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4	On behalf of the Petitioner
5	GEN. PAUL D. CLEMENT, ESQ.
6	On behalf of the United States, as amicus
7	curiae, supporting Petitioner
8	R. TED CRUZ, ESQ.
9	On behalf of the Respondent
10	REBUTTAL ARGUMENT OF
11	DONALD F. DONOVAN, ESQ.
12	On behalf of the Petitioner
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument
this morning in Case 06-984, Medellin v. Texas.

Mr. Donovan.

ORAL ARGUMENT OF DONALD F. DONOVAN

ON BEHALF OF THE PETITIONER

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

The President and the Senate entered into
three treaties, the Optional Protocol, the UN Charter,
and the ICJ Statute, by which the United States agreed
that it would comply with the ICJ's decision in any case
to which it was a party. We now have such a decision,
and the President of the United States has determined
that the United States should comply.

Texas, however, tells this Court that it
should tell the world that the framers left us a
Constitution in which neither this Court nor the
President nor maybe even Congress could ensure that the
United States kept the promise that its elected
representatives made to its treaty partners. Texas's
position is directly contrary to the constitutional
design.

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 if that obligation --

9 CHIEF JUSTICE ROBERTS: Even if we
10 determine, even if we determine that that judgment is
11 based on a legal error?

12 MR. DONOVAN: The question -- that's the
13 basis of submitting a dispute to a third-party
14 dispute-resolution mechanism, yes.

15 CHIEF JUSTICE ROBERTS: So if the ICJ
16 determined that the officers should each go to jail for
17 5 years, we would have no basis for reviewing that
18 judgment?

19 MR. DONOVAN: Wel, that would be -- well,
20 that would be a -- raise a separate obstacle. If I may
21 answer the questions in turn, first --

22 JUSTICE GINSBURG: Does the ICJ ever issue a
23 judgment of that character? It issues a judgment
24 between two nations, two or more nations, and it is
25 instructs the United States to do something. I'm not

1 aware of any -- any decision of the ICJ that says what a
2 sentence should be for a particular individual.

3 MR. DONOVAN: That is correct. The ICJ
4 decides disputes between nations, but those disputes may
5 involve the nations' obligation as to specific
6 individuals. In this case --

7 JUSTICE KENNEDY: Well, I'm still interested
8 in the answer to the Chief Justice's hypothetical.

9 MR. DONOVAN: Well, as I say, there are two
10 --

11 JUSTICE KENNEDY: Suppose the court acts
12 beyond, clearly beyond, its jurisdiction?

13 MR. DONOVAN: Well, it's -- with respect,
14 there's no suggestion here that the court has acted
15 beyond its jurisdiction. Indeed, the President has
16 determined otherwise.

17 JUSTICE KENNEDY: Could you answer the
18 hypothetical, please.

19 MR. DONOVAN: But if the court, itself -- if
20 the ICJ, itself, made a determination as to a dispute
21 that is within its jurisdiction and that imposes an
22 obligation that is within this Court's provenance to
23 enforce, that is, that it determines the rights
24 attributable -- enforceable within a court of justice,
25 this Court would be enforcing the obligation to comply.

1 It wouldn't -- the fact that it diverged
2 from the court's own interpretation, for example, here
3 in Sanchez-Llamas, is not relevant to the treaty
4 obligation that this Court is exercising --

5 CHIEF JUSTICE ROBERTS: I'm sorry. I'm
6 still looking for an answer to the hypothetical. What
7 would be the basis for this Court's reviewing the ICJ's
8 determination that officers should go to jail for 5
9 years?

10 MR. DONOVAN: Because in that situation that
11 may be beyond the Court's -- the executive power of the
12 Court. What the Court would be doing is determining
13 the rights attributable to --

14 CHIEF JUSTICE ROBERTS: The Court doesn't
15 have executive power. It has judicial power. It's
16 already exercised that judicial power in Sanchez-Llamas
17 in determining the meaning of this treaty.

18 And I understood your position to be that we
19 have no authority to construe the treaty in this case
20 because a judgment was issued by the International Court
21 of Justice.

22 MR. DONOVAN: The -- the question here is
23 that the --the Court would be exercising its judicial
24 authority to construe the United States's obligation to
25 comply with the judgment. The nature of that

1 obligation, itself, could be one that would be
2 enforceable, in this Court's words, "in a court of
3 justice;" and that's the nature of this obligation. Mr.
4 Medellin gets a review and reconsideration.

5 In the Chief Justice's hypothetical, that
6 may well be an obligation that would be enforceable by
7 other actors that would -- which would not be directly
8 enforceable in a court as here.

9 JUSTICE BREYER: I thought --

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

11 JUSTICE BREYER: I thought the question --
12 and I apologize if I'm not paraphrasing it because I
13 have my own. This has arisen frequently. Brussels has
14 a treaty, and that treaty binds all the member nations,
15 and supreme courts of various nations have come up
16 against this problem:

17 What would happen if the Brussels court or
18 the EU court insists under the treaty that we do
19 something that violates our own Constitution? I think
20 this is an example of that. And the answer typically
21 has been: Well, we'd follow our own Constitution, at
22 least if it was a violation, what the EU said, of
23 fundamental human rights or destroyed some basic
24 structural part of our Constitution.

25 And the question that I would have is,

1 doesn't that kind of approach -- not exactly but that
2 kind of approach -- satisfy whatever problem there is in
3 this respect here?

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

5 JUSTICE BREYER: If the ICJ were to do
6 something which it had never done, like, say, put
7 everybody in jail for 50 years -- I don't know that
8 there is such a thing -- but suppose they did, if they
9 did, I guess that might violate something basic in our
10 Constitution, in which case we wouldn't enforce it.

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

12 JUSTICE BREYER: If we took that approach --

13 CHIEF JUSTICE ROBERTS: Now --

14 MR. DONOVAN: If there --

15 CHIEF JUSTICE ROBERTS: Just to get back,
16 you're conceding, I take it, whether the ICJ has done
17 something like this before or not -- and we can debate
18 whether what they've done in this case is precisely that
19 -- there is a role for this Court in determining whether
20 or not a judgment of the ICJ should be enforced.

21 MR. DONOVAN: There is surely because it's
22 this Court that would be enforcing the obligation to
23 comply. And just as a treaty cannot contravene an --

24 CHIEF JUSTICE ROBERTS: Just enforcing the
25 obligation to comply or, as we have in this case,

1 determining the legal basis for the ICJ determination?

2 MR. DONOVAN: There are -- there are two
3 different obligations here: There is an obligation
4 under the Vienna Convention itself, and this Court has
5 determined the dispositive effect of that obligation of
6 a matter of U.S. law. But there's a different
7 obligation. The President and the Senate agree to go to
8 a third party, to go to the International Court of
9 Justice, to resolve disputes. The very premise of that
10 obligation is that we might disagree with the
11 determination -- with the interpretation of the treaty,
12 and we agreed in that circumstance to comply with the --

13 JUSTICE KENNEDY: Suppose in this case the
14 President did the opposite -- the same facts only the
15 President said to Texas, do not comply with this
16 judgment.

17 MR. DONOVAN: Well, it -- that would -- it
18 would be inconsistent with this Court's duty and
19 obligation to comply, to enforce a treaty that the --
20 that the --

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

22 MR. DONOVAN: If the --

23 JUSTICE KENNEDY: -- determination is not
24 conclusive.

25 MR. DONOVAN: Well, the President's

1 determination -- what the President has determined here
2 is to enforce the treaty. He --

3 JUSTICE KENNEDY: My hypothetical is he's
4 coming out the other way. He says don't follow this
5 judgment. And you say he can't do that.

6 MR. DONOVAN: If --

7 JUSTICE KENNEDY: And I -- I think that
8 that's not -- not consistent with your earlier position.

9 MR. DONOVAN: Oh, if the President here --
10 the -- if there's an obligation here to comply and, in
11 the words this Court, it's "an obligation of a nature to
12 be enforced in a court of justice," and here the
13 obligation imposed by the ICJ and the Avena judgment is
14 an -- is an obligation --

15 JUSTICE ALITO: Isn't the obligation --

16 MR. DONOVAN: -- which essentially --

17 JUSTICE ALITO: Isn't the obligation that
18 the United States undertook when it signed the UN
19 Charter the obligation to undertake to comply with ICJ
20 judgments in accordance with its own constitutional
21 processes, not necessarily that any ICJ decision would
22 be regarded by any court in this country as binding
23 Federal law?

24 MR. DONOVAN: Well, it would be -- that --
25 that's exactly right. What the -- what the ICJ -- what

1 U.S. did is undertake to comply. So the question is,
2 what is the nature of the obligation imposed?

3 JUSTICE GINSBURG: If you had a --

4 MR. DONOVAN: It might have obligations --

5 JUSTICE GINSBURG: If you had a treaty on
6 the recognition and enforcement of judgments, mutual
7 recognition and enforcement, then we would enforce the
8 judgment that we agreed to enforce by treaty. We
9 wouldn't look behind it to see if we agreed with it on
10 the merits.

11 Are you saying that this undertaking, this
12 agreement to submit to the compulsory jurisdiction of
13 the ICJ gives the judgment in the particular case,
14 although not precedential effect, the counterpart to
15 full faith and credit?

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

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

20 MR. DONOVAN: It's --

21 JUSTICE SCALIA: I thought you -- you think
22 this treaty is self-enforcing. You don't really need
23 the President's order here.

24 MR. DONOVAN: Well, if the -- whether or not
25 the treaty obligation is self-executing or

1 self-enforcing goes to the nature of the obligation. If
2 the ICJ said -- if a treaty or an ICJ judgment said, go
3 pass a statute, that's obviously directed to Congress.
4 If it said cease hostilities, that's directed to the
5 President. But as this Court has said, when a treaty
6 or, by extension, a treaty obligation to comply with a
7 judgment is --

8 JUSTICE STEVENS: May I --

9 MR. DONOVAN: -- of a nature to be enforced
10 --

11 JUSTICE STEVENS: May ask this question? I
12 don't think you've answered the Chief Justice's original
13 hypothetical. It's easy, of course; they cannot compel
14 us to violate our Constitution by a judgment of their
15 kind. But what about the hypothetical that they said
16 the sentence for this man should be 5 years, not just
17 there be an investigation to see if he's been
18 prejudiced. Would we have to follow that judgment?

19 MR. DONOVAN: Well, in that situation, if it
20 was a judgment rendered in a case to which we had --

21 JUSTICE STEVENS: In this very case.

22 MR. DONOVAN: That would be --

23 JUSTICE STEVENS: This very case. Supposing
24 they had said the judgment is that Medellin should spend
25 5 years in jail and no more. Would we have to honor

1 that judgment?

2 MR. DONOVAN: In the first instance, yes,
3 the Court would honor that judgment as an obligation to
4 comply. But remember that there are --

5 JUSTICE GINSBURG: Then it becomes --

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

7 JUSTICE GINSBURG: Then it becomes a penal
8 judgment, and I thought the rule was that no country
9 forces -- enforces another country's penal judgment.

