action?

17             GENERAL CLEMENT:  That's correct, Justice

18   Scalia.  Now, obviously, Mr. Donovan and his client

19   could get here and ask you to enforce the judgment of its

20   own force without the President's determination and that

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

22   course --

23             JUSTICE SCALIA:  We could ask the tide to go

24   back, too.  But would we have any authority to do it?

25             GENERAL CLEMENT:  I hope that you wouldn't

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

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

3    two components and I think it makes clear why the

4    President's intervening role here is important.  94(1)

5    says that we undertake to comply our obligations --

6    with our obligations to comply with the judgment.  But

7    94(2) says what happens when a country doesn't do that.

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

9    course, I think necessarily implies that countries do

10   retain the option to put themselves out of compliance

11   with an International Court of Justice judgment.

12              JUSTICE GINSBURG:  But that would take an

13   action by somebody in the country.

14              GENERAL CLEMENT:  Exactly, Justice Ginsburg,

15   and I think that --

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

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

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

19   to comply.

20              GENERAL CLEMENT:  Absolutely, and that's why

21   we're here supporting Mr. Donovan in this case.  But --

22              JUSTICE SCALIA:  Wait a minute.  In order to

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

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

25   simply not to comply?

1          GENERAL CLEMENT:  Whether it's an omission

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

3     Scalia.  My point --

4          JUSTICE SCALIA:  I thought that was the

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

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

7     affirmative decision to comply?

8          GENERAL CLEMENT:  I didn't take that to be

9     the import of her question.

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

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

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

13    States agreed that it would submit to the binding

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

15    judgment and I am going to enforce it.

16         GENERAL CLEMENT:  I agree, I think the

17    omission-commission --

18         JUSTICE SCALIA:  I know you agree, but it

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

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

21    enforcing the judgment of whether that international law

22    obligation shall be made domestic law is a judgment for

23    the Congress.

24         Congress passes a law to enforce the treaty,

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

 1  Congress; the President can make a domestic law by

 2  writing a memo to his Attorney General.

 3              GENERAL CLEMENT:  Well, Justice Scalia, let

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

 5  discussion of what happened here by saying the reason I

 6  think the commission-omission distinction doesn't have

 7  much purchase here is because the President did make a

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

 9  ask the question who makes the determination as to

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

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

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

13  President, and Congress has acquiesced in that with the

14  UN Participation Act at 22 U.S.C. 287.

15              CHIEF JUSTICE ROBERTS:  What if the

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

17  judgment, but in a different way than the ICJ

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

19  case whether there's already been a determination of

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

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

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

23  law?

24              GENERAL CLEMENT:  It depends exactly what

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

1    I'm stumbling with that question --

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

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

4    one we had here.

5            GENERAL CLEMENT:  And what does it suggest

6    that is supposed to be done with the end product of that

7    determination?

8            CHIEF JUSTICE ROBERTS: It says that if there

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

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

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

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

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

14   judgment, which suggests there should be a new

15   determination in every case.

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

17   the memorandum here?

18           GENERAL CLEMENT:  I would say that it

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

20   suggest, not fully comply and not fully discharge with

21   our obligation.

22           But the extent to which we did and purported

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

24   would have the same force as providing the rule of

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

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

2   unprecedented.  It is not materially different from when

3   the President supplies the rule of decision in the

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

5   the courts, State and Federal, that somebody has

6   sovereign immunity.

7           JUSTICE ALITO:  If we agree with you, would

8   the effect be that the President can take any treaty

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

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

11  under domestic law?

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

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

14  that --

15          JUSTICE ALITO:  Well, why would it not?

16          GENERAL CLEMENT:  Well, first of all,

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

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

19  pursuant to this which is inconsistent with other

20  constitutional obligations.

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

22  take action that's inconsistent with the determination

23  of Federal law by this Court?

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

25  don't think that's true.

1          CHIEF JUSTICE ROBERTS:  I thought we

2   determined in Sanchez-Llamas that the treaty did not

3   mean what the ICJ has said it means in this case.

4          GENERAL CLEMENT:  That's exactly right as to

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

6   not about the proper interpretation of the Vienna

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

8   with this Court on its interpretation of the Vienna

9   Convention in Sanchez-Llamas.  The relevant treaties

10  here are the Optional Protocol and the UN Charter, and

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

12  judgment as precedent --

13         CHIEF JUSTICE ROBERTS:  Do you doubt that

14  the judgment here is based on a determination of the

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

16  determined last year?

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

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

19  individuals that are covered by the judgment that of

20  course this Court has the final word on the

21  interpretation of the Vienna Convention.

22         JUSTICE SCALIA:  They were not

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

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

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

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

2  don't know of any such principle.

3          GENERAL CLEMENT:  Justice Scalia --

4          JUSTICE SCALIA:  These people were not

5  parties to the -- the countries were parties to the

6  judgment.

7          GENERAL CLEMENT:  Of course the countries

8  were parties, but these 51 individuals' claims were

9  specifically adjudicated.  Why were they specifically

10  adjudicated?  Because they were effectively -- their

11  claims were espoused by the Mexican Government.

12  That system --

13          JUSTICE GINSBURG:  General Clement, can we

14  just clarify something which I think is important?

15  Justice Scalia suggested that this wasn't self-executing.

16  The State Department with respect to the Vienna Convention

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

18  anything; this is self-executing.  And then the Protocol

19  says:  We the United States agree to accept the

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

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

22  "self-executing" has anything to do with this case.

23          GENERAL CLEMENT:  Well, Justice Ginsburg, I

24  think that reflects that "self-executing" is one of

25  those words that people use to cover a lot of different

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

2    right to say that the Vienna Convention is

3    self-executing.

4              So there didn't have to be legislation

5    before Texas and its local officials were obligated to

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

7    default on that treaty obligation by the State and local

8    officials that has us in this predicament in the first

9    place.

10             Now, there's another meaning of

11   "self-executing" -- or maybe it's a misuse of the term --

12   to say whether it gives rise to individually enforceable

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

14   position that if the President had done nothing, and

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

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

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

18   that this judgment would be enforceable as of its own

19   terms.

20             JUSTICE GINSBURG:  But in Nicaragua the

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

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

23   jurisdiction is always an exception to the obligation,

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

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

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

2  does have jurisdiction, then the obligation kicks in.

