

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -X

3   MOISES SANCHEZ-LLAMAS,                   :

4                   Petitioner                   :

5           v.   :   No. 04-10566

6   OREGON;   :

7   and    :

8   MARIO A. BUSTILLO,                        :

9                   Petitioner                   :

10          v.   :   No. 05-51

11   GENE M. JOHNSON, DIRECTOR,               :

12    VIRGINIA DEPARTMENT OF                   :

13    CORRECTIONS.                               :

14   - - - - -X

  Washington, D.C.

  Wednesday, March 29, 2006

17                   The above-entitled matter came on for oral  
18   argument before the Supreme Court of the United States  
19   at 10:03 a.m.

20   APPEARANCES:

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22                   Petitioner in No. 04-10566.

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25

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3 04-10566.

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5 Richmond, Virginia; on behalf of the Respondent in  
6 No. 05-51.

7 GREGORY G. GARRE, ESQ., Deputy Solicitor General,  
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9 of the United States, as amicus curiae, supporting  
10 the Respondents.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in two cases, Sanchez-Llamas v.  
5 Oregon and Bustillo v. Johnson.

6 Mr. Gartlan.

7 ORAL ARGUMENT OF PETER GARTLAN

8 ON BEHALF OF THE PETITIONER IN 04-10566

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

11 This case presents three questions. The  
12 first is, does article 36 of the Vienna Convention on  
13 Consular Relations confer rights to individuals such as  
14 Mr. Sanchez-Llamas? The second is can Mr. Sanchez-  
15 Llamas enforce the right in a State criminal  
16 prosecution. And the third is can the right be  
17 enforced by suppression.

18 The first issue is -- is a matter of treaty  
19 interpretation, and the language of the article 36 is  
20 -- is plain. It confers three rights. Article 36(1)  
21 says that the consulate and the individual can have  
22 free communication between them. Article 36(1)(b)  
23 gives to the detainee, the foreign national detainee,  
24 the right to have his consulate notified of his arrest  
25 and the right to forward communication to the

1 consulate. And it also imposes a duty on the detaining  
2 authorities to inform the foreign national under -- of  
3 his rights under that section. And it's critical, or  
4 at least important, and telling to -- to notice that  
5 the detainee gets to control the communication. The  
6 detainee initiates and controls the communication with  
7 the consulate. It's not the consulate contacting the  
8 detainee initially. It's the detainee authorizes the  
9 contact.

10           The secondary sources -- we -- we believe the  
11 text is plain, but if the Court resorts any  
12 secondary sources, that too will confirm the plain  
13 language of -- of the article.

14           CHIEF JUSTICE ROBERTS: But I thought that the  
15 argument on the other side is that those references in  
16 the secondary sources and in the document itself are  
17 meant to make clear that if the individual detainee  
18 does not want contact with his consular officials, for  
19 example, in a case where he might be seeking asylum or  
20 something like that, that it was, as you said earlier,  
21 his decision and not necessarily that there was to be a  
22 departure from the norm in international -- the  
23 international context where treaties are between the  
24 sovereigns and don't confer enforceable rights on  
25 individuals.

1           MR. GARTLAN: Well, Your Honor, actually the  
2 article 36 is -- is unique and different in that the  
3 revolutionary part of this is that the detainee did,  
4 for the first time, have the authority to have the  
5 consulate notified. Typically most of the notification  
6 statutes, bilateral treaties, multilateral treaties  
7 require mandatory notification, but this is an instance  
8 where the detainee gets to control. The detainee  
9 decides whether or not the consulate is going to be  
10 contacted.

11           CHIEF JUSTICE ROBERTS: Right. So the --  
12 that's what the different countries, the signatories,  
13 are supposed to provide, and if they don't, that's a  
14 matter to be taken up bilaterally between the countries  
15 involved and not necessarily an individual enforceable  
16 right.

17           MR. GARTLAN: Well, it -- it could work on  
18 the international level as well. You know, a state  
19 could complain to another state, but the question here  
20 is whether or not this article, as domestic law in the  
21 United States, confers a personal right to a foreign  
22 national detainee because a treaty in the United  
23 States, a self-executing treaty -- and everybody agrees  
24 this is that -- works in two spheres, on two levels.  
25 One level is the international level, but by -- through

1 the Supremacy Clause, the treaty is also domestic law.  
2 And the question is whether as domestic law this  
3 treaty confers personal rights to individuals because  
4 --

5 JUSTICE GINSBURG: And at least you have the  
6 authority of the International Court of Justice that  
7 says this is a right. This is not just a matter  
8 between the states.