10 MR. DONOVAN: Well, that would depend on the
11 -- if -- how you construed the obligation to comply.

12 JUSTICE GINSBURG: But if we say --

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

14 JUSTICE GINSBURG: -- this man goes to jail
15 for 5 years, it seems to me that's a penal judgment.

16 MR. DONOVAN: If that was the nature of the
17 dispute that the United -- that is, of course, not the
18 nature of the dispute that the United States --

19 JUSTICE ALITO: What if they say --

20 MR. DONOVAN: But if he --

21 JUSTICE ALITO: -- he goes to jail for no
22 time at all? They say that the remedy for these
23 violations, in order to deter future violations, should
24 be that the charges should be dismissed and any future
25 prosecution should be barred. Would that be

1 automatically binding?

2 MR. DONOVAN: Well, the question is, is it
3 binding in the first instance because the -- there's an
4 obligation to comply? That doesn't say anything about,
5 for example, Congress's ability to repudiate that
6 obligation to comply, just like it has the obligation --
7 the authority as a last-in-time rule, pursuant to the
8 last-in-time rule, to repudiate any treaty obligation.
9 But the framers wanted treaties to be enforced in the
10 first instance when they were susceptible of judicial
11 enforcement, and if the ICJ renders a judgment pursuant
12 to our treaty obligation to submit disputes, that is of
13 a nature to be judicially enforced, then the Court --

14 CHIEF JUSTICE ROBERTS: Is the answer to --

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

16 CHIEF JUSTICE ROBERTS: Is the answer to
17 either my or Justice Stevens's hypothetical then, yes,
18 we do have to enforce an ICJ judgment of that sort?

19 MR. DONOVAN: You would enforce an ICJ
20 judgment that did in fact -- that was of a nature to be
21 enforced in -- in a judicial proceeding.

22 CHIEF JUSTICE ROBERTS: But --

23 JUSTICE SCALIA: This is not of a nature to
24 be enforced in a judicial proceeding in Texas. Texas
25 has procedural rules that disable the Texas court from

1 complying with the ICJ judgment here. Are you telling
2 me that the ICJ judgment empowers either Federal or
3 State courts to do things which -- which their laws do
4 not permit them to do?

5 MR. DONOVAN: If the -- both the President's
6 determination and the Article 94 obligation which result
7 in the Avena judgment are Federal law. The President's
8 determination pursuant to his State court authority and
9 Article II authority and the -- and the Avena judgment
10 pursuant to the treaty --

11 JUSTICE SCALIA: And -- and do you know of
12 any other Federal law that -- that interferes in the --
13 in the procedures of State criminal courts, directs them
14 as to what -- what procedures they have to have?

15 MR. DONOVAN: The Court has -- when there's
16 a Federal procedural rule that preempts a State
17 procedural rule, the Court allows that to preempt as a
18 Federal rule all the time.

19 JUSTICE SCALIA: Really?

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

21 JUSTICE SCALIA: Where? I don't know what
22 you're talking about unless you're talking about
23 constitutional requirements. Of course, those are
24 binding on the States. But you're saying that the
25 Federal Government can prescribe State court procedures

1 and authorize State courts to do things which -- which
2 the State government does not authorize them to do?

3 MR. DONOVAN: The Federal Government can
4 prescribe rules of decision that preempt Federal rules
5 and require the cases that other -- that would not
6 otherwise be heard to be heard. That's --

7 JUSTICE SOUTER: Well, you're -- you're --
8 as I understand it, in order for you to prevail on that
9 point, the only -- the only conclusion that has to be
10 drawn, as I understand it, is that the Texas courts have
11 subject matter jurisdiction of this kind of -- of order,
12 and that the bar that Texas is asserting is simply, in
13 effect, a procedural bar; and, therefore, in order for
14 this Federal rule to preempt the State bar is not to
15 give the State courts jurisdiction they don't have, but
16 to remove a bar to the exercise of their jurisdiction
17 that State law, absent preemption, would impose; is that
18 correct?

19 MR. DONOVAN: That's correct. That's right.
20 It removes a bar by preempting that bar.

21 JUSTICE ALITO: You just --

22 MR. DONOVAN: If I may --

23 JUSTICE ALITO: You just said that the Avena
24 decision is Federal law. How is the -- how is the Avena
25 decision itself a Federal law?

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 the treaty
7 obligation to comply with it under Article 94-1, or the
8 President's determination under his Article II authority
9 to require -- to determine that the United States should
10 comply. And by either one of those vehicles, in effect
11 the judgment becomes the --

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

13 MR. DONOVAN: -- the instrument by which it
14 must be complied with.

15 JUSTICE GINSBURG: You didn't mention the
16 Optional Protocol which is -- is where the United States
17 gave its promise. It voluntarily accepted this
18 jurisdiction. It didn't have to.

19 MR. DONOVAN: Well, that's right. It's the
20 combined force of the Optional Protocol and the UN
21 Charter and ICJ statute.

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

23 CHIEF JUSTICE ROBERTS: Well, why don't --
24 why don't you take 5 extra minutes? And we'll give you
25 your rebuttal time.

1 If the Avena judgment is binding as Federal
2 law, is it your position, though, that the -- this Court
3 has no authority to review the content of that Federal
4 law -- the judgment? Our choice is simply enforce it?

5 MR. DONOVAN: The relevant Federal law here
6 is the Federal law that says that the United States will
7 comply pursuant to its voluntary choice to submit
8 these -- this --

9 CHIEF JUSTICE ROBERTS: So we have no --

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

11 CHIEF JUSTICE ROBERTS: We have no authority
12 to review the judgment itself, even though the judgment
13 will have the effect as Federal law of preempting the
14 State law in this instance?

15 MR. DONOVAN: Well, you are in effect
16 applying Federal law in the form of the obligation to
17 comply. That's different than applying the Vienna
18 Convention --

19 CHIEF JUSTICE ROBERTS: Excuse me, but your
20 position is not that we are applying the obligation to
21 comply, because we interpreted that in Sanchez-Llamas
22 and came to the exact same conclusion as the ICG here.
23 What you're saying is it's different here because the
24 operative law is the judgment.

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

1 different because on the one hand, in Sanchez-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 Mexico nationals
11 have not received a hearing. It didn't say all of them.
12 And I have a problem, incidentally, because I think
13 Medellin did receive all the hearing that he's entitled
14 to under the judgment anyway.

15 Can we interpret the judgment in that
16 respect if it's ambiguous, not clear?

17 MR. DONOVAN: Well, in this case, the court
18 would be -- a court applying the Avena judgment either
19 by virtue of the Optional Protocol in 94-1 and the
20 President's determination would be in effect applying
21 Federal law. We think the judgments --

22 JUSTICE KENNEDY: Can we interpret the
23 judgment?

24 MR. DONOVAN: Well, to the extent necessary
25 to apply Federal law in the form of a judgment --

1 JUSTICE KENNEDY: And can the President
2 displace our authority to do that?

3 MR. DONOVAN: The President would not
4 displace the Court's authority to interpret a judgment,
5 no. What the President has said is that the judgment
6 shall be enforced. That's an independent source of
7 Federal law under his Article II --

8 CHIEF JUSTICE ROBERTS: So if he determines
9 that the judgment should not be enforced and this Court
10 determines, based on our construction of the treaty and
11 the judgment that it should be enforced, which
12 determination controls?

13 MR. DONOVAN: This Court -- to the extent
14 that this is Federal law, this Court has the ultimate
15 authority to determine whether or not it should be
16 complied with. And this Court -- the framers have made
17 treaties supreme Federal law specification so they could
18 be judicially enforceable.

19 CHIEF JUSTICE ROBERTS: Well, if we have the
20 authority to determine whether the treaty should be
21 complied with in the face of a presidential
22 determination, why don't we have the independent
23 authority to determine whether or not it should be
24 complied with at a matter of Federal law without regard
25 to the President's determination?

1 MR. DONOVAN: You have two separate and
2 independent sources of authority here. Without the
3 President's determination, this Court pursuant to the
4 mandate in the Supremacy Clause would apply the treaty
5 obligation to comply with the judgment because the
6 nature of the judgment is such to be enforced in a court
7 of justice. In this instance, you have an entirely
8 independent source of authority because the President in
9 the exercise of his Article II authority has determined
10 that it's in the paramount interest of the United States
11 to comply. That becomes a second object.

12 Of course, it would be a judicial function
13 to interpret the -- interpret those obligations,
14 interpret what the President meant. But in this case
15 it's crystal clear. The Avena judgment is mandatory and
16 prospective. The President is determined that it be
17 enforced, and that would be the result even had the
18 President not acted pursuant to the mandate of the
19 Supremacy Clause, which makes treatise enforceable
20 Federal law.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Donovan. We'll give you 5 minutes for your
23 rebuttal.

24 General Clement.

25 ORAL ARGUMENT OF GEN. PAUL D. CLEMENT.

1 ON BEHALF OF THE UNITED STATES AS
2 AMICUS CURIAE SUPPORTING THE PETITIONER
3 GENERAL CLEMENT: Mr. Chief Justice, and may
4 it please the Court:

5 JUSTICE SCALIA: You don't agree with the
6 last statement.

7 GENERAL CLEMENT: I don't think I do agree
8 with that and there's a couple of the issues here where
9 we take a slightly different take. Obviously we feel
10 the President's determination here that we will comply
11 with the Avena judgment is a critical element in why
12 there's an enforceable obligation --

13 JUSTICE SCALIA: We would have no --
14 according to you, we would have no obligation to enforce
15 this judgment but for the President's action?

16 GENERAL CLEMENT: That's correct, Justice
17 Scalia. Now, obviously, Mr. Donovan and his clients
18 could get here and ask you to enforce the judgment of it
19 own force without the President's determination and that
20 would ultimately be a question for this Court. We of
21 course --

22 JUSTICE SCALIA: We could decide to go back,
23 too. But would we have any authority to do it?

24 GENERAL CLEMENT: I hope that you wouldn't
25 and we would be up here saying don't, because if you

1 look at Article 94 of the UN Charter as a whole, it has
2 two components and I think it makes clear why the
3 President's intervening role here is important. 94-1
4 says that we undertake to comply with our obligations,
5 with our obligations to comply with the judgment. But
6 94-2 says what happens when a country doesn't do that.
7 It's a matter for the Security Council. And that, of
8 course, I think necessarily implies that countries do
9 retain the option to put themselves out of compliance
10 with an International Court of Justice judgment.

11 JUSTICE GINSBURG: But that would take an
12 action by somebody in the country.

13 GENERAL CLEMENT: Exactly, Justice Ginsburg,
14 and I think that --

15 JUSTICE GINSBURG: Here that hasn't -- that
16 hasn't happened. 94 would never be triggered because we
17 haven't said we're breaking our promise, we're not going
18 to comply.

19 GENERAL CLEMENT: Absolutely, and that's why
20 we're supporting Mr. Donovan.

21 JUSTICE SCALIA: Wait a minute. In order to
22 get it to the Security Council, you have to take some
23 affirmative action not to comply? It's just not enough
24 simply not to comply?

25 GENERAL CLEMENT: Whether it's an omission

1 or a commission I don't think is the point, Justice
2 Scalia. My point --

3 JUSTICE SCALIA: I thought that was the
4 point of Justice Ginsburg's comment, that there had been
5 no decision not to comply. Don't you need an
6 affirmative decision to comply?