3        GENERAL CLEMENT:  That's absolutely right,

4  and that gets back to the basic principles of reviewing

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

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

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

8  interpretation of the Vienna Convention.  It's a

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

10  effectively validated by the executive branch.  And

11  there's two things --

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

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

14  judgment's clearly wrong as a matter of international

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

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

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

18  Justice Stevens.  As Justice Ginsburg put it --

19        JUSTICE STEVENS:  That's provided that we

20  regard these individuals as though they're tantamount to

21  parties to the judgment itself.

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

23  certainly our obligation under that judgment, as the

24  executive branch sees it, is to these 51 individuals as

25  their claims have been espoused by Mexico.

1          JUSTICE KENNEDY:  Suppose the President had

2    reached the contrary conclusion, the hypothetical we put

3    earlier.  Suppose the President had told Texas, do not

4    follow this judgment?

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

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

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

8    view of this, is a necessary step; and that seems to me

9    to be --

10          JUSTICE SOUTER:  What side of the podium --

11          JUSTICE KENNEDY:  I would agree that we

12    should give that determination great weight, but that's

13    something quite different from saying that he can

14    displace the authority of this Court on that issue of

15    law.

16          GENERAL CLEMENT:  Oh, but the -- the

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

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

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

20    viewed that judgment as something we should comply with,

21    then the role of this Court is limited to deciding

22    whether there was jurisdiction to issue that judgment in

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

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

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

1    why the answer to the Chief Justice's original

2    hypothetical, about a sentence to 5 years for guards

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

4          But here there's no colorable argument that

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

6    lies outside the power of the Federal Government as a

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

8    States.

9          JUSTICE SOUTER:  Mr. Chief Justice, may I

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

11         CHIEF JUSTICE ROBERTS:  Yes.

12         JUSTICE SOUTER:  Let me try one other

13   variation to make sure that I understand your argument.

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

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

16   this Court interpreted the Avena judgment as binding, as

17   providing a rule of decision and a rule of decision

18   which was entitled to respect by Texas?

19         Would this Court's authority to make that

20   declaration and issue a judgment to that effect be

21   displaced by the President's determination that it would

22   not be -- that the Avena judgment would not be enforced?

23         GENERAL CLEMENT:  Of course not, Justice

24   Souter.  That would just be like cases that

25   unfortunately happen, where we would take a position

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

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

3    the land.

4            JUSTICE SOUTER:  Okay.

5            GENERAL CLEMENT:  We don't suggest that we

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

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

8    here is unimportant.

9            JUSTICE SOUTER:  So --

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

11    stick to our view that the President's role here both

12    makes this an easier case and is in our view dispositive.

13           JUSTICE SOUTER:  But it does follow then

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

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

16    entire question of Presidential authority.

17           GENERAL CLEMENT:  You could.  I think

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

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

20    the President effectively espousing the judgment, and in

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

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

23           JUSTICE SOUTER:  That's in effect a judicial

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

25    in the Steel case.

1          GENERAL CLEMENT:  Exactly.

2          JUSTICE SOUTER:  He was talking about the

3   President and Congress; we're talking about the

4   President and the Court.

5          GENERAL CLEMENT:  Right.

6          JUSTICE SOUTER:  Yes.

7          JUSTICE SCALIA:  The President espousing the

8   judgment -- Texas takes the position that this

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

10  from the President to the -- to his Attorney General.

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

12  refers to "pursuant to the principles of comity," which

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

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

15          What is your response to that?  And would it

16  be enough if the President simply wrote a memorandum to

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

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

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

20  Attorney General?

21          GENERAL CLEMENT:  Well, Justice Scalia, I

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

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

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

25  historical practice, this is not something where you a

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

2   executive agreement that this case -- this Court gave

3   dispositive effect to in Belmont and Pink.  It was an

4   exchange of diplomatic letters, nothing more.  Look to

5   the executive determination that this Court give

6   dispositive effect to, dismissed the lawsuit completely

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

8   Undersecretary of State to the Attorney General.

9           Going back to the very beginnings of the

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

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

12  extradite him?  A letter from the Secretary of State to

13  Judge Bee in South Carolina.

14          CHIEF JUSTICE ROBERTS:  In none of those

15  cases were we talking about a determination contrary to

16  a legal determination by this Court concerning the scope

17  of powers under the treaty.

18          GENERAL CLEMENT:  Well, with respect --

19          JUSTICE KENNEDY:  And in Nash he was being

20  held under Federal custody.  So Nash is just

21  inapplicable here.

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

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

24  fours.

25          JUSTICE KENNEDY:  Of course, Nash is just a

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

2   opinion.

3            GENERAL CLEMENT:  But it is a wonderful

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

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

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

7   you should look at that speech before rejecting our

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

9   there you had a treaty obligation duly approved by the

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

11  Congress before the executive can extradite somebody?

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

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

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

15  but absent the congressional determination, the

16  President has the authority to extradite Nash.

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

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

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

20  at issue is simply recognizing that there's binding

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

22  recognized that it was binding Federal law, it would

23  have applied under their own State procedural default

24  law.

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

1  down, there was a second part of your question, Justice

2  Scalia, which was addressed to what does the reference

3  to "comity" mean.  Obviously, from the very beginning in

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

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

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

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

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

9          I think if you actually look at the law of

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

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

12 controlling view from one of the political branches.

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

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

15 effect to the judgment.

16          Thank you.

17          CHIEF JUSTICE ROBERTS:  Thank you, General.

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

19 extra 10 minutes.

20              ORAL ARGUMENT OF R. TED CRUZ,

21               ON BEHALF OF THE RESPONDENT

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

23 please the Court:

24          The entirety of the United States' argument

25 is predicated on the idea that the President's

1  two-paragraph memorandum is in and of itself binding

2  Federal law.

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

4  the argument, but your brother the Solicitor General has

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

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

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

8  judgment to Texas that, among other things, would

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

10  obviate the question of Presidential power.

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

12  decided it on the ground that Avena was a binding

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

14          I would note the United States strenuously

15  disagrees with that proposition.  And, indeed, the

16  United States explicitly disclaims these treaties as the

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

18  this Court's decision in Sanchez-Llamas.

19          JUSTICE BREYER:  Maybe you could spend a

20  minute explaining that, because, as I read the

21  Constitution, it says "all treaties made, or which shall

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

23  be the supreme law of the land; and the judges in every

24  State" -- I guess it means including Texas --

25          (Laughter.)