9 MR. GARTLAN: Yes, Your Honor. Yes, Your  
10 Honor. In two cases, the ICJ has held that this  
11 article 36 does confer rights to individuals. There's  
12 the LaGrand case --

13 JUSTICE SCALIA: That court is not a common  
14 law court, is it?

15 MR. GARTLAN: No, Your Honor.

16 JUSTICE SCALIA: And not being a common law  
17 court, it's not bound by its own prior decisions, is  
18 it?

19 MR. GARTLAN: I don't believe so, Your Honor.

20 JUSTICE SCALIA: I think its statute says  
21 that it -- it decides the particular case and does not  
22 set forth propositions of law that are binding in  
23 future cases. If it's not bound by its prior cases, I  
24 don't know why we should be.

25 JUSTICE GINSBURG: How many times now has the

1 ICJ said that this convention confers rights on the  
2 individual?

3 MR. GARTLAN: At least two, Your Honor,  
4 LaGrand and Avena, and both involved criminal cases.

5 JUSTICE GINSBURG: And what is the view of  
6 our treaty partners on that issue?

7 MR. GARTLAN: Many of the treaty partners  
8 view it as conferring a right, at least 11 tell an  
9 arrestee of his rights under -- under the treaty and --

10 CHIEF JUSTICE ROBERTS: But do any of our  
11 treaty partners apply the exclusionary rule to  
12 violations of this?

13 MR. GARTLAN: That's beginning to happen,  
14 Your Honor. In Australia and Great Britain, there -- I  
15 believe it has been --

16 JUSTICE GINSBURG: Not at the time this  
17 treaty came into force.

18 MR. GARTLAN: Excuse me, Your Honor?

19 JUSTICE GINSBURG: Not at the time the Vienna  
20 Convention came into force.

21 MR. GARTLAN: No, Your Honor.

22 JUSTICE GINSBURG: We were almost alone in  
23 having suppression as the remedy.

24 MR. GARTLAN: Yes, Your Honor, and --

25 CHIEF JUSTICE ROBERTS: We didn't even have

1 it then, did we?

2 MR. GARTLAN: In 1969? Yes, we did, Your  
3 Honor.

4 CHIEF JUSTICE ROBERTS: And that -- that's  
5 when the convention came into effect?

6 MR. GARTLAN: That -- that -- excuse me.  
7 That's when the United States ratified the treaty,  
8 1969.

9 JUSTICE SCALIA: What -- what remedies have  
10 other countries provided for -- for these rights? I  
11 mean, it's -- it's easy to say the right exists. What  
12 -- what have other countries done by way of vindicating  
13 these rights?

14 MR. GARTLAN: Typically I think the --

15 JUSTICE SCALIA: I mean, advising them of  
16 them is -- is really not vindicating them, it doesn't  
17 seem to me.

18 MR. GARTLAN: Typically it is a matter of  
19 state to state complaints or apologies and --

20 JUSTICE SCALIA: Well, that's -- but, you  
21 know, that's what the other side said the whole thing  
22 should consist of, that it's a matter to be enforced by  
23 -- by state-to-state protests, not -- not by the  
24 judicial system or the legal system taking it upon  
25 itself to provide a remedy.

1           What -- what remedies have been provided in  
2 -- in other countries? You -- you mentioned an  
3 exclusion in Australia?

4           MR. GARTLAN: Yes, Your Honor.

5           JUSTICE SCALIA: When -- when was that?

6           MR. GARTLAN: Offhand -- I believe it's  
7 within the last couple years.

8           JUSTICE KENNEDY: Was there a showing of  
9 prejudice in that case or just automatic exclusion?

10          MR. GARTLAN: No, it's not automatic.  
11 Typically in the commonwealth countries, a judge has a  
12 lot of equitable authority to kind of balance some  
13 interests and decide whether or not to exclude the --  
14 the evidence. And I'm not saying that it's happened  
15 worldwide, that it's pervasive practice, but in -- in  
16 some sense, what other countries are doing in their  
17 individual systems, it's nice to know but it's not all  
18 that controlling because the question, again, is how  
19 does this statute work as domestic law?