7 GENERAL CLEMENT: I didn't take that to mean
8 --

9 JUSTICE GINSBURG: If you don't -- if you
10 don't comply, you don't comply. But we -- certainly not
11 -- in that situation here, the President said the United
12 States agreed that it would submit to the binding
13 jurisdiction for one case only, and we are bound by that
14 judgment and I'm going to enforce it.

15 GENERAL CLEMENT: I agree, I think the
16 omission-commission --

17 JUSTICE SCALIA: I know you agree, but it
18 depends on whether it's up to the President to make that
19 call. Usually when we have treaties that are not self-
20 enforcing the judgment of whether that international law
21 obligation shall be made domestic law is a judgment for
22 the Congress.

23 Congress passes a law to enforce the treaty,
24 and you're telling us that, well, we don't need the
25 Congress; the President can make a domestic law by

1 writing a memo to his attorney general.

2 GENERAL CLEMENT: Well, Justice Scalia, let
3 me take that in turn. Let me just first close the
4 discussion of what happened here by saying the reason I
5 think the commission-omission distinction doesn't have
6 much purchase here is because the President did make a
7 determination that we would comply. And I think if you
8 ask the question who makes the determination as to
9 whether we're going to default on our international law
10 obligations or comply, especially vis-a-vis the UN, the
11 answer to that question is quite clear: It's the
12 President, and Congress has acquiesced in that with the
13 UN Participation act at 22 U.S.C. 287.

14 CHIEF JUSTICE ROBERTS: What if the
15 President had said, we're going to comply with this
16 judgment, but in a different way than the ICJ
17 determined. We're going to comply by examining in each
18 case whether there's already been a determination of
19 prejudice, and if there has then there's no further
20 review, but if there hasn't then there'll be further
21 review. Would that be binding as a matter of Federal
22 law?

23 GENERAL CLEMENT: It depends exactly what
24 form that would take. I think part of the problem --
25 I'm stumbling with that question --

1 CHIEF JUSTICE ROBERTS: It's the same as a
2 memorandum just like -- it's a memorandum just like the
3 one we have here.

4 GENERAL CLEMENT: And what does it suggest
5 that is supposed to be done with the end product of that
6 determination?

7 CHIEF JUSTICE ROBERTS: It says that if there
8 has already been -- the State courts are to determine if
9 there's already been a determination of prejudice in the
10 case, and if there has there's to be no further review.
11 But if they determine there hasn't, there is to be
12 further review. That's different than the ICJ's
13 judgment, which suggests there should be a new
14 determination in every case.

15 Is that -- does that have the same status as
16 the memorandum here?

17 GENERAL CLEMENT: I would say that it
18 wouldn't -- I would say that it wouldn't, as you
19 suggest, not fully comply and not fully discharge with
20 our obligation.

21 But the extent to which we did and purported
22 to be doing that under compliance with the judgment, it
23 would have the same force as providing the rule of
24 decision, which, to get back to Justice Scalia's
25 question, especially in a context like this, is not so

1 unprecedented. It is not materially different from when
2 the President supplies the rule of decision in the
3 pre-FSIA practice by making a determination, binding on
4 the courts State and Federal, that somebody has
5 sovereign immunity.

6 JUSTICE ALITO: If we agree with you, would
7 the effect be that the President can take any treaty
8 that is ratified on the understanding that it's not
9 self-executing and execute the treaty and give it force
10 under domestic law?

11 GENERAL CLEMENT: No, Justice Alito, I don't
12 think the theory would sweep that broadly, and I think
13 that --

14 JUSTICE ALITO: Well, why would it not?

15 GENERAL CLEMENT: Well, first of all,
16 there's obviously a limiting principle in our theory,
17 which is to say that the President can't take any action
18 pursuant to this which is inconsistent with other
19 constitutional obligations.

20 CHIEF JUSTICE ROBERTS: But he can -- he can
21 take action that's inconsistent with the determination
22 of Federal law by this Court?

23 GENERAL CLEMENT: No, Mr. Chief Justice, I
24 don't think that's true.

25 CHIEF JUSTICE ROBERTS: I thought we

1 determined in Sanchez-Llamas that the treaty did not
2 mean what the ICJ said it means in this case.

3 GENERAL CLEMENT: That's exactly right as to
4 the Vienna Convention. But this case raises a question,
5 not about the proper interpretation of the Vienna
6 Convention, because as you remember we were four-square
7 with this Court on its interpretation of the Vienna
8 Convention in Sanchez-Llamas. The relevant treaties
9 here the Optional Protocol and the UN Charter, and the
10 question here is not the force of -- of the Avena
11 judgment as precedent --

12 CHIEF JUSTICE ROBERTS: Do you doubt that
13 the judgment here is based on a determination of the
14 Vienna Convention that's exactly the opposite of what we
15 determined last year?

16 GENERAL CLEMENT: No doubt at all, Mr. Chief
17 Justice. And we think with respect to anyone but the 51
18 individuals that are covered by the judgment that of
19 course this Court has the final word on the
20 interpretation of the Vienna Convention.

21 JUSTICE SCALIA: They were not
22 parties to it. What do you mean, "covered by the
23 judgment?" Is this some -- some new kind of new kind of
24 jurisdiction? If you're named in a suit by somebody
25 else, you somehow acquire rights under that suit? I

1 don't know of any such principle.

2 GENERAL CLEMENT: Justice Scalia --

3 JUSTICE SCALIA: These people were not
4 parties to the -- the countries were parties to the
5 judgment.

6 GENERAL CLEMENT: Of course the countries
7 were parties, but these 51 individuals' claims were
8 specifically adjudicated. Why were they specifically
9 adjudicate? Because they were effectively -- the claims
10 were espoused by the Mexican Government. That system --

11 JUSTICE GINSBURG: General, can we just
12 clarify something which I think is important? Justice
13 Scalia suggested that this wasn't self-executing. The
14 State Department with respect to the Vienna Convention
15 itself told Congress very clearly: You don't have to do
16 anything; this is self-executing. And then the protocol
17 says: We the United States agree to accept the
18 jurisdiction of the ICJ in a certain class of cases.
19 And Congress ratified that, too. So I don't think that
20 self-executing has anything to do with this case.

21 GENERAL CLEMENT: Well, Justice Ginsburg, I
22 think that reflects that self-executing is one of those
23 words that people use to cover a lot of different
24 meanings; and I think in its most correct sense, you're
25 right to say that the Vienna Convention is

1 self-executing.

2 So there didn't have to be legislation
3 before Texas and its local officials were obligated to
4 provide notice in this case; and of course, it's their
5 default on that treat obligation by the State and local
6 officials that has us in this predicament in the first
7 place.

8 Now, there's another meaning of
9 "self-executing", or maybe it's a misuse of the term, to
10 say whether it gives rise to individually enforceable
11 rights in court without more. And we do take the
12 position that if the President had done nothing, and
13 certainly if the President had said we're not going to
14 comply, we're going to respond to this ICJ judgment the
15 way we did with the Nicaragua judgment, we don't think
16 that this judgment would be enforceable as of its own
17 terms.

18 JUSTICE GINSBURG: But in Nicaragua the
19 United States took the position from day 1 that the ICJ
20 had no jurisdiction over the case. So the absence of
21 jurisdiction is always an exception to the obligation,
22 even within the United States, to give full faith and
23 credit. If the court had no jurisdiction, another State
24 doesn't have to give full faith and credit. But if it
25 does have jurisdiction, then the obligation kicks in.

1 GENERAL CLEMENT: That's absolutely right,
2 and that gets back to the basic principle of reviewing
3 foreign judgments; and it's not that this Court is
4 disabled from its judicial role. It's just the judicial
5 role here is not a straight-up question of the
6 interpretation of the Vienna Convention. It's a
7 question of what effect to give the judgment that's been
8 effectively validated by the executive branch. And
9 there's two things --

10 JUSTICE STEVENS: You're arguing it's just
11 the normal choice of law problem, that even though the
12 judgment's clearly wrong on the matter of international
13 law, if the court had judgment -- had jurisdiction to
14 enter the judgment, we must treat it as binding?

15 GENERAL CLEMENT: That's -- that's right,
16 Justice Stevens. As Justice Ginsburg put it --

17 JUSTICE STEVENS: That's provided that we
18 regard these individuals as though they're tantamount to
19 the parties to the judgment itself.

20 GENERAL CLEMENT: I think that's right, and
21 certainly our obligation under that judgment as the
22 executive branch sees it is to these 51 individuals as
23 their claims have been espoused by --

24 JUSTICE KENNEDY: Suppose the President had
25 reached the contrary conclusion, a hypothetical we put

1 earlier. Supposed the President had told Texas, do not
2 follow this judgment?

3 GENERAL CLEMENT: Then I'd be on that side
4 of the podium, Your Honor. I mean, we would take the
5 position that the President's authority here is, in his
6 view of this, is a necessary step; and that seems to be
7 --

8 JUSTICE KENNEDY: I agree that we should
9 give that determination great weight, but that's
10 something quite different from saying that he can
11 displace the authority of this Court on that issue of
12 law.

13 GENERAL CLEMENT: Oh, but the -- the
14 President can't displace the role of this Court. It's
15 just that the role of this Court in a situation where
16 there's been a judgment and the executive branch has
17 viewed that judgment as something we should comply with,
18 then the role of this Court is limited to deciding
19 whether there was jurisdiction to issue that judgment in
20 the first place; and then the secondary role of this
21 Court would be to say, does the rule of law embodied
22 by that judgment violate the Constitution. And that's
23 why the answer to the Chief Justice's original
24 hypothetical, about a sentence to 5 years for guards
25 that had no notice -- that's a different case.

1 But here there's no colorable argument that
2 the -- that the judgment here and what's embodied in it
3 lies outside the power of the Federal Government as a
4 whole to adjudicate and to put as an obligation on the
5 States.

6 JUSTICE SOUTER: Mr. Chief Justice, may I
7 ask a further - may I ask a further question?

8 CHIEF JUSTICE ROBERTS: Yes.

9 JUSTICE SOUTER: Let me try one other
10 variation to make sure that I understand your argument.
11 What if the President of the United States had said this
12 judgment, the Avena judgment, will not be enforced, and
13 this Court interpreted the Avena judgment as binding, as
14 providing a rule of decision and a rule of decision
15 which was entitled to respect by Texas?

16 Would this Court's authority to make that
17 declaration and issue a judgment to that effect be
18 displaced by the President's determination that it would
19 not be that the Avena judgment would not be enforced?

20 GENERAL CLEMENT: Of course not, Justice
21 Souter. That would just be like cases that
22 unfortunately happen, where we would take a position
23 that the judgment on its own is not binding and you
24 would reject that position and that would be the law of
25 the land.

1 JUSTICE SOUTER: Okay.

2 GENERAL CLEMENT: We don't suggest that we
3 wouldn't comply with a judgment of this Court, accepting
4 Mr. Donovan's first theory that the President's role
5 here is unimportant.

6 JUSTICE SOUTER: So --

7 GENERAL CLEMENT: -- but we do think, we
8 stick to our view that the President's role here makes
9 this an easier case and is in our view dispositive.

10 JUSTICE SOUTER: But it does follow then
11 from what you've said that if we take exactly the
12 position that I outlined in my hypo, we could avoid the
13 entire question of presidential authority.

14 GENERAL CLEMENT: You could. I think
15 another route, of course, that would be available to you
16 is to simply say: Here we have a judgment and we have
17 the President effectively espousing the judgment, and in
18 those cases we don't have to worry about what would
19 happen if we didn't have one or the other.