1          JUSTICE BREYER:  -- "shall be bound thereby,

2    anything in the Constitution or laws of any State to the

3    contrary notwithstanding."

4          Now, as I understand it, the United States

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

6    the interpretations and the judgments of the

7    International Court of Justice in respect to the Vienna

8    Convention.

9          And that court did make a judgment in that

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

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

12   must redo the procedural hearing simply to see whether,

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

14   a procedural default, full account is taken of the

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

16   talking about.

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

18   States has promised to follow that judgment of the

19   court.  The Constitution says, since it promised by

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

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

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

23   -- chain of law.

24         MR. CRUZ:  Certainly, Justice Breyer.

25   Texas, of course, does not dispute that the

41

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

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

3   these three.

4            The President's memorandum is none of those

5   three.

6            JUSTICE BREYER:  I was not talking --

7            MR. CRUZ:  And, with respect --

8            JUSTICE BREYER:  -- about the President's

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

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

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

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

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

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

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

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

17  in the sense we recognize "judgment" in U.S. courts for

18  six separate reasons.

19           JUSTICE BREYER:  No, forget whether we

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

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

22  whatever name you want.  We promised to follow that

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

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

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

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

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

3    called: "The appropriate reparation in this case

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

5    and then they listed it.

6             So I take it we have promised to carry out

7    that obligation by treaty.

8             MR. CRUZ:  Except that when the Senate

9    ratified the Optional Protocol, it made clear that the

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

11   point Mr. Donovan made in his argument --

12            JUSTICE BREYER:  What are the words that the

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

14   the easiest way for me to understand that is the

15   Constitution means what it says.

16            But there happened to be a few instances

17   where the nature of the obligation or the intent of the

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

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

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

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

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

23   enforceable in U.S. domestic courts.

24            JUSTICE BREYER:  Oh, and so if they did

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

1    reference where the Senate said:  Although we entered

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

3    do it --

4                MR. CRUZ:  Well --

5                JUSTICE BREYER:  -- unless you --

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

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

8    the UN Charter provides that the remedy is that the

9    party may have recourse to the Security Council.

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

11   breach, but we -- let's stick to the Protocol, the

12   Optional Protocol -- optional.  The Protocol says:

13               We accept the compulsory jurisdiction of the

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

15   cases of this character, Vienna Convention violation

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

17   ICJ.

18               What is there that needs execution about

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

20   executive branch of the United States decides that it's

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

22   the ICJ.  We ratify that.

23               And I don't see anything left for Congress

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

25   jurisdiction of the ICJ.

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

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

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

4  resolved through political and diplomatic avenues.  And

5  the best example of that --

6           JUSTICE SCALIA:  It just means we agree that

7  the case can go before the court.

8           MR. CRUZ:  Exactly.

9           JUSTICE SCALIA:  And we will be a party

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

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

12 away from this Court the power and responsibility to

13 decide what the treaty obligations of the United States

14 are?

15          MR. CRUZ:  Justice Scalia, I --

16          JUSTICE SCALIA:  Isn't there some problem

17 there?

18          MR. CRUZ:  I would go further than some

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

20 give the authority to make binding adjudications of

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

22 it would violate Article III of the Constitution.

23          JUSTICE SCALIA:  I thought that's what our

24 Constitution --

25          JUSTICE BREYER:  Fine.  Then, are you

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

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

3   follow what an international tribunal said.  Somebody

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

5   there are approximately 116 regulatory entities in the

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

7   regimes, where there are various adjudicatory tribunals

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

9           And is your view:  All of these thousands,

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

11  and that our promises are not enforceable, because

12  there's a constitutional question?

13          MR. CRUZ:  There are hundreds of treaty

14  obligations that this nation is committed to that are

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

16  in domestic--

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

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

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

20  instances where the United States has promised to follow

21  the decisions of tribunals that are not Article III

22  courts and to put them into effect at once.

23          MR. CRUZ:  If -- if --

24          JUSTICE BREYER:  And I wonder, without

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

1    unconstitutional?

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

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

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

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

6              JUSTICE BREYER:  Okay.

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

8    question are not making definitive interpretations of

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

10   the example Mr. Donovan used in his opening argument

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

12   cease hostilities, that would be directed to the

13   President.

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

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

16   and apparently the Federal courts could order the

17   President to cease hostilities if that was the

18   instruction of the ICJ.

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

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

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

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

23             MR. CRUZ:  The treaty is Federal law,

24   Justice Breyer.

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

1    you because the WTO interprets a treaty.  It interprets

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

3    is interpreting a treaty that binds the United States.

4    So what's the difference?

5              MR. CRUZ:  The nature of this treaty,

6    every -- every position -- the United States State

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

8    and every member of the Senate who discussed it,

9    understood that the decisions of the ICJ would not have

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

11   the understanding of every single nation --

12             JUSTICE KENNEDY:  And what you are saying --

13   and this has been the law --

14             JUSTICE STEVENS:  Could I ask one question,

15   please?

16             JUSTICE KENNEDY:  Go ahead.

17             JUSTICE STEVENS:  It's critical to me to

18   understand the effect of the judgment, and you said

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

20   I really would like to hear what those reasons are

21   without interruption from all of my colleagues.

22             (Laughter.)

23             MR. CRUZ:  I would be happy to provide

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

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

1  have force in United States courts.

2          The second reason is, if it was a binding

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

4  to a tribunal other than this Court the authority to

5  determine Federal law.

6          The third reason is in Sanchez-Llamas a

7  majority of this Court rejected this argument and

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

9  purpose of the ICJ suggests that its interpretations

10  were intended to be conclusive on our courts."

11          The fourth reason is the parties in Avena

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

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

14  binding in this case is that Texas is vicariously part

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

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

17  is in some sense one of the parties.

18          The fifth reason is the Breard case was in

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

20  issuing an order to this Court concerning Breard,

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

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

23          And the sixth and final reason that it is

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

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

1    comply.  Everyone agrees, for example in the Nicaragua

2    case, that the President retains the authority to say

3    no, we're not going to comply.

4              Which is why the entire purpose of this

5    adjudication is not to resolve something finally in a

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

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

8    during the hostage crisis.  We didn't believe that the

9    Ayatollah was going to listen to the ICJ and suddenly

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

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

12   helpful diplomatically to bring it to that tribunal to

13   then put international pressure.  That --

14             JUSTICE KENNEDY:  Then this is consistent

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

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

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

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

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

20   we are going to comply with the international

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

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

23   self-executing.