20          JUSTICE SOUTER: Well, is that -- that -- my  
21 question was going to be are -- are you suggesting or  
22 arguing that the remedy ought to be exclusion as a  
23 matter of domestic law or as a necessary implication of  
24 -- of the treaty?

25          MR. GARTLAN: It's a necessary implication or

1 it's an implication of the treaty, of section 2 of  
2 article 36. But --

3 JUSTICE SOUTER: Well, what would you do in a  
4 country that does not apply an exclusion remedy in --  
5 in domestic cases given the provision, which I can't  
6 quote correctly, but you'll know what it is, the -- the  
7 provision that the treaty will -- will be administered  
8 in accordance with or consistently with, I guess it is,  
9 domestic law so long as full effect is given to its  
10 substantive provisions? I would have thought that that  
11 -- that that provision for administration in accordance  
12 with domestic law would have a great bearing, if -- if  
13 not being dispositive, on the remedy, so that if I were  
14 answering the question I -- I had asked you, I -- I  
15 would have said, well, it's probably a domestic law  
16 basis for -- for exclusion, but not a treaty basis.

17 So why in those countries -- getting back to  
18 -- to my -- why -- why in those countries that do not  
19 customarily apply an exclusion remedy wouldn't it be  
20 consistent with the treaty for them to decline to apply  
21 it given the provision for administration consistently  
22 with -- with domestic law?

23 MR. GARTLAN: It could be appropriate. The  
24 treaty was prepared -- drafted full knowing that there  
25 are various and myriad kinds of legal systems

1 throughout the world, and it wasn't intended to say,  
2 here's the -- here's the remedy because typically under  
3 international law, the remedy is -- is a domestic  
4 remedy. And this -- this doesn't -- the treaty does  
5 not say, thou shalt suppress.

6 CHIEF JUSTICE ROBERTS: Well, if it doesn't  
7 --

8 JUSTICE SOUTER: So if the treaty --

9 CHIEF JUSTICE ROBERTS: Why don't you go  
10 ahead?

11 JUSTICE SOUTER: The -- the treaty provision  
12 then governs only in the sense that for remedy it  
13 refers you to domestic law. Is that it?

14 MR. GARTLAN: Yes, Your Honor.

15 JUSTICE SOUTER: Okay.

16 CHIEF JUSTICE ROBERTS: So -- so if the  
17 treaty doesn't say suppress, what authority does a  
18 Federal court have to direct a State court to exclude  
19 evidence?

20 MR. GARTLAN: Through the Supremacy Clause,  
21 Your Honor.

22 CHIEF JUSTICE ROBERTS: Supremacy Clause  
23 gives effect to the treaty. You just told me the  
24 treaty doesn't require suppression.

25 MR. GARTLAN: Well, the treaty doesn't in --

1 in its text doesn't say, thou shalt suppress, but is --  
2 it is a source of authority because the treaty says  
3 thou shalt give full effect to the law.

4 JUSTICE SCALIA: Well, it's a source of  
5 authority but not a source of authority for  
6 suppression. And I find it implausible that we signed  
7 a treaty which requires us to suppress evidence of this  
8 sort, but allows the other treaty partners to do  
9 whatever they like, not -- not suppress, let it in,  
10 rely upon consular protests. Is -- is that what this  
11 provision, you know, in accordance with domestic law,  
12 means, that -- you know, each man to himself?

13 MR. GARTLAN: In -- in many cases, yes, Your  
14 Honor. Again, the -- the drafters recognized that  
15 remedies would be local, and so the question is for our  
16 system, for the United States system, how does the  
17 United States system -- how does it remedy breaches?  
18 And it depends upon the type of the breach. In this  
19 instance, the breach here involved statements, and so  
20 the breach occurred when the authorities did not inform  
21 Mr. Sanchez-Llamas of his right to contact the  
22 consulate.

23 JUSTICE KENNEDY: Well, of course, that's  
24 assuming a causal link, which is an altogether  
25 different problem.

1           But it's still not clear to me. Are you  
2 saying that we should require the States to follow and  
3 the United States Government to follow an exclusionary  
4 rule because that's what the treaty requires or because  
5 this is the remedy that we ought to devise in the  
6 exercise of our supervisory powers? And if it's the  
7 latter, it seems to me surely there must be some causal  
8 linkage between the violation and the -- and the  
9 statement at -- at a minimum.