20 JUSTICE SOUTER: That's in effect a judicial
21 version of one of the variants in Justice Jackson's hypo
22 in the Steel case --

23 GENERAL CLEMENT: Exactly.

24 JUSTICE SOUTER: He's talking about the
25 President and Congress; we're talking about the

1 President and the Court.

2 GENERAL CLEMENT: Right.

3 JUSTICE SOUTER: Yes.

4 JUSTICE SCALIA: The President espousing the
5 judgment -- Texas takes the position that this
6 memorandum has -- has no legal effect; it's a memorandum
7 from the President to the -- to his attorney general.
8 It's not a directive to the States. In fact, it even
9 refers to pursuant to the principles of comity, which
10 suggests, you know, do it if you want to be cooperative,
11 don't do it if you don't want to be cooperative.

12 What is your response to that? And would it
13 be enough if the President simply wrote a memorandum to
14 himself saying that, I think this is the way that the --
15 that the judgment of the ICJ should be enforced? He
16 doesn't have to tell Texas. He can just tell his
17 attorney general?

18 GENERAL CLEMENT: Well, Justice Scalia, I
19 think there's two questions there. I'd like to try to
20 answer them both. One is, what degree of formality is
21 required? And we would say that if you look to
22 historical practice, this is not something where you a
23 need a high degree of formality. So look to the
24 executive agreement that this case -- this Court gave
25 its positive effect to in Belmont and Pink. It was an

1 exchange of diplomatic letters, nothing more. Look to
2 the executive determination that this Court give
3 dispositive effect to, dismissed the lawsuit completely
4 in Ex Parte Peru. It was a letter from the
5 undersecretary of state to the attorney general.

6 Going back to the very beginnings of the
7 nation, look at the extradition of Thomas Nash. What
8 was the form of the President's determination we would
9 extradite him? A letter from the secretary of state to
10 Judge Bee in South Carolina.

11 CHIEF JUSTICE ROBERTS: In none of those
12 cases were we talking about a determination contrary to
13 a legal determination by this Court concerning the scope
14 of powers under the treaty.

15 GENERAL CLEMENT: Well, with respect --

16 JUSTICE KENNEDY: And in Nash he was being
17 held under Federal custody. So Nash is just
18 inapplicable here.

19 GENERAL CLEMENT: Well, I don't think Nash
20 is inapplicable, Justice Kennedy; I think it is on all
21 fours.

22 JUSTICE KENNEDY: Of course, Nash is just a
23 wonderful speech by Marshall anyway; it's not an
24 opinion.

25 GENERAL CLEMENT: But it is a wonderful

1 speech, and I really do think you should take a look at
2 that speech. If you want to find it, it's actually
3 appended to volume 18 of the U.S. Reports. And I think
4 you should look at that speech before rejecting our
5 position here, because it really is on all fours in that
6 there you had a treaty obligation duly approved by the
7 Senate, and there was a question: Do we need an act of
8 Congress before the executive can extradite somebody?
9 And Marshall I think put the law exactly right in that
10 case when he said: Sure, Congress can make a
11 determination and if it does, that's the end of matter;
12 but absent the congressional determination, the
13 President has the authority to extradite Nash.

14 Now, that's a situation where somebody's
15 personal liberty was at stake. So I would say that in
16 some respects it's a fortiori that in this case what's
17 at issue is simply recognizing that there's binding
18 Federal law here, that I think if the Texas court had
19 recognized that it was binding Federal law, it would
20 have applied under their own State procedural default
21 law.

22 Now, just to finish up, and then I will sit
23 down, there's a second part of your question, Justice
24 Scalia, which was addressed to what does the reference
25 to comity mean. Obviously, from the very beginning in

1 this case we have taken the position in this Court that
2 the President's memorandum directs the State courts, in
3 its words, to give effect to the Avena judgment -- not
4 decide whether you want to give it effect based on your
5 State law of comity, but give effect to the judgment.

6 I think if you actually look at the law of
7 comity, one of the things that it talks about is comity
8 is really what the courts should do in the absence of a
9 controlling view from one of the political branches.
10 Here the President has made clear, it's clear to me what
11 the answer is applying comity, which would be to give
12 effect to the judgment.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, General.

15 Mr. Cruz, by my count we'll give you an
16 extra 10 minutes.

17 ORAL ARGUMENT of R. TED CRUZ,

18 ON BEHALF OF THE RESPONDENT

19 MR. CRUZ: Mr. Chief Justice, and may it
20 please the Court:

21 The entirety of the United States's argument
22 is predicated on the idea that the President's
23 two-paragraph memorandum is in and of itself binding
24 Federal law.

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

1 the argument, but your brother the Solicitor General has
2 conceded that if we take the position in this case that
3 there is a -- a rule of decision that should be
4 respected in this Court and, hence, the subject of a
5 judgment to Texas that, among other things, would
6 suspend Texas's procedural bar law -- that that would
7 obviate the question of presidential power.

8 MR. CRUZ: There's no doubt, if the Court
9 decided it on the ground that Avena was a binding
10 judgment, the President's order would be unnecessary.

11 I would note the United States strenuously
12 disagrees with that proposition. And, indeed, the
13 United States explicitly disclaims these treaties as the
14 source of his authority; in fact, expressly agrees with
15 this Court's decision in Sanchez-Llamas.

16 JUSTICE BREYER: Maybe you could spend a
17 minute explaining that, because, as I read the
18 Constitution, it says all treaties made, or which shall
19 be made, under the authority of the United States shall
20 be the supreme law of the land, and the judges in every
21 State -- I guess it means including Texas --

22 (Laughter.)

23 JUSTICE BREYER: -- shall be bound thereby,
24 anything in the constitution or laws of any State to the
25 contrary notwithstanding.

1 Now, as I understand it, the United States
2 entered into a treaty. That treaty said we will follow
3 the interpretations and the judgments of the
4 International Court of Justice in respect to the Vienna
5 Convention.

6 And that Court did make a judgment in that
7 respect, in respect to this client, and it said: Our
8 judgment is that Texas, or someone in the United States,
9 must redo the procedural hearing simply to see whether,
10 in deciding whether there's prejudice or whether there's
11 a procedural default, full account is taken of the
12 importance of the Vienna rights. That's what we're
13 talking about.

14 It's a judgment of the court. The United
15 States has promised to follow that judgment of the
16 court. The Constitution says, since it promised by
17 treaty, that is the law; and the law binds the States.

18 That may be simple-minded, but I'd like to
19 hear what the answer to that, rather, chain of logic is
20 -- chain of law.

21 MR. CRUZ: Certainly, Justice Breyer.
22 Texas, of course, does not dispute that the
23 Constitution, laws, and treaties are the supreme law of
24 the land. And Texas statutes must give way to any of
25 these three.

1 The President's memorandum is none of those
2 three.

3 JUSTICE BREYER: I was not talking --

4 MR. CRUZ: And, with respect --

5 JUSTICE BREYER: -- about the President's
6 memorandum at the moment. And to be -- to disclose
7 fully what I'm thinking, I'm thinking that maybe if a
8 president disagreed in such a thing, some kind of a
9 question -- I'm not sure what -- would be presented.

10 But whatever "what," I don't worry about
11 that "what" here, because the President, too, agrees.

12 MR. CRUZ: Justice Breyer, the -- the answer
13 to your question is the Avena decision is not a judgment
14 in the sense we recognize judgment in U.S. courts for
15 six separate reasons.

16 JUSTICE BREYER: No, forget whether we
17 recognize it this way as a judgment. I'm saying we
18 promised in the treaty to follow that thing. Call it
19 whatever name you want. We promised to follow that
20 thing, which I have in front of me -- excerpts of which
21 -- called an Avena something. And we know what that
22 says. I'm just looking to see what they call it. They
23 call it -- well, you tell me what they call it. They
24 call it -- it is not called the word "judgment." It's
25 called: "The appropriate reparation in this case

1 consists of the obligation of the United States to" --
2 and then they listed it.

3 So I take it we have promised to carry out
4 that obligation by treaty.

5 MR. CRUZ: Except that when the Senate
6 ratified the Optional Protocol, it made clear that the
7 Optional Protocol was not self-executing. Indeed, a
8 point Mr. Donovan made in his argument --

9 JUSTICE BREYER: What are the words that the
10 Senate said? Because, when you say "self-executing,"
11 the easiest way for me to understand that is the
12 Constitution means what it says.

13 But there happened to be a few instances
14 where the nature of the obligation or the intent of the
15 party makes it very difficult to enforce it as a binding
16 judgment of a court. That is not this case.

17 MR. CRUZ: This -- this Court has made clear
18 for 200 years the Senate can ratify a treaty and yet
19 leave it not self-executing in the sense that it is not
20 enforceable in U.S. domestic courts.

21 JUSTICE BREYER: Oh, and so if they did
22 that, now, will you quote the words or give me the
23 reference where the Senate said: Although we entered
24 into this and although we ratify it, we're not going to
25 do it --

1 MR. CRUZ: Well --

2 JUSTICE BREYER: -- unless you --

3 MR. CRUZ: The text of the treaty, itself,
4 is the first place to look. The text of Article 94 of
5 the UN Charter provides that the remedy is that the
6 party may have recourse to the Security Council.

7 JUSTICE GINSBURG: That's after there's a
8 breach, but we -- let's stick to the protocol, the
9 Optional Protocol -- optional. The protocol says:

10 We accept the compulsory jurisdiction of the
11 ICJ. "Jurisdiction" means power. We agree that in
12 cases of this character, Vienna Convention violation
13 cases, we submit to the jurisdiction of X tribunal, the
14 ICJ.

15 What is there that needs execution about
16 that? Congress said yes, the United States, the
17 Executive Branch of the United States decides that it's
18 a good idea to submit to the -- to the jurisdiction of
19 the ICJ. We ratify that.

20 And I don't see anything left for Congress
21 to do. It said the United States can submit to the
22 jurisdiction of the ICJ.

23 MR. CRUZ: "Jurisdiction" in that sense is
24 not "jurisdiction" in the sense of a U.S. court.
25 Rather, it is an international obligation that is to be

1 resolved through political and diplomatic avenues. And
2 the best example of that --

3 JUSTICE SCALIA: It just means we agree that
4 the case can go before the court.

5 MR. CRUZ: Exactly.

6 JUSTICE SCALIA: And we will be a party
7 before the court. Isn't there some doubt whether the --
8 the Senate and the President, together, can -- can take
9 away from this Court the power and responsibility to
10 decide what the treaty obligations of the United States
11 are?

12 MR. CRUZ: Justice Scalia, I --

13 JUSTICE SCALIA: Isn't there some problem
14 there?

15 MR. CRUZ: I would go further than some
16 doubt, and I would say that if the treaty purported to
17 give the authority to make binding adjudications of
18 Federal law to any tribunal other than this Court, that
19 it would violate Article III of the Constitution.

20 JUSTICE BREYER: Fine. Then, are you
21 saying there are -- there are 112, I believe, treaties
22 in which we've entered into promises that we're going to
23 follow what an international tribunal said. Somebody
24 looked up, I saw on the Internet, that at this moment
25 there are approximately 116 regulatory entities in the

1 world where we've entered, or others have entered into,
2 regimes, where there are various adjudicatory tribunals
3 of different kinds, mostly commercial, that bind us.