24             MR. CRUZ:  Justice Kennedy, that is exactly

25   correct.

1      JUSTICE KENNEDY:  At some point I think in

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

3   the Vienna Convention itself is or is not

4   self-executing.  I think the Solicitor General was

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

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

7   with it.

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

9   that the State has to accept whatever procedural

10  framework the foreign national demands.

11          MR. CRUZ:  I would agree with the

12  characterization you suggest, which is that the Vienna

13  Convention was self-executing in the sense that it

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

15  not self-executing in the sense that it provided

16  judicially cognizable rights.

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

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

19  Vienna Convention created individual rights, and

20  although Texas maintains that it did not create

21  individual rights and the United States maintains that

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

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

24  assuming it created individual rights in this case,

25  Medellin defaulted on that claim and this Court held

1   in Sanchez-Llamas that procedural default is

2   consistent with the treaties.

3          And the real question here in this case,

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

5   whether the Optional Protocol is self-executing, the

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

7   whether the President has some sort of independent

8   authority to make Federal law.

9          And in this respect --

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

11   like to get back to that Optional Protocol.  It was a

12   submission to jurisdiction.  My understanding is that

13   any two parties can agree, can have a forum

14   selection clause, can agree that we accept the authority

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

16   you accept their authority to adjudicate, you are bound

17   to follow its decision.  And that that seems to be

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

19   that even though there are cases like Nicaragua and

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

21   nations that agree to submit to the jurisdiction of that

22   tribunal?

23          MR. CRUZ:  Justice Ginsburg, that is correct

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

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

1    to the Vienna Convention and of the 50 nations that

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

3    nation -- treats ICJ judgments as binding in their

4    domestic courts.

5              What Petitioners are arguing here is for an

6    interpretation of this treaty that no other nation

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

8    Mexico and arrested without consular notification, I

9    could not raise this claim in Mexico.  The Mexican

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

11   prosecution.

12             And so --

13             JUSTICE GINSBURG:  Do you have a case that

14   says that?  A Mexican case that says that?

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

16   that, but neither Petitioner nor their many amici have

17   been able to point to a single instance.

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

19             MR. CRUZ:  Given that these treaties are

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

21   nation has accorded binding force to ICJ --

22             JUSTICE BREYER:  Maybe these other nations

23   have an inquisitorial system where an investigating

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

25   dossier and the investigating judge and the prosecution

53

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

2                MR. CRUZ:  Justice --

3                JUSTICE BREYER:  You know that doesn't

4    happen?

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

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

7    peculiar nature of this.  Procedural default only --

8                JUSTICE BREYER:  No, I --

9                MR. CRUZ:  -- matters in a system like the

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

11   apple.  Most other countries don't allow criminal

12   defendants to relitigate criminal matters, in which case

13   procedural default matters.  The other countries simply

14   deny it altogether.

15               JUSTICE BREYER:  Of course it matters.  But

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

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

18   telling you to set aside a procedural default rule.

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

20   the United States' own choosing, review and

21   reconsideration of the convictions and sentences by

22   taking account of the violation of rights.

23               And throughout they ask -- when you decided

24   whether the person was really prejudiced, when you

25   decided whether there had been forfeiture of the rights,

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

2   might not have raised them was because he knew nothing

3   about them and his lawyer knew nothing about them,

4   because nobody ever told either about them?  In which

5   case there might be a causal connection.

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

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

8   read our opinion and keeping this in mind.

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

10  your question goes back to Justice Ginsburg's question

11  about the effect of an ICJ decision.

12             The legal -- legal adviser to the State

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

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

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

16  enforcement of such decisions.  And one fascinating

17  example of this is the entire debate over the Connally

18  Amendment.  One can look in the entire course of

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

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

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

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

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

24  might be independently enforceable.  Nobody discussing

25  that understood it that way.

1          JUSTICE SCALIA:  Once again, there is a

2  constitutional problem, is there not, if they are

3  automatically enforceable?

4          MR. CRUZ:  Absolutely.

5          JUSTICE SCALIA:  That is conferring upon the

6  ICJ the responsibility to decide the meaning of a United

7  States treaty which is United States law.

8          MR. CRUZ:  Absolutely --

9          JUSTICE SCALIA:  I'm rather jealous of that

10  power.

11          (Laughter.)

12          JUSTICE SCALIA:  I think it belongs in this

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

14  there is no problem.

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

16  House pass a law which the President -- it doesn't

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

18  memorandum to his Attorney General, but it does become

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

20          MR. CRUZ:  And that --

21          JUSTICE SCALIA:  That solves the

22  constitutional problem, but in the situation we're

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

24  allow some international court to decide what is the

25  responsibility of this Court, which is the meaning of

1   United States law.

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

3   correct.

4             JUSTICE BREYER:  And how does the WTO

5   differ?

6             MR. CRUZ:  The imperative --

7             JUSTICE BREYER:  How does the WTO and NAFTA

8   and all our trade agreements differ?

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

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

11   is also adjudicating specific factual questions that

12   dealing with the application of facts to a particular

13   circumstance.  It's not interpreting the treaty and

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

15   underlying Federal law means.

16             JUSTICE KENNEDY:  And the United States

17   apparently accepts the verdict of those -- those courts.

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

19   choose not to.

20             JUSTICE KENNEDY:  You have three different

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

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

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

24   Vienna Convention itself.

25             And the only question I have that I need

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

2   doesn't interrupt the train of your argument.

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

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

5   States to conform to the consular notification

6   provision.

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

8           JUSTICE KENNEDY:  Suppose you have a judge

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

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

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

12  you mandate that -- assuming State procedures allow him

13  any -- couldn't you mandate that judge to require him to

14  allow the notification to take place?

15          MR. CRUZ:  The consequence of the argument

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

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

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

19          MR. CRUZ:  Yes.

20          And so in that circumstance, it would mean,

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

22  individual defendant would not have an appealable legal

23  error.

24          JUSTICE KENNEDY:  If I thought he did, would

25  I still have to rule against you?

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

2     this Court did in Breard and Sanchez-Llamas, it assumed

3     that the Vienna Convention created individual rights.

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

5     identical outcome.  Because even assuming we are

6     incorrect concerning individual rights, the

7     Sanchez-Llamas holding is that procedural default

8     respects those rights just as fully as it respects

9     constitutional rights.