10           MR. GARTLAN: Yes, Your Honor. Well, it's  
11 kind of a combination of both. The treaty directs give  
12 effect to these rights. And we are asking the Court to  
13 exercise its authority to remedy the breach because  
14 suppression is a creature of this Court's authority,  
15 common law authority.

16           JUSTICE GINSBURG: You don't think that the  
17 -- that the remedy that the ICJ imposed in the case  
18 where the United States was before it as a party, that  
19 that would be the appropriate remedy? It was not  
20 suppression. It was reconsider this, taking account of  
21 the failure to notify and what might have happened if  
22 notice had been provided.

23           MR. GARTLAN: Yes, Your Honor, and then  
24 supply whatever remedy would be appropriate. And  
25 again, that -- that's a call upon the judiciary to

1 remedy treaty violations, and -- and that's been --

2 JUSTICE GINSBURG: But there wasn't any word  
3 in either of the ICJ judgments, if I recall them  
4 correctly, that said, United States, you have a  
5 suppression remedy, so you should suppress.

6 MR. GARTLAN: No, Your Honor, because again,  
7 remedies are a question of domestic law, so it's up to  
8 the domestic courts to decide what would be the  
9 appropriate remedy.

10 JUSTICE ALITO: Well, did you ask for any  
11 remedy in this case other than suppression? This arose  
12 on the motion to suppress, am I right?

13 MR. GARTLAN: Correct, Your Honor. No other  
14 remedy but -- but suppression.

15 JUSTICE KENNEDY: One of the things -- and I  
16 -- I really have this question for all counsel. If the  
17 Miranda warning is given, it seems to me that that  
18 comprehends the relief that you need. If the accused  
19 talks with his attorney, his attorney is presumed to  
20 know the treaty's -- the provisions of the convention.  
21 If he does not, he proceeds at his risk. Attorneys  
22 have lots of things they can tell clients, and if you  
23 don't have an attorney, you proceed at your risk. I  
24 just think this is a very important point here.

25 MR. GARTLAN: Yes, Your Honor, and many

1 courts have held that -- well, the Miranda rights  
2 pretty much encompasses these rights, but they're  
3 different. These are standalone rights, and what's  
4 critical about this, what's really important is that  
5 for every United States citizen who's arrested -- and  
6 typically interrogation is going to follow quickly on  
7 the heels of the arrest -- they're giving the Miranda  
8 warnings. And essentially they have three options.  
9 They can speak to the police. They can invoke the  
10 right to silence, or they can invoke the right to an  
11 attorney. However, foreign nationals have a fourth  
12 option and that fourth option is they can have the  
13 consulate contacted, if they want. And the consulate  
14 provides different kinds of information and support for  
15 the arrestee.

16 And it's -- what's critical is -- what's hard  
17 to see is that because we're in this country, we don't  
18 see it, but if you're overseas and you've been arrested  
19 -- let's say you're in Damascus and you're given a dime  
20 and your options are to call the local attorney  
21 provided by your jailers or the American consulate.  
22 And I think it's pretty clear that most people are  
23 going to call the American consulate. Why? It's  
24 because there's a kind of a familiarity. There's an  
25 attraction there. There's an appeal. There's

1 security. You're dealing with the known. Whereas, a  
2 local attorney, it's the unknown, and it's provided by  
3 the local authorities.

4 JUSTICE SCALIA: That may give you a warmer  
5 feeling inside, but do you think that the foreign  
6 consulate is -- is more likely to give you good advice  
7 about what you should do under American law than an  
8 American lawyer that you've been provided?

9 MR. GARTLAN: Well, you know, Your Honor,  
10 it's not really the content of the advice. The  
11 question is at this point what would people do, and the  
12 legal error here, what's wrong, is that the foreign  
13 national is given the same three options, but by law,  
14 he's supposed to have a fourth option.

15 JUSTICE SCALIA: Yes, but I'm just saying  
16 whether it makes any difference. I mean, you're  
17 talking about anything that -- that affects substantive  
18 rights. He's been provided an attorney who knows  
19 American law better, presumably, than -- than a  
20 consular official. What -- other than the comfort of  
21 -- of speaking to somebody from his own country, what  
22 -- what's the substantive harm here?