4 And is your view: All of these thousands,
5 perhaps, or hundreds, anyway, of treaties are unlawful,
6 and that our promises are not enforceable, because
7 there's a constitutional question?

8 MR. CRUZ: There are hundreds of treaty
9 obligations that this nation is committed to that are
10 not self-executing, that don't immediately have force --

11 JUSTICE BREYER: No. No. I'm thinking that
12 are self-executing. I'm thinking that there are --
13 like WTO, NAFTA. We can go down a long list of
14 instances where the United States has promised to follow
15 the decisions of tribunals that are not Article III
16 courts and to put them into effect at once.

17 MR. CRUZ: If -- if --

18 JUSTICE BREYER: And I wonder, without
19 further ado, now, are you saying that all those are
20 unconstitutional?

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

22 JUSTICE BREYER: "Yes" or "no"? I'd
23 appreciate a "yes" or "no" answer.

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

25 JUSTICE BREYER: Okay.

1 MR. CRUZ: In those instances, the bodies in
2 question are not making definitive interpretations of
3 what Federal law is. The best illustration of this is
4 the example Mr. Donovan used in his opening argument
5 where he said, if the ICJ said to the United States
6 cease hostilities, that would be directed to the
7 President.

8 Now, under Mr. Donovan's argument, that's a
9 clear directive. The United States is bound by treaty,
10 and apparently the Federal courts could order the
11 President to cease hostilities if that was the
12 instruction of the ICJ.

13 JUSTICE BREYER: I'm sorry. What I don't
14 understand about this is that I thought that the ICJ in
15 this case interpreted the treaty. That's not Federal
16 law. That's the treaty. And it said that the treaty --

17 MR. CRUZ: The treaty is Federal law,
18 Justice Breyer.

19 JUSTICE BREYER: Oh, then I don't understand
20 you because the WTO interprets a treaty. It interprets
21 a treaty that binds the United States, just like the ICJ
22 is interpreting a treaty that binds the United States.
23 So what's the difference?

24 MR. CRUZ: The nature of this treaty,
25 every -- every position -- the United States State

1 Department at the time it was introduced, the Senate,
2 and every member of the Senate who discussed it,
3 understood that the decisions of the ICJ would not have
4 binding effect in U.S. courts. And that is identical to
5 the understanding of every single nation --

6 JUSTICE KENNEDY: And what you are saying --
7 and this has been the law --

8 JUSTICE STEVENS: May I ask a question,
9 please?

10 JUSTICE KENNEDY: Go ahead.

11 JUSTICE STEVENS: It's critical to me to
12 understand the effect of the judgment, and you said
13 there are six reasons why it's not an ordinary judgment.
14 I really would like to hear what those reasons are
15 without interruption from all of my colleagues.

16 (Laughter.)

17 MR. CRUZ: I would be happy to provide
18 those, Justice Stevens. The first reason is because the
19 Optional Protocol is not self-executing, so it does not
20 have force in United States courts.

21 The second reason is, if it was a binding
22 judgment, that would violate Article III. It would give
23 to a tribunal other than this Court the authority to
24 determine Federal law.

25 The third reason is in Sanchez-Llamas a

1 majority of this Court rejected this argument and
2 provided explicitly, quote, "nothing in the structure or
3 purpose of the ICJ suggests that its interpretations
4 were intended to be conclusive on our courts.

5 The fourth reason is the parties in Avena
6 were the United States and Mexico. Neither is a party
7 to this proceeding. The argument as to why it is
8 binding in this case is that Texas is vicariously part
9 of the United States. That was equally true of Oregon
10 in Sanchez-Llamas. In both cases, there's one State who
11 is in some sense one of the parties.

12 The fifth reason is the Breard case was in
13 many senses equally a judgment, in that you had the ICJ
14 issuing an order to this Court concerning Breard,
15 concerning his specific case, to stop his execution, and
16 this Court concluded that that could not trump U.S. law.

17 And the sixth and final reason that it is
18 not a judgment is to treat it as a binding judgment
19 would be to cut out the President's authority not to
20 comply. Everyone agrees, for example in the Nicaragua
21 case, that the President retains the authority to say
22 no, we're not going to comply.

23 Which is why the entire purpose of this
24 adjudication is not to resolve something finally in a
25 court of law, but it is rather a diplomatic measure,

1 much as -- much like when the United States sued Iran
2 during the hostage crisis. We didn't believe the
3 Ayatollah was going to listen to the ICJ and suddenly
4 let the hostages go. We didn't -- we didn't expect that
5 Iranian courts would give force to it, but it was
6 helpful diplomatically to bring it to that tribunal to
7 then put international pressure. That --

8 JUSTICE KENNEDY: Then this is consistent
9 with what you've been explaining to Justice Breyer in
10 your answer, that for 200 years we have had some
11 treaties that are very important, but they're not
12 self-executing; their violation may put us in violation
13 of international law; but it is for us to determine how
14 we are going to comply with the international
15 obligation; and there is no obligation on the part of
16 the State to comply with that law because it's not
17 self-executing.

18 MR. CRUZ: Justice Kennedy, that is exactly
19 correct.

20 JUSTICE KENNEDY: At some point I think in
21 the course of your argument, we may get back to whether
22 the Vienna Convention itself is or is not
23 self-executing. I think the Solicitor General was
24 correct in saying that that's a difficult word. I think
25 it is self-executing in that the State has to comply

1 with it.

2 I'm not sure that it is self-executing in
3 that the State has to accept whatever procedural
4 framework the foreign national demands.

5 MR. CRUZ: I would agree with the
6 characterization you suggest, which is that the Vienna
7 Convention was self-executing in the sense that it
8 didn't require legislation to go into effect, but it was
9 not self-executing in the sense that it provided
10 judicially cognizable rights.

11 But let me add a caveat to that, which is in
12 both *Breard* and *Sanchez-Llamas*, this Court assumed the
13 Vienna Convention created individual rights, and
14 although Texas maintains that it did not create
15 individual rights and the United States maintains that
16 it did not create individual rights, we don't have to
17 win on that proposition to prevail in this case. Even
18 assuming it created individual rights in this case,
19 *Medellin* defaulted on that claim and this Court held
20 with *Sanchez-Llamas* that procedural default is
21 consistent with the treaty.

22 And the real question here in this case,
23 particularly with respect to the President's order, is
24 whether the Optional Protocol is self-executing, the
25 decision of the *Avena* court, or, as a subsequent matter,

1 whether the President has some sort of independent
2 authority to make Federal law.

3 And in this respect --

4 JUSTICE GINSBURG: Well, I still -- I would
5 like to get back to that Optional Protocol. It -- was
6 it submission to jurisdiction? My understanding is that
7 any two parties that can agree, can have a formed
8 selection clause, can agree that we accept the authority
9 of this tribunal, and then it follows from that that if
10 you accept their authority to adjudicate, you are bound
11 to follow its decisions. And that that seems to be
12 understood in the world community because, is it not so
13 that even though there are cases like Nicaragua and
14 Iran, most ICJ judgments are indeed complied with by the
15 nations that agree to submit to the jurisdiction of that
16 tribunal?

17 MR. CRUZ: Justice Ginsburg, that is correct
18 as a political and diplomatic matter, but in my judgment
19 it speaks volumes that of the 166 nations that signed on
20 to the Vienna Convention and of the 50 nations that
21 signed on to the Optional Protocol, zero -- not a single
22 nation -- treats ICJ judgments as binding in their
23 domestic courts.

24 What Petitioners are arguing here is for an
25 interpretation of this treaty that no other nation

1 gives. And in fact, if I found myself in the nation of
2 Mexico and arrested without consular notification, I
3 could not raise this claim in Mexico. The Mexican
4 courts would not treat it as a defense to my criminal
5 prosecution.

6 And so --

7 JUSTICE GINSBURG: Do you have a case that
8 says that? A Mexican case that says that?

9 MR. CRUZ: I do not have a case that says
10 that, but neither Petitioner nor their many amici have
11 been able to point to a single instance.

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

13 MR. CRUZ: Given that these treaties are
14 four decades old, that that speaks volumes that no -- no
15 nation has accorded binding force to ICJ --

16 JUSTICE BREYER: Maybe these other nations
17 have an inquisitorial system where an investigating
18 judge collects a dossier and the fact is noted in the
19 dossier and the investigating judge and the prosecution
20 give it such weight as it's entitled to.

21 MR. CRUZ: Justice --

22 JUSTICE BREYER: You know that doesn't
23 happen?

24 MR. CRUZ: Justice Breyer, I -- I think you
25 could well be right, but I think that also speaks to the

1 peculiar nature of this. Procedural default only --

2 JUSTICE BREYER: In an --

3 MR. CRUZ: -- matters in system like the
4 United States' where habeas allows a second bite at the
5 apple. Most other countries don't allow criminal
6 defendants to relitigate criminal matters, in which case
7 procedural default matters. The other countries simply
8 deny it altogether.

9 JUSTICE BREYER: Of course it matters. But
10 the -- of course it matters. That's why when I read the
11 -- the ICJ opinion, I read it as saying that they're not
12 telling you to set aside a procedural default rule.
13 What they've asked you to do is to provide, by means of
14 the United States' own choosing, review and
15 reconsideration of the convictions and sentences by
16 taking account of the violation of rights.

17 And throughout they ask -- when you decided
18 whether the person was really prejudiced, when you
19 decided whether there had been forfeiture of the rights,
20 at that time, did you ask yourself that the reason he
21 might not have raised them was because he knew nothing
22 about them and his lawyer knew nothing about them,
23 because nobody ever told either about them? In which
24 case there might be a causal connection.

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

1 you but just asked you, please, look at it again having
2 read our opinion and keeping this in mind.

3 MR. CRUZ: But the ICJ's decision -- I think
4 your question goes back to Justice Ginsburg's question
5 about the effect of an ICJ decision.

6 The legal -- legal adviser to the State
7 Department told the Senate, when it was ratifying the UN
8 Charter, that decisions of the ICJ are "a moral
9 obligation" and there is "no provision" for the
10 enforcement of such decisions. And one fascinating
11 example of this is the entire debate over the Connally
12 Amendment. One can look in the entire course of
13 legislative history, and it's an argument back and forth
14 about whether it is wise to require the United States to
15 cast a veto in the Security Council over an attempt to
16 enforce an ICJ. And not a single senator of the entire
17 U.S. Senate suggested the proposition that ICJ decisions
18 might be independently enforceable. Nobody discussing
19 that understood it that way.

20 JUSTICE SCALIA: Once again, there is a
21 constitutional problem, is there not, if they are
22 automatically enforceable?

23 MR. CRUZ: Absolutely.

24 JUSTICE SCALIA: That is conferring upon the
25 ICJ the responsibility to decide the meaning of a United

1 States treaty which is United States law.

2 MR. CRUZ: And --

3 JUSTICE SCALIA: I'm rather jealous of that
4 power.

5 (Laughter.)

6 JUSTICE SCALIA: I think it belongs in this
7 Court. And when you have a non-self-executing treaty,
8 there is no problem.

9 It becomes U.S. law when the Senate and the
10 House pass a law which the president -- it doesn't
11 become U.S. law because the President writes a
12 memorandum to his Attorney General, but it does become
13 U.S. law when a law is enacted.