10          JUSTICE GINSBURG:  But Sanchez --

11          JUSTICE KENNEDY:  Could I make a distinction

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

13     hypothetical and a demand that the procedural framework

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

15     cases, do you think?

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

17     also in your hypothetical, your hypothetical assumes a --

18     a deliberate violation of the law which no one suggests

19     here rather than inadvertence.  And inadvertence

20     complied with, as you suggested earlier, no prejudice

21     whatsoever.  And there has -- both the Federal and

22     State court that looked at this concluded that there

23     was no even arguable prejudice from the violation.

24          JUSTICE GINSBURG:  Mr. Cruz --

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

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

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

3    whether the -- whether it was a correct interpretation

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

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

6    this Court disagreed with its legal analysis?

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

8    because I do not believe consistent with Article III

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

10             JUSTICE STEVENS:  How is it given away to a

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

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

13   wrong?  Is it giving away its judicial authority by

14   obeying the Full Faith and Credit Clause?

15             MR. CRUZ:  That is provided by the

16   Constitution.  And in this instance, giving any other

17   entity the authority to make a conclusive determination

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

19   III power.

20             JUSTICE GINSBURG:  Are you saying that even

21   -- the United States --

22             JUSTICE STEVENS:  Even if it was agreed by

23   treaty to give it conclusive effect?

24             MR. CRUZ:  If the Senate agreed that this

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

1    the Presidency and Congress working together.  But even

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

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

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

5    another body.

6              JUSTICE GINSBURG:  Then we couldn't have a

7    treaty with another country on the mutual recognition

8    and enforcement of judgments, because the other country

9    might get it wrong, we might disagree with its

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

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

12   advantage of a reciprocal guarantee that our judgments

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

14   judgments.

15             MR. CRUZ:  In enforcing foreign judgments,

16   the foreign court is not purporting to make a definitive

17   determination of U.S. law.

18             JUSTICE GINSBURG:  It may be that if the

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

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

21   wrong.  Still, it's always been that you don't look behind

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

23   not going to apply that wrong interpretation. But here

24   I'm bound by a judgment.

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

1    heavy use of Sanchez-Llamas.  I agreed with the Court in

2    that case because it was a question of interpretation.

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

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

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

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

7    recognize in your brief.

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

9    consistent position of the United States for over four

10   decades from the day this treaty was ratified that the

11   Optional Protocol was not self-executing, was not

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

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

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

15   And the power to transform a non-self --

16             JUSTICE GINSBURG:  I thought you said

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

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

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

20   a matter of goodwill?

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

22   correct.  And the President had a number of

23   constitutional means at his disposal to comply, had he

24   chosen.  The --  but just --

25             JUSTICE GINSBURG:  What else?  What could --

1    other than -- I mean, the most logical place to have this

2    go on is the courts that rendered the judgment.  It's always

3    better for the court that rendered the judgment than

4    some foreign court or another State court.

5              So what else could the President do?  The

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

7    the President chose the most logical forum, but what

8    else could he have done?

9              MR. CRUZ:  There are three avenues that the

10   President could have chosen that would have been

11   constitutional.  The first of which he could have gone

12   to Congress and proposed a statute amending the AEDPA to

13   allow Federal habeas review.

14             The second is he could have negotiated a

15   treaty, submitted it to the --

16             JUSTICE GINSBURG:  Let's start with the

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

18   It's a State judgment that's in question.

19             MR. CRUZ:  This Court has made clear that

20   the Federal Government cannot expand the jurisdiction of

21   the State courts.  There is a State statute --

22             JUSTICE GINSBURG:  But you can have the

23   Federal court overseeing the State court and telling the

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

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

1    State courts, you do it.

2              MR. CRUZ:  Well, and --

3              JUSTICE GINSBURG:  -- or to say Federal

4    courts, you do it.

5              MR. CRUZ:  A corollary --

6              JUSTICE SCALIA:  A lot of people think

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

8    habeas jurisdiction quite improperly.  But it happens

9    every day, doesn't it?

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

11   is Congress could pass a statute creating a Federal

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

13   the principles of Testa versus Katt would have to be

14   respected in the State courts.

15             JUSTICE GINSBURG:  Who would be doing the

16   review?

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

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

19   Federal courts would give review.  Interestingly enough,

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

21   jurisdictional bar because the Texas jurisdictional bar

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

23   passed a new law there would be jurisdiction to raise

24   it on successive habeas.

25             JUSTICE GINSBURG:  A law passed by Congress

1 saying Texas dispense with your procedural bar rule?

2          MR. CRUZ:  A law passed by Congress saying

3 in order to give effect to the Avena judgment, the 51

4 Mexican nationals at issue shall be entitled to review

5 and reconsideration of whether there was prejudice from

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

7 respected equally.

8          And I would suggest actually Testa v. Katt,

9 which Petitioner uses, is actually a case that powerfully

10 supports Texas, because the principle of Testa versus

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

12 equally in Federal courts and State courts.  And the

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

14          This is a very curious assertion of

15 Presidential power.  Because the Presidential power is

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

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

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

19 Federal mandate that falls only on the States, singles

20 out the States, and commandeers those judges.

21          In over 200 years of our nation's history

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

23 directly to the State courts and State judges.

24          JUSTICE GINSBURG:  So what's absent in your

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

1   been done --

2          MR. CRUZ:  Absolutely.

3          JUSTICE GINSBURG:  -- and Texas could have

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

5   authority to do it just on the basis of the ICJ decision.

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

7   powerful parallel is the decision of this Court last

8   term in Hamdan.  In Hamdan, the President was at the

9   height of his war powers authority.  And nonetheless,

10  this Court concluded that he could not act contrary to

11  the will of Congress.

12          Here his interests are far less than

13  prosecuting war, and yet he is asserting the authority

14  to go it alone, despite a consistent stream of

15  congressional disapproval, both in ratifying these

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

17  in passing the AEDPA.

18          JUSTICE GINSBURG:  The not self-executing in

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

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

21  letter from the current -- the then current legal

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

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

24  Federal, and that the President has directed Oklahoma to

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

1    the other officials.

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

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

4    candid in what they are doing.  The Department to its

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

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

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

8    sufficient to create a binding legal rule.

9              The Department is not hiding what they're

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

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

12   saying a two-paragraph memorandum from the President to

13   a member of the Cabinet is binding Federal law.

14             JUSTICE GINSBURG:  Which -- which letter are

15   you quoting?  Are you quoting --

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

17   brief in this proceeding, page 6 of the brief.  And

18   actually page 5, it also describes the President's power

19   as "establishing binding rules of decisions that preempt

20   contrary State law."

21             If that is correct, there is no reason why

22   the President could not have directed his memorandum to

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

24   that is an extraordinarily broad power to be asserted on

25   behalf of the Executive.

1          JUSTICE SOUTER:  Mr. Cruz, you have

2     frequently emphasized the non-self-executing character

3     of the Optional Protocol.

4          Is there any rule, any positive rule in

5     existence today, either of international law or of

6     domestic law, that precludes this Court from being the

7     implementing authority as opposed to the Executive or

8     the Executive and the Senate?

9          MR. CRUZ:  This Court has the final

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

11    this Court determined that that's what the treaties

12    required, then that would be Federal law.  Now I would

13    suggest that would require overruling Sanchez-Llamas.

14          JUSTICE SOUTER:  These treaties including

15    the Optional Protocol.

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

17    reached that conclusion it would be an error.  But --

18          JUSTICE SCALIA:  I think you misunderstood.

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

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

21          JUSTICE SOUTER:  That's right.  Yes.

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

23    illegitimate for the Court to do so.

24          JUSTICE SOUTER:  Why?

25          MR. CRUZ:  Because --

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

2    the positive rule of international and domestic law that

3    precludes it?

4          MR. CRUZ:  The rule is the constitutional

5    rule, that the President makes treaty and the Senate

6    advises and consents.  And the limitation --

7          JUSTICE SOUTER:  They've made the treaty.

8    We have got the Optional Protocol.  Whatever the

9    Optional Protocol means, it is Federal law.

10          MR. CRUZ:  The limitations that the Senate

11   puts on it are as much a part of the treaty as the treaty

12   itself, and the consequence of something being --

13          JUSTICE SOUTER:  Yes, but you're -- my point

14   is I'm accepting as a premise of the question the

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

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

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

18   precludes this Court from that role?

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

20   judgment it would be usurping the role of Congress.

21          JUSTICE SOUTER:  All right.

22          MR. CRUZ:  Because the essence of the

23   decision --

24          JUSTICE SOUTER:  I don't mean to be

25   disrespectful of your judgment but what do you base it

1   on -- tradition?

2           MR. CRUZ:  The essence of the decision by

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

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

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

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

7   non-self-executing, they mean you got to come back to

8   us?  That's what the term means.

9           MR. CRUZ:  That's exactly what it means.  That

10  if you want to change U.S. law, come to Congress.

11          JUSTICE SCALIA:  They mean that it does not

12  automatically become part of United States law.

13          MR. CRUZ:  Indeed.

14          JUSTICE SCALIA:  And it follows from that,

15  that you have to change United States law.

16          MR. CRUZ:  Exactly.

17          JUSTICE SCALIA:  And it is not the function

18  of this Court to change United States law.

19          MR. CRUZ:  That's precisely correct.

20          JUSTICE BREYER:  If you assume it is

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

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

23  sense of saying Texas do that over -- he had other routes.

24          I assume the reason he asked Texas to have

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

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

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

3  didn't seem to be any evidence.  In respect to their

4  finding that there was no prejudice, they said well, he

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

6  of trouble, I think.

7          MR. CRUZ:  He had two lawyers, actually.

8          JUSTICE BREYER:  He had two lawyers.  One

9  got into trouble, and the other didn't? I don't know the

10 facts.

11         MR. CRUZ:  And they vigorously defended him.

12         JUSTICE BREYER:  Okay, they vigorously

13 defended him.

14         MR. CRUZ:  The only argument --

15         JUSTICE BREYER:  Fine.  Fine.  My point is

16 there's no evidence of that.

17         MR. CRUZ:  With respect, Justice Breyer,

18 there actually is.

19         JUSTICE BREYER:  There is?  In the first

20 habeas hearing?

21         MR. CRUZ:  The evidence there is --

22         JUSTICE BREYER:  I read the whole thing.

23         MR. CRUZ:  -- and it is in our appendix --

24 is an affidavit from the Mexican consulate.  Once the

25 Mexican consulate started assisting Medellin, they prepared

1  an affidavit, and the affidavit said if we had been

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

3  would have told you to get a lawyer.  Now, the problem with

4  that is Medellin confessed within about three hours of

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

6  notification had to occur within 72 hours.

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

8  evidence at the first habeas hearing that led the

9  district judge to reach his conclusion that there was no

10 prejudice and that the procedural default was not

11 excused.  It's in that hearing that I didn't see what

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

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

14 easiest for Texas to go back to that.

15        MR. CRUZ:  Justice Breyer, that affidavit was

16 part of the State-court record, and it was the basis for

17 saying there was no prejudice.

18        JUSTICE BREYER:  It was in the first

19 hearing?

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

21 included in our appendix.

22        JUSTICE BREYER:  So you think there was no

23 reason for the ICJ to ask Texas to do it?

24        MR. CRUZ:  It is difficult to explain.

25        CHIEF JUSTICE ROBERTS:  Was the basis for

1    the determination of no prejudice the fact that the

2    Petitioner in this case had received full Miranda

3    warnings, which went beyond what the consulate was going

4    to tell him?

5              MR. CRUZ:  I think that is completely correct,

6    and he waived those in writing.

7              JUSTICE SCALIA:  And he had lived in this

8    country for how long?

9              MR. CRUZ:  Practically his entire life.

10   Wrote and read English and was educated in American

11   public schools.

12             JUSTICE BREYER:  And what did happen to the

13   lawyers that Texas gave him?

14             MR. CRUZ:  Both of them vigorously defended

15   him, and in Medellin I we devoted several pages of our

16   brief to going through in considerable detail the many

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

18   they failed to raise this particular claim.

19             JUSTICE BREYER:  And so they haven't been

20   penalized --

21             JUSTICE STEVENS:  Suppose the Texas Court --

22   the Texas Court of Criminal Appeals didn't adopt the simple

23   solution to the case, to say he got all the protections;

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

25   treaty violation.

1        MR. CRUZ:  The Texas Court of Criminal

2   Appeals didn't have at its option to say, it would have

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

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

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

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

7   divests it of jurisdiction unless there is new Federal

8   law.