14 MR. CRUZ: And that --

15 JUSTICE SCALIA: That solves the
16 constitutional problem, but in the situation we're
17 talking about here, I don't know on what basis we can
18 allow some international court to decide what is the
19 responsibility of this Court, which is the meaning of
20 the United States law.

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

23 JUSTICE BREYER: And how does the WTO
24 differ?

25 MR. CRUZ: The imperative --

1 JUSTICE BREYER: How does the WTO and NAFTA
2 and all our trade agreements differ?

3 MR. CRUZ: The WTO and NAFTA -- I mean NAFTA
4 is not a treaty. It's a congressional agreement, but it
5 is also adjudicating specific factual questions that
6 deal with the application of facts to a particular
7 circumstance. It's not interpreting the treaty and
8 purporting to bind the United States on this is what the
9 underlying Federal law means.

10 JUSTICE KENNEDY: And the United States
11 apparently accepts the verdict of those --

12 MR. CRUZ: Right. Right. And it could
13 choose not to.

14 JUSTICE KENNEDY: You have three different
15 things that you have to tell us about today: That the
16 President's authority, the effect of the ICJ, and -- and
17 the Avena judgment, and ultimately, the force of the
18 Vienna Convention itself.

19 And the only question I have that I need
20 your help with is as to the last, and I hope that it
21 doesn't interrupt the train of your argument.

22 I think the ICJ -- pardon me, the Vienna
23 Convention is self-executing, in that it requires the
24 States to conform to the consular notification
25 provision.

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

2 JUSTICE KENNEDY: Suppose you have a judge
3 who has control over a defendant who's being held in
4 custody pending trial, and the defendant says I want to
5 see my -- my foreign counsel. The judge says no. Can
6 you mandate that -- assuming State procedures allow him
7 in, couldn't you mandate that judge to require him to
8 allow the notification to take place?

9 MR. CRUZ: The consequence of the argument
10 that it doesn't create individual rights would mean that
11 that individual defendant could not raise it in that --

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

13 MR. CRUZ: Yes.

14 And so in that circumstance, it would mean,
15 if a judge declined to comply with that obligation, the
16 individual defendant would not have an appealable legal
17 error.

18 JUSTICE KENNEDY: If I thought he did, would
19 I still have to rule against you?

20 MR. CRUZ: No, not at all. In fact, just as
21 this Court did in *Breard* and *Sanchez-Llamas*, it assumes
22 that the Vienna Convention created individual rights.
23 And so we don't need to prevail on that to reach the
24 identical outcome. Because even assuming we are
25 incorrect concerning individual rights, the

1 Sanchez-Llamas holding is that procedural default
2 respects those rights just as fully as it respects
3 constitutional rights.

4 JUSTICE GINSBURG: But --

5 JUSTICE KENNEDY: Could I make a distinction
6 between failing to let him see the counsel at all in my
7 hypothetical and a demand that the procedural framework
8 be altered? Isn't there a distinction between those two
9 cases, do you think?

10 MR. CRUZ: I think that's right. I think
11 also in your hypothetical, your hypothetical assumes a -
12 a deliberate violation of the law which no one suggests
13 here rather than inadvertence. And inadvertence
14 complied with, as you suggested earlier, no prejudice
15 whatever so. And there has -- both the Federal and
16 State courts that looked at this concluded that there
17 was no even arguable prejudice from the violation.

18 JUSTICE GINSBURG: Mr. Cruz --

19 JUSTICE STEVENS: Mr. Cruz, could I go back
20 to your discussion of whether this is a judgment or not?
21 It seems to me some of your reasons actually go to
22 whether the -- whether it was a correct interpretation
23 of the treaty. And if it were a judgment, would you
24 agree that this Court would have to accept it, even if
25 this Court disagreed with its legal analysis?

1 MR. CRUZ: Justice Stevens, I would not,
2 because I do not believe consistent with Article III
3 this Court's authority can be given away by treaty.

4 JUSTICE STEVENS: How is it given away to a
5 treaty if it just says one State court must honor a
6 judgment of a sister State even if it thinks it's dead
7 wrong? Is it giving away its judicial authority by
8 obeying the Full Faith and Credit Clause?

9 MR. CRUZ: That is provided by the
10 Constitution. And in this instance, giving any other
11 entity, the authority to make a conclusive determination
12 of Federal law, that goes to the heart of the Article
13 III power.

14 JUSTICE GINSBURG: Are you saying that even
15 --

16 JUSTICE STEVENS: Even if it was agreed by
17 treaty to give it conclusive effect?

18 MR. CRUZ: If the Senate agreed that this
19 was self-executing, then you would have the height of
20 the Presidency and Congress working together. But even
21 in that situation, I would submit as a matter of
22 separation of powers, they could not give this Court's
23 essential role, under Marbury, to say what the law is to
24 another body.

25 JUSTICE GINSBURG: Then we couldn't have a

1 treaty with another country on the mutual recognition
2 and enforcement of judgment, because the other country
3 might get it wrong, we might disagree with its
4 interpretation of the law, and, therefore, unlike the
5 rest of the world, the United States can't get the
6 advantage of a reciprocal guarantee that our judgments
7 will be respected, and in turn we will respect your
8 judgment.

9 MR. CRUZ: In enforcing foreign judgments,
10 the foreign court is not purporting to make a definitive
11 determination of U.S. law.

12 JUSTICE GINSBURG: It may be that if the
13 case turns on a question of U.S. law, and we may think,
14 as many think about the ICJ, that they got that question
15 wrong. Still, it's always been if you don't look behind
16 the judgment. You say in the next case I'm certainly
17 not going to apply that wrong interpretation. But here
18 I'm bound by a judgment.

19 And that's why I questioned your use -- your
20 heavy use of Sanchez-Llamas. I agreed with the court in
21 that case because it was a question of interpretation.
22 We don't have to agree with the ICJ. We were not faced
23 with a decision, a binding adjudication, which we accept
24 for that case only. So there's a difference between
25 Sanchez-Llamas and this case that you appear not to

1 recognize in your brief.

2 MR. CRUZ: Justice Ginsburg, it has been the
3 consistent position of the United States for over four
4 decades from the day this treaty was ratified that the
5 Optional Protocol was not self-executing, was not
6 enforceable in U.S. courts. So it is not a judgment
7 that has -- were this Court to treat it as -- as a
8 judgment, it would be making that treaty self-executing.
9 And the power to transform a non- --

10 JUSTICE GINSBURG: I thought you said
11 that -- oh, you said that this is a matter of goodwill
12 or that most ICJ judgments -- ICJ judgments, they're not
13 binding but people comply -- nations comply with them as
14 a matter of goodwill?

15 MR. CRUZ: Justice Ginsburg, that's exactly
16 correct. And the President had a number of
17 constitutional means at his disposal to comply, had he
18 chosen. The -- but --

19 JUSTICE GINSBURG: What could -- other
20 than -- I mean, the most logical place to have this go
21 on is the court that rendered the judgment. It's always
22 better for the court that rendered the judgment than
23 some foreign court or another State court.

24 So what else could the President do? The
25 ICJ did say U.S., as a matter of your own choosing. And

1 the President chose the most logical forum, but what
2 else could he have done?

3 MR. CRUZ: There are three avenues that the
4 President could have chosen that would have been
5 constitutional. The first of which he could have gone
6 to Congress and proposed a statute amending the AEDPA to
7 allow Federal habeas review.

8 The second is he could have negotiated a
9 treaty, submitted it --

10 JUSTICE GINSBURG: Let's start with the
11 first one. Why should this case be in Federal court?
12 It's a state judgment that's in question.

13 MR. CRUZ: This Court has made clear that
14 the Federal Government cannot expand the jurisdiction of
15 the State courts. There is a State --

16 JUSTICE GINSBURG: But you can have the
17 Federal court overseeing the State court and telling the
18 State what to do? That seems to me practically much
19 more of an encroachment on State authority than to say,
20 State courts, you do it.

21 MR. CRUZ: Well, and --

22 JUSTICE GINSBURG: -- or to say Federal
23 courts, you do it.

24 MR. CRUZ: A corollary --

25 JUSTICE SCALIA: A lot of people think

1 that's exactly right, that really we expanded Federal
2 habeas jurisdiction quite improperly. But it happens
3 every day, doesn't it?

4 MR. CRUZ: It does. And a corollary to this
5 is if Congress could pass a statute creating a Federal
6 right to review, and that Federal right to review under
7 the principles of Testa versus Katt would have to be
8 respected in the State court.

9 JUSTICE GINSBURG: Who would be doing the
10 review?

11 MR. CRUZ: Well, if it were a Federal right
12 to review, under Testa versus Katt, both the State and
13 Federal courts would give review. Interestingly enough,
14 if it were a new Federal right, it would clear the
15 jurisdictional bar because the Texas jurisdictional bar
16 allows an exception for a new law. So if Congress
17 passed a new law that would be jurisdiction to raise --

18 JUSTICE GINSBURG: A law passed by Congress
19 saying Texas dispense with your procedural bar rules?

20 MR. CRUZ: A law passed by Congress saying
21 in order to give effect to the Avena judgments the 51
22 Mexican nationals at issue shall be entitled to review
23 and reconsideration of whether there was prejudice from
24 the denial of the Vienna Convention. That law would be
25 respected equally.

1 I would suggest that Testa versus Katt,
2 which Petitioner uses, is a case which powerfully
3 supports Texas, because the principle of Testa versus
4 Katt was there is one Federal law that must be applied
5 equally in Federal courts and State courts. And the
6 State courts are not at liberty to ignore Federal law.

7 This is a very curious assertion of
8 presidential power. Because the presidential power is
9 not directed at the Federal courts. It is directed at
10 the State courts, and the State courts alone. And I
11 would submit is the only instance I'm aware of, of a
12 Federal mandate that falls only on the states, singles
13 out the states, and commandeers those judges.

14 In over 200 years of our nation's history
15 I'm not aware of any other directive from the President
16 directly to the State courts and State judges.

17 JUSTICE GINSBURG: So what's absent in your
18 view is Congress. You say that all of this could have
19 been done --

20 MR. CRUZ: Absolutely --

21 JUSTICE GINSBURG: -- and Texas could have
22 been ordered, but the President doesn't have the
23 authority to do it just on the basis of the ICJ,

24 MR. CRUZ: And Justice Ginsburg, I think a
25 powerful parallel is the decision of this Court last

1 near in Hamdan. In Hamdan the President was at the
2 height of his war powers authority. And nonetheless,
3 this Court concluded that he could not act contrary to
4 the will of Congress.

5 Here his interests are far less than
6 prosecuting war, and yet he is asserting the authority
7 to go it alone, despite a consistent stream of
8 congressional disapproval, both in ratifying these
9 treaties and saying they're not self-executing and also
10 in passing the AEDPA.

11 JUSTICE GINSBURG: The not self-executing in
12 the position of the State Department, wasn't there -- in
13 the parallel proceedings in Oklahoma, wasn't there a
14 letter from the current -- the then current legal
15 adviser telling Oklahoma that this is a judgment that's
16 binding on all courts in the United States, State and
17 Federal, and that the President has directed Oklahoma to
18 comply? I think that was sent both to the governor and
19 the other officials.