9        JUSTICE STEVENS:  Yes, but that statute

10  really would not have divested it  -- if I understand

11  the Texas law correctly -- if you did agree -- which you

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

13  obligation to honor judgments of the ICJ, then under

14  the Testa v. Katt principle and the Howlett opinion and

15  others, the Texas court would have had jurisdiction.

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

17  would suggest, in considerable tension if not directly

18  contrary to Sanchez-Llamas.

19        JUSTICE STEVENS:  Well, but Sanchez-Llamas

20  doesn't deal with the judgment.  And if there is a

21  separate Federal obligation --

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

23  United States as Texas.

24        JUSTICE STEVENS:  Then I think the Texas --

25  there would be jurisdiction in the Texas court to

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

2    that?

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

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

5              JUSTICE STEVENS:  It would be a new

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

7    the Chief Justice's opinion in that case.

8              MR. CRUZ:  Let me point out one consequence

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

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

11   -- putting the President's assertion to one side,

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

13   vigorously don't -- that there were a preexisting

14   Federal obligation -- an obligation of the United States

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

16   think is wrong as a matter of international law because we

17   have previously construed the treaty to the contrary --

18   but if there were an independent obligation to expect --

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

20   me that that obligation could be enforced in Federal

21   court.

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

23   Justice Stevens.

24             JUSTICE STEVENS:  You don't.

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

1    the premise.

2              JUSTICE STEVENS:  Yes.

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

4    don't disagree with the conclusion.

5              The statute allows jurisdiction where there

6    is a new legal basis that was not previously

7    available.  The only two potential sources of that

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

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

10   and, in fact, it is worth underscoring that if the United

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

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

13   If the President has the authority to take a

14   non-self-executing international law treaty and order it

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

16   contrary --

17             JUSTICE GINSBURG:  Yes, there is.  We have

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

19   Article 36 means, we disagree with the ICJ.

20             MR. CRUZ:  I agree with you, Justice

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

22   States believes that the President has the authority to

23   make decisions to implement treaties -- an

24   independent authority to create new binding law, even

25   though the obligation is not self-executing.

1          CHIEF JUSTICE ROBERTS:  Thank you.

2          JUSTICE KENNEDY:  How many parties to

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

4   Texas?

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

6   the State of Texas.  There are now 14 because one was

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

8   States across the country.

9          JUSTICE GINSBURG:  And Oklahoma has taken

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

11   review and reconsideration?

12          MR. CRUZ:  That's correct.

13          JUSTICE GINSBURG:  And has any other State

14   acted?

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

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

17   44.  For various reasons these individuals are not on

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

19   Avena decision.

20          CHIEF JUSTICE ROBERTS:  Well, the fact that

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

22   because the judgment of the ICJ purports to vacate the

23   convictions as well; isn't that correct?

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

25   fact, in paragraph 34 of Avena it asserted the authority

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

2  hypotheticals coming from bench, under the ICJ --

3          JUSTICE GINSBURG:  I thought the ICJ flatly

4  refused Mexican -- Mexico said ICJ annulled the

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

6  either.  It just said give reconsideration to

7  see whether there was prejudice.

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

9  that they did not order the annulment.  But in paragraph

10  34 they asserted they could order the annulment.  They

11  simply were choosing --

12          CHIEF JUSTICE ROBERTS:  I'm looking at page

13  --

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

15          CHIEF JUSTICE ROBERTS:  I'm looking at page

16  186.  They require review and reconsideration of the

17  conviction and sentence.

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

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

20  that their statute does not allow them to have precedent

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

22          The fact that the court's ruling has concerned

23  only Mexican nationals cannot be taken to imply the

24  conclusion reached in the present judgment do not apply

25  to other foreign nationals finding themselves in similar

1    situations.  They were in an unprecedented act reporting

2    the authority to bind U.S. courts in a way, to the best

3    of my knowledge, no --

4              JUSTICE GINSBURG:  Their very own statute,

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

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

7    particular case.  It has no precedential effect for

8    other cases, not even within the ICJ.

9              MR. CRUZ:  But they can issue a decision

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

11   they issued --

12             JUSTICE GINSBURG:  Has that ever happened?

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

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

15   the Security Council there.

16             JUSTICE GINSBURG:  And the U.S. exercised

17   its veto.

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

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

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

21   courts will enforce it.

22             Indeed, if the ICJ had asserted the power it

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

24   theory the President presumably could have issued an

25   order effectively pardoning State prisoners despite the

1   fact that the Constitution limits his pardon authority

2   to Federal crimes.

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

4           Mr. Donovan, you have five minutes.

5           REBUTTAL ARGUMENT OF DONALD F. DONOVAN

6                 ON BEHALF OF THE PETITIONER

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

8           First, there is nothing in the ratification

9   history that suggests that anybody made any assumptions

10  about whether or not the Optional Protocol would be

11  self-executing.  The Connally Amendment went to the

12  compulsory jurisdiction of the ICJ, and the discussion

13  to which Texas has referred is entirely about the

14  international ramifications.

15          In fact, the Senate specifically declined to

16  apply the Connally Amendment to the Optional Protocol.

17  So that gets to the question that we have been

18  discussing here, which is:

19          What is the scope of the enforceability of

20  an ICJ judgment?  There are obviously constraints to

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

22  hypothetical.  That is, there are affirmative

23  constraints in the Constitution, itself.

24          The second is illustrated by a point I made,

25  but I think Mr. Cruz misunderstood, which is if the nature

1    of the obligation emanating from the judgment is directed

2    at a constitutional branch such as the obligation to

3    enforce -- to comply -- enact a statute.  Obviously, that

4    is not enforceable in court.

5              If the nature of the obligation is to cease

6    hostilities, that is obviously directed to the President

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

8    by the Nicaragua case in which the ICJ issued a

9    judgment.  Congress passed a statute that it wasn't

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

11   to comply.

12             That, in turn, applies to the third

13   constraint, which is the political constraint, itself.

14   The Nicaragua case illustrates that if the ICJ issues a

15   judgment that the United States does not want to comply

16   with, Congress can pass a statute and say we repudiate

17   the obligation.

18             So the obligations that we are talking about

19   here in which the ICJ judgment would be enforceable by

20   an individual fall squarely in the class of cases that

21   this Court has decided for two centuries where an

22   individual has a right conferred by a statute.

23             And he walks into a court, and he asks

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

25   right in -- as in the Asakura case, the Roucher case,

1    cases going back to the founding.