20 MR. CRUZ: This letter was sent out to all
21 affected States, but it is -- the United States is quite
22 candid in what they are doing. The department to its
23 credit describes it as "unprecedented," and it goes
24 further, if I may read a portion of page 5 of the memo,
25 or memo page 6, rather: The President's memorandum is

1 sufficient to create a binding legal rule.

2 The department is not hiding what they're
3 arguing. They're not arguing the treaties require it.
4 They're not arguing any statutes requiring it. They're
5 saying a two-paragraph memorandum from the President to
6 a member of the cabinet is binding Federal law.

7 JUSTICE GINSBURG: Which -- which letter are
8 you quoting? Are you quoting --

9 MR. CRUZ: I'm quoting the United States'
10 brief in this proceeding, page 6 of the brief. On page
11 5 it also describes the President's power as
12 "establishing binding rules of decisions that preempt
13 contrary State law."

14 If that is correct, there is no reason why
15 the President could not have directed his memorandum to
16 the Federal district courts or even to this Court, and
17 that is an extraordinarily broad power to be asserted on
18 behalf of the executive.

19 JUSTICE SOUTER: Mr. Cruz, you have
20 frequently emphasized the non-self-executing character
21 of the optional protocol.

22 Is there any rule, any positive rule in
23 existence today either of international law or domestic
24 law that precludes this Court from being the
25 implementing authority as opposed to the executive or

1 the executive and the Senate?

2 MR. CRUZ: This Court has the final
3 authority to determine what Federal law is, and so if
4 this Court determines that that's what the treaty
5 requires, then that be federal law. Now I would suggest
6 that would require overruling --

7 JUSTICE SOUTER: These treaties including
8 the optional protocol.

9 MR. CRUZ: In my judgment, if the Court
10 reached that conclusion it would be error. But --

11 JUSTICE SCALIA: I think you misunderstood.
12 I thought he was asking whether if it is -- assuming it
13 is not self-executing, this Court can execute it.

14 JUSTICE SOUTER: That's right. Yeah.

15 MR. CRUZ: In my judgment it would be wholly
16 illegitimate for the Court to do so.

17 JUSTICE SOUTER: Why?

18 MR. CRUZ: Because --

19 JUSTICE SOUTER: What's the rule -- what is
20 the positive rule of international and domestic law that
21 precludes it?

22 MR. CRUZ: The rule is a constitutional
23 rule, that the President makes treaties the Senate
24 advises and consents. And the limitation --

25 JUSTICE SOUTER: They've made the treaty.

1 We have got the optional protocol. Whatever the
2 optional protocol means is Federal law.

3 MR. CRUZ: The limitations the Senate put on
4 are it as much a part of the treaty as the treaty
5 itself, and the consequences --

6 JUSTICE SOUTER: But you're -- my point is,
7 my -- I'm accepting as premise of the question the
8 limitation which you assert, i.e., non-self-executing;
9 and my question is, may the execution, if you will, be
10 made by this Court? Is there an independent rule that
11 precludes this Court from that role?

12 MR. CRUZ: If this Court did so, in my
13 judgment it would be usurping the role of Congress. All
14 right? Because the essence of the decision --

15 JUSTICE SOUTER: I don't mean to be
16 disrespectful of your judgment but what do you base it
17 on -- tradition?

18 MR. CRUZ: The essence of the decision by
19 the Senate to say something is non-self-executing is to
20 say if something in this treaty is going to change U.S.
21 domestic law, you have to come back to us.

22 JUSTICE SOUTER: You're saying by -- by
23 non-self-executing, they mean you have to come back to
24 us? The terms --

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

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

2 JUSTICE SCALIA: They mean it does not
3 automatically become part of United States law.

4 MR. CRUZ: Indeed.

5 JUSTICE SCALIA: And it follows from that,
6 that you have to change United States law?

7 MR. CRUZ: Exactly.

8 JUSTICE SCALIA: And it is not the function
9 of this Court to change United States law.

10 MR. CRUZ: That's precisely correct.

11 JUSTICE BREYER: If you assume it is
12 self-executing, just for one second, I'd like to find
13 out -- you said that the President was unreasonable in a
14 sense of saying Texas do that over again --

15 I assume the reason he asked Texas to have
16 the hearing is because the ICJ knew -- and I guess maybe
17 he knew -- that the only hearing they'd had on this
18 subject -- as far as I can see; I looked at it, there
19 didn't seem to be any evidence in respect to their
20 finding that there was no prejudice. They said well, he
21 had a lawyer, but that lawyer later got into quite a lot
22 of trouble, I think.

23 MR. CRUZ: He had two lawyers.

24 JUSTICE BREYER: He had two lawyers. One
25 got into trouble, and the other didn't?

1 MR. CRUZ: And they vigorously defended him.

2 JUSTICE BREYER: Okay, they vigorously
3 defended him.

4 MR. CRUZ: The only argument --

5 JUSTICE BREYER: Fine. Fine. My point is
6 there's no evidence of that.

7 MR. CRUZ: With respect, Justice Breyer,
8 there actually is.

9 JUSTICE BREYER: There is? In the first
10 habeas hearing?

11 MR. CRUZ: The evidence there is --

12 JUSTICE BREYER: I read the whole thing.

13 MR. CRUZ: In our appendix there is an
14 affidavit from the Mexican Consulate. Once the Mexican
15 Consulate started assisting Medellin, they prepared an
16 affidavit, and the affidavit said if we had been
17 contacted, we would have told you not to confess; and we
18 would have told you to get a lawyer. The problem with
19 that is Medellin confessed within about three hours of
20 being arrested, and even the ICJ in Avena said that
21 notification had to occur within 72 hours.

22 JUSTICE BREYER: What I'm thinking of is the
23 evidence at the first habeas hearing that led the
24 district judge to reach his conclusion that there was no
25 prejudice and that the procedural default was not

1 excused -- it's in that hearing that I didn't see what
2 that finding was based on; and I suppose the reason that
3 the President wanted Texas to do it is it would be
4 easiest for Texas to go back to that.

5 MR. CRUZ: Justice Breyer -- it was part of
6 the State court record, and it was the basis for saying
7 there was no prejudice.

8 JUSTICE BREYER: It was in the first
9 hearing.

10 MR. CRUZ: I believe it was. And it's
11 included in our appendix four.

12 JUSTICE BREYER: So you think there was no
13 reason for the ICJ to ask the President --

14 MR. CRUZ: It is difficult to explain.

15 CHIEF JUSTICE ROBERTS: Was the basis for
16 the determination of no prejudice the fact that the
17 Petitioner in this case had received full Miranda
18 warnings, which went beyond what the consulate was going
19 to tell him?

20 MR. CRUZ: That is completely correct, and
21 he waived those in writing.

22 JUSTICE SCALIA: And he had lived in this
23 country for how long?

24 MR. CRUZ: Practically his entire life.
25 Wrote and read English and was educated in American

1 public schools.

2 JUSTICE BREYER: And what did happen to the
3 lawyers Texas gave him?

4 MR. CRUZ: Both of them vigorously defended
5 him, and in Medellin we devoted several pages of our
6 brief to going through in considerable detail the many
7 motions they filed. It was a vigorous defense, and yet
8 they failed to raise this particular --

9 JUSTICE STEVENS: And so they have -- the
10 Texas Court of Criminal Appeals didn't adopt a simple
11 solution of the case, to say He got all the protection;
12 that there's no prejudice and therefore there's no
13 treaty violation.

14 MR. CRUZ: The Texas Court of Criminal
15 Appeals didn't have it as option to say, it would have
16 been easier, one might say, to just go along. The
17 President is asking you to do this, make the whole thing
18 go away; just go along. The problem is the Texas Court
19 of Criminal Appeals had a statute, and a statute that
20 divested of jurisdiction unless there is new Federal
21 law.

22 JUSTICE STEVENS: Yes, but that statute
23 really would not have divested -- if I understand he
24 Texas law correctly -- if you did agree -- which you
25 don't, I know -- that there was a preexisting Federal

1 obligation to honor judgments of the ICJ, then under
2 Testa v Katt principle and Howlett opinion and others,
3 the Texas court would have had jurisdiction.

4 MR. CRUZ: Although that holding would be, I
5 would suggest, in considerable tension if not directly
6 contrary to Sanchez-Llamas.

7 JUSTICE STEVENS: Well, but Sanchez-Llamas
8 doesn't deal with the judgment. And It says a separate
9 Federal obligation --

10 MR. CRUZ: Oregon is as much a part of the
11 United States as Texas.

12 JUSTICE STEVENS: Then I think the Texas --
13 there would be jurisdiction in the Texas court to
14 entertain this claim. I think you -- you agree with
15 that?

16 MR. CRUZ: I do not, because it has to be a
17 new claim, and if this were a judgment, the judgment --

18 PLAINTIFF'S CO-COUNSEL: It would be a new
19 claim based on a new judgment which was after Sanchez --
20 the Chief Justice's opinion in that case.

21 MR. CRUZ: Let me point out one consequence
22 of -- of the President's assertion of authority.

23 JUSTICE STEVENS: Well, I'm -- you just
24 -- for -- putting the President's assertion to one side,
25 it seems to me if you did agree -- and I know you

1 vigorously don't -- that there were a pre-existing
2 Federal obligation -- an obligation of the United States
3 to respect the judgment of the ICJ, which is -- which we
4 think is wrong as a matter of international law; we have
5 previously construed the treaties to the contrary -- but
6 if there were an independent obligation to expect --
7 Federal obligation -- respect that judgment, it seems to
8 me that that obligation could be enforced in Federal
9 court.

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

12 JUSTICE STEVENS: You don't.

13 MR. CRUZ: If -- although I disagree with
14 the premise.

15 JUSTICE STEVENS: Yes.

16 MR. CRUZ: But if the premise were true, I
17 don't disagree with the conclusion.

18 The statute allows jurisdiction where there
19 is a new legal basis that was not previously
20 availability. The only two potential sources of that
21 are Avena, which we submit is a non-self-executing
22 international law obligation, or the President's order;
23 and, in fact, it is worth underscoring if the United
24 States' theory is correct, there's no reason why the
25 President needed to wait for a decision from the ICJ.

1 If the President has the authority to take a
2 non-self-executive international law treaty and order it
3 to be implemented and set aside any State law to the
4 contrary --

5 JUSTICE GINSBURG: Yes, there is. We have
6 interpreted the law, and we have said as far as what
7 Article 36 means, we disagree with the ICJ.

8 MR. CRUZ: I agree with you, Justice
9 Ginsburg, but the United States does not. The United
10 States believes that the President has the authority to
11 make decisions and to implement treaties -- an
12 independent authority to create new binding law, even
13 though the obligation is not self-executing.

14 CHIEF JUSTICE ROBERTS: Thank you.

15 JUSTICE KENNEDY: How many parties to
16 Avena -- there were 51 -- are being held in the State of
17 Texas?

18 MR. CRUZ: There are 51. There were 15 in
19 the State of Texas. There are now 14 because 1 was
20 under the age of 18, so is now off of death row; 51 in 9
21 States across the country.

22 JUSTICE GINSBURG: And Oklahoma has taken
23 the opposite position, and they -- they did give the
24 review and reconsideration?