2              And this Court has said when the right is of

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

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

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

6    eminently suitable to judicial enforcement because it

7    goes to the judicial process, itself.

8              The second point with respect to Article

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

10   enforce -- gives away its Article III authority when

11   somebody else enforces a judgment.  We know from the

12   Comegys and La Abra cases that we have cited that the

13   Court has in fact said that when the U.S. submits a case

14   to international adjudication, that international

15   adjudication is binding and it's not reexaminable in a

16   U.S. court.

17             CHIEF JUSTICE ROBERTS:  I read the Comegys

18   case, however you say it, to be for the exact opposite

19   proposition.  There they were simply saying, this is an

20   international arbitration, there's no reason to go

21   behind it.

22             But the question of whether or not that

23   arbitration is binding in the bankruptcy proceeding that

24   was at issue there was very much one for the U.S.

25   Supreme Court to make.

1      MR. DONOVAN:  But that's because that was

2  not part of what the court had actually decided, or

3  rather that the international adjudication had actually

4  decided.  I mean, you could think about -- if the

5  proposition that nobody else but an Article III court

6  can decide a Federal question, this Court could not have

7  decided Mitsubishi.  In Mitsubishi the Court sent Federal

8  statutory antitrust claims to an arbitration panel in

9  Tokyo and said that the result would be enforceable

10  so long as the panel actually took cognizance

11  of the claim and actually decided it.

12      This Court if it evaluated the claim that

13  Mr. Medellin is entitled to review and reconsideration

14  as a result of the treaty obligation under 94(1) and the

15  President's determination that that treaty obligation

16  will be given effect, this Court would be performing a

17  supremely judicial function, that is it would be

18  interpreting and applying Federal law in the form of a

19  statute, which is exactly what the Supremacy Clause

20  requests the Court to do.

21      With respect to review and --

22      JUSTICE SCALIA:  Put precisely, it would be

23  making it Federal law and then applying it.  If you

24  assume it's not self-executing, somebody has to make it

25  to domestic law.  Now, Congress can obviously do that by

1    passing a law.

2              But you're saying the Court can do it, can

3    make it domestic law and then enforce it.

4              MR. DONOVAN: That assumes that it is not

5    self-executing.  The whole question here is --

6              JUSTICE SCALIA:  Yes, yes, yes.

7              MR. DONOVAN:  -- when we're talking about

8    self-executing here we're saying what branch is the

9    obligation directed to.  And what the Court has said

10   time and time again is when the obligation is of a

11   nature to be enforced in a court of justice it is

12   directed to the judicial authority.

13             JUSTICE SOUTER:  Then what you are saying if

14   I understand you is that Justice Scalia was wrong when

15   he said that would be making it Federal law.  I think

16   you were saying that would be a -- the branch that was

17   responsible for determining how to execute, i.e., to

18   apply, Federal law.  Is that your point?

19             MR. DONOVAN:  That's exactly right.  The

20   thing that makes the treaty Federal law is not the

21   Court; it's the Supremacy Clause, which makes it supreme

22   Federal law.

23             CHIEF JUSTICE ROBERTS:  What is the

24   authority -- I'll get back to where I started.  I

25   understood you to concede that we would have authority

1    to construe the judgment if it provided, for example,

2    for a punitive sanction against the officers.  What is

3    the basis under your theory for that authority?

4               MR. DONOVAN:  Well, it's settled that a

5    treaty cannot contravene an affirmative constitutional

6    obligation.  There would be -- if there was -- if the

7    ICJ judgment --

8               CHIEF JUSTICE ROBERTS:  But it can -- it can

9    contravene our interpretation of the treaty as a matter

10   of Federal law.

11              MR. DONOVAN:  There are two different treaty

12   obligations.  There's a treaty obligation under the

13   Vienna Convention, which this Court has now

14   dispositively interpreted, and there's a treaty

15   obligation to comply.  And it's the very nature of an

16   obligation to put a dispute to a third party that you

17   may not agree with the result, and that does not in any

18   way compromise this Court's Article III authority to

19   rest that judgment on an obligation committed to by the

20   political branches, three treaties ratified by the

21   President and Senate that said when this country commits

22   itself to do something we're going to do it.  Now we

23   have the President of the United States saying that it's

24   in the paramount interests of the United States for

25   purposes of enforcing --

1              CHIEF JUSTICE ROBERTS:  Do we have the

2    authority to interpret the judgment of the ICJ?

3              MR. DONOVAN:  The courts in enforcing that

4    judgment would.  Of course that would be part of the

5    judicial enterprise.  The applicable instrument is now

6    the Avena judgment, pursuant to the treaties and the

7    President's determination, independent sources.  In

8    applying that judgment, there may well be interpretive

9    questions because the Avena judgment lays down standards

10   and requires obligations and that would be part of the

11   judicial enterprise.

12             CHIEF JUSTICE ROBERTS:  So we have the

13   authority to interpret it, we have the authority to

14   construe whether it's contrary to the Constitution,

15   but we do not the authority to consider whether it's

16   consistent with Federal law?

17             MR. DONOVAN:  That's right, because that's

18   the very nature of enforcing a judgment:  You do not

19   reexamine the merits.  You take the judgment and you

20   enforce the judgment.  And if the judicial enterprise

21   to construe what that -- it may be a question about

22   construing that -- what that instrument requires, what

23   that judgment requires.  But it's the judicial function

24   in enforcing the judgment that calls upon this Article

25   -- the Court's Article III authority, and does not in

1   any way compromise it, which in turn goes to the

2   question about what the judgment itself requires.  It

3   requires prospective review and reconsideration.  The Texas

4   court didn't suggest that Mr. Medellin had received review

5   and reconsideration.  The ICJ made it clear that it had to

6   be prospective, and one of the fundamental reasons for

7   that is because the judgment says that the treaty right

8   has to be determined on it own.  Mr. Medellin is

9   entitled to show that the violation of the treaty

10  standing on its own two feet and not filtered through a

11  constitutional right affected -- that he is entitled to

12  show prejudice.

13              CHIEF JUSTICE ROBERTS:  Thank you,

14  Mr. Donovan.

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

16              CHIEF JUSTICE ROBERTS:  The case is

17  submitted.

18              (Whereupon, at 11:30 a.m., the case in the

19  above-entitled matter was submitted.)

20

21

22

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24

25

## A

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