25 MR. CRUZ: That's correct.

1 JUSTICE GINSBURG: And has any other State
2 acted?

3 MR. CRUZ: Not that we're aware of, no.
4 There have -- the 51 -- my understanding is it's down to
5 44. For various reasons these individuals are not on
6 death row but, other than Oklahoma, not related to the
7 Avena decision.

8 CHIEF JUSTICE ROBERTS: Well, the fact that
9 they're on -- on death row isn't at all significant
10 because the judgment of the ICJ purports to vacate the
11 convictions as well; isn't that correct?

12 MR. CRUZ: That's exactly right; and, in
13 fact, in Paragraph 34 of Avena it asserted the authority
14 to annul U.S. criminal convictions. So some of the
15 hypotheticals coming from bench, under the ICJ --

16 JUSTICE GINSBURG: I thought the ICJ flatly
17 refused Mexican -- Mexico said ICJ annulled the
18 judgment. The ICJ said no, and it didn't vacate it,
19 either. It just said that it did a reconsideration to
20 see whether there was prejudice.

21 MR. CRUZ: Justice Ginsburg, you're correct
22 they did not order the annulment. But in paragraph 34
23 they asserted they could order the annulment. They
24 simply were choosing --

25 CHIEF JUSTICE ROBERTS: I'm looking at page

1 --

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

3 CHIEF JUSTICE ROBERTS: I'm looking at page
4 186. They require review and reconsideration of the
5 conviction and sentence.

6 MR. CRUZ: That's correct. So it is not
7 just the sentence; and, in fact, they, despite the fact
8 that their statute does not allow them to have precedent
9 in any other cases, they said in paragraph 151:

10 The fact that the Court's ruling concerned
11 only Mexican nationals cannot be taken to imply the
12 conclusion reached in the present judgment do not apply
13 to other foreign nationals finding themselves in
14 situations. They were in an unprecedented act recording
15 the authority to bind U. S. Courts in a way, to the best
16 of my knowledge, no --

17 JUSTICE GINSBURG: Their very own statute,
18 the statute setting up the ICJ, makes it clear that is
19 not the case. They can issue a binding judgment in the
20 particular case. It has no precedential effect for
21 other cases, not even within the ICJ.

22 MR. CRUZ: But they can issue a decision
23 that can be enforced by the Security Council. And had
24 they issued --

25 JUSTICE GINSBURG: Has that ever happened?

1 MR. CRUZ: It has gone -- for example, in
2 the Nicaragua case, there was an effort to take it to
3 the Security Council there.

4 JUSTICE GINSBURG: And the U.S. exercised
5 its veto.

6 MR. CRUZ: Correct. And that's part of a
7 diplomatic treaty, where it's between nations is -- is
8 that it is not binding in the sense that the domestic
9 courts will enforce it.

10 Indeed, if the ICJ had asserted the power it
11 claimed to annul U.S. convictions, under the U.S.'s
12 theory the President presumably could have issued an
13 order effectively pardoning State prisoners despite the
14 fact that the Constitution limits its pardon authority
15 to Federal crimes.

16 CHIEF JUSTICE ROBERTS: Thank you, Mr. Cruz.
17 Mr. Donovan, you have five minutes.

18 REBUTTAL ARGUMENT BY DONALD F. DONOVAN
19 ON BEHALF OF THE PETITIONER

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

21 First, there is nothing in the ratification
22 history that suggests that Avena made any assumptions
23 about whether or not the Optional Protocol would be
24 self-executing. The Connally Amendment went to the
25 compulsory jurisdiction of the ICJ, and the discussion

1 to which Texas has referred is entirely about the
2 international ramifications.

3 In fact, the Senate specifically declined to
4 apply the Connally Amendment to the Optional Protocol.
5 So that gets to the question that we have been
6 discussing here, which is:

7 What is the scope of the enforceability of
8 an ICJ judgment? There are obviously constraints to
9 that. One is illustrated by the Chief Justice's
10 hypothetical. That is, there are affirmative
11 constraints in the Constitution, itself.

12 The second is illustrated by a point I made,
13 but Mr. Cruz misunderstood, which is that the nature of
14 the obligation emanating from the judgment is directed
15 at a constitutional branch such as the obligation to
16 enforce an active statute. Obviously, that is not
17 enforceable in court.

18 If the nature of the obligation is to cease
19 hostilities, that is obviously directed to the President
20 and is not enforceable in court. And that's illustrated
21 by the Nicaragua case in which the ICJ issued a
22 judgment. Congress passed a statute that said it wasn't
23 going to comply; and the President said he wasn't going
24 to comply.

25 That, in turn, applies to the third

1 constraint, which is the political constraint, itself.
2 The Nicaragua case illustrates that if the ICJ issues a
3 judgment that the United States does not want to comply
4 with, Congress can pass a statute to say we repudiate
5 the obligation.

6 So the obligations that we are talking about
7 here in which the ICJ judgment would be enforceable by
8 an individual fall squarely in the class of cases that
9 this Court has decided for two centuries where an
10 individual has a right conferred by the statute.

11 And he walked into a court, and he asked
12 that court to enforce that right, and he invokes that
13 right in -- as in the Caffa core case, the Roucher case,
14 cases going back to the founding.

15 And this Court has said when the right is of
16 a nature to be enforced in a court of justice, this
17 Court will enforce it. And that is all Mr. Medellin is
18 asserting here: The right to enforce a right that is
19 eminently suitable for judicial enforcement because it
20 goes to the judicial process, itself.

21 The second point with respect to Article
22 III: It cannot be the case that this Court can never
23 enforce -- gives away its Article III authority when
24 somebody else enforces a judgment. We know from the
25 Comegys and the Abba cases that we have cited that the

1 Court has in fact said that when the U.S. submits a case
2 to international adjudication that international
3 adjudication is binding and it's not reexaminable in a
4 U.S. court.

5 CHIEF JUSTICE ROBERTS: I read the *Comegys*
6 case, however you say it, to be for the exact opposite
7 proposition. There they were saying, this is an
8 international arbitration, there's no reason to go
9 behind it.

10 But the question of whether or not that
11 arbitration is binding in the bankruptcy proceeding that
12 was at issue there was very much one for the U.S.
13 Supreme Court to make.

14 MR. DONOVAN: But that's because that was
15 not part of what the court had actually decided, or
16 rather that the international adjudication had actually
17 decided. You think about, if the proposition is that
18 nobody else but an Article III court can decide a
19 Federal question, this Court could not have decided
20 *Mitsubishi*. In *Mitsubishi* the Court sent Federal
21 statute antitrust claims to an arbitration panel in
22 Tokyo and said that the result would be everyone
23 forcible so long as the panel actually took cognizance
24 of the claim and actually decided it.

25 This Court if it evaluated the claim that

1 Mr. Medellin is entitled to review and reconsideration
2 as a result of the treaty obligation under 94-1 and the
3 President's determination that that treaty obligation
4 will be given effect, this Court would be performing a
5 supremely judicial function, that is it would be
6 interpreting and applying Federal law in the form of a
7 statute, which is exactly what the Supremacy Clause
8 requests the Court to do.

9 With respect to --

10 JUSTICE SCALIA: Put precisely, it would be
11 making it Federal law and then applying it. If you
12 assume it's not self-executing, somebody has to make it
13 to domestic law. Now, Congress can obviously do it by
14 passing a law.

15 But you're saying the Court can do it, can
16 make it domestic law and then enforce it.

17 MR. DONOVAN: That assumes that it is not
18 self-executing, yes. But the whole question here is --

19 JUSTICE SCALIA: Yes, yes, ys.

20 MR. DONOVAN: -- when we're talking about
21 self-executing here we're saying what branch is the
22 obligation directed to. And what the Court has said
23 time and time again is when the obligation is of a
24 nature to be enforced in a court of justice it is
25 directed to the judicial authority.

1 JUSTICE SOUTER: Then what you are saying if
2 I understand you is that Justice Scalia was wrong when
3 he said that would be making it Federal law. I think
4 you were saying that would be a -- the branch that was
5 responsible for determining how to execute, i.e., to
6 apply, Federal law. Is that your point?

7 MR. DONOVAN: That's exactly right. The
8 thing that makes the treaty Federal law is not the
9 Court; it's the Supremacy Clause, which makes it supreme
10 Federal law.

11 CHIEF JUSTICE ROBERTS: What is the
12 authority -- I get back to where I started. I
13 understood you to concede that we would have authority
14 to construe the judgment if it provided, for example,
15 for a punitive sanction against the officers. What is
16 the basis under your theory for that authority?

17 MR. DONOVAN: Well, it's settled that a
18 treaty cannot contravene an affirmative constitutional
19 obligation. There would be -- if there was -- if the
20 ICJ --

21 CHIEF JUSTICE ROBERTS: But it can -- it can
22 contravene our interpretation of the treaty as a matter
23 of Federal law.

24 MR. DONOVAN: There are two different treaty
25 obligations. There's a treaty obligation under the

1 Vienna Convention, which this court has now
2 dispositively interpreted, and there's a treaty
3 obligation to comply. And it's the very nature of an
4 obligation to put a dispute to a third party that you
5 may not agree with the result, and that does not in any
6 way compromise this Court's Article III authority to
7 rest that judgment on an obligation committed to by the
8 political branches, three treaties ratified by the
9 President and Senate that said when this country commits
10 itself to do something we're going to do it. Now we
11 have the President of the United States saying that it's
12 in the paramount interests of the United States for
13 purposes of enforcing --

14 CHIEF JUSTICE ROBERTS: Do we have the
15 authority to interpret the judgment of the ICJ?

16 MR. DONOVAN: The courts in enforcing that
17 judgment would. Of course that would be part of the
18 judicial enterprise. The applicable instrument is now
19 the Avena judgment, pursuant to the treaties and the
20 President's determination, independent sources. In
21 applying that judgment, there may well be interpretive
22 questions because the Avena judgment lays down standards
23 and requires obligations and that would be part of the
24 judicial enterprise.

25 CHIEF JUSTICE ROBERTS: So we have the

1 authority to interpret it, we have the authority to
2 construe whether it's carry to the Constitution, but we
3 do not the authority to consider whether it's consistent
4 with Federal law?

5 MR. DONOVAN: That's right, because that's
6 the very nature of enforcing a judgment: You do not
7 re-examine the merits. You take the judgment and you
8 enforce the judgment. And it's the judicial enterprise
9 to construe what that -- it may be a question about
10 construing that -- what that instrument requires, what
11 that judgment requires. But it's the judicial function
12 in enforcing that judgment that calls upon this Article
13 -- the Court's Article III authority, and does not in
14 any way compromise it, which in turn goes to the
15 question about what the judgment requires. It requires
16 prospective review and reconsideration. The Texas court
17 didn't suggest that Mr. Medellin had received review and
18 reconsideration. The ICJ made it clear that it had to
19 be prospective, and one of the fundamental reasons for
20 that is because the judgment says that the treaty rights
21 have to be determined on it own. Mr. Medellin is
22 entitled to show that the violation of the treaty
23 standing on its own two feet and not filtered through a
24 constitutional right affected -- that he is entitled to
25 show prejudicie.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Donovan.

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

4 CHIEF JUSTICE ROBERTS: The case is
5 submitted.

6 (Whereupon, at 11:30 a.m., the case in the
7 above-entitled matter was submitted.)

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