23 MR. GARTLAN: Well, but really he hasn't been  
24 given an attorney yet, Your Honor. We have to remember  
25 this is the arrest has been made and he's confronted

1 with options.

2 JUSTICE KENNEDY: Well, but you -- you want  
3 us to write an opinion to say that we're holding our  
4 attorneys to the same standard of evaluation as the  
5 attorneys in Syria --

6 MR. GARTLAN: Oh, no, Your Honor.

7 JUSTICE KENNEDY: -- and -- and our bar is --  
8 is not to be trusted to have the expertise that's at  
9 least equivalent to that of the foreign counsel?

10 MR. GARTLAN: No. What I'm saying, Your  
11 Honor, is that if you're arrested, the next -- you have  
12 a choice, and you have one of three if you are a  
13 national, but if you're a foreigner, you have one of  
14 four. And the question --

15 JUSTICE BREYER: The question --

16 JUSTICE KENNEDY: But the question is who  
17 tells you about that choice, and your attorney can tell  
18 you about that choice.

19 MR. GARTLAN: But this contemplates that the  
20 detaining authorities informed the person of -- of what  
21 their rights are to contact the consulate.

22 JUSTICE BREYER: Suppose they don't do it.  
23 They don't do it. They violated the treaty.

24 MR. GARTLAN: Yes, Your Honor.

25 JUSTICE BREYER: We assume that. Then the

1 question is, what is a proper remedy?

2 MR. GARTLAN: Yes, Your Honor.

3 JUSTICE BREYER: And I'll assume with you,  
4 for the moment, that -- that the treaty has to be read  
5 as saying you have to have some kind of appropriate  
6 remedy, but it doesn't say what kind. So why isn't it  
7 an appropriate remedy that he was given a lawyer, if he  
8 wanted one, and the lawyer either told him about the  
9 right to talk to the consul or he didn't. And if he  
10 didn't -- if he did, he found out, and if he didn't and  
11 it mattered, maybe that was ineffective assistance of  
12 counsel. So if we have ineffective assistance of  
13 counsel claims to take care of the tough cases where it  
14 really did matter, doesn't that suffice under the  
15 treaty, or does it?

16 MR. GARTLAN: Your Honor, I'd -- I'd like to  
17 -- to move back the discussion to there's no attorney  
18 yet, and the question is what can that person do. And  
19 -- and the error --

20 JUSTICE BREYER: Oh, he's stuck without an  
21 attorney. I have no doubt about that. I have no doubt  
22 that the treaty was violated. I follow you that far,  
23 but now you're talking about the domestic court's power  
24 to do what there is an international obligation to do,  
25 which is to create a remedy. I'm not sure why that

1 remedy need always be suppression.

2 MR. GARTLAN: Your Honor, it needn't --

3 JUSTICE BREYER: I think sometimes it could  
4 be something else.

5 MR. GARTLAN: Yes. It depends on the legal  
6 injury that flows from the violation. Now, in this  
7 instance, we're dealing with statements because again,  
8 to illustrate perhaps, even a national, given these  
9 three options -- what if the police forgot to tell the  
10 -- the person that he has a right to an attorney? Now,  
11 he's given these two options, and he -- he waives  
12 those. And that waiver is voluntary, but it's still  
13 invalid as a matter of law because he wasn't given all  
14 the options he's supposed to be given. And that's the  
15 difference because we don't know what would have --  
16 typically you don't know what would have happened if  
17 somebody were given all the options. That's -- that's  
18 a problem. So now --

19 JUSTICE GINSBURG: But we do know, don't we,  
20 Mr. Gartlan, that if the treaty had been followed, it  
21 still would have been permissible for the police,  
22 having given Miranda warnings, to commence  
23 interrogation? The treaty does not require that the  
24 enforcing officials in this country immediately call  
25 the foreign consulate. Isn't that so?

1 MR. GARTLAN: Well, actually the language of  
2 the article says without delay, Your Honor, so that  
3 suggests that there's some kind of promptness that's --  
4 that's involved.

5 JUSTICE GINSBURG: Promptness. And I think  
6 that the United States has told us it's generally done  
7 here somewhere between 24 and 72 hours. A suspect who  
8 has been given Miranda warnings as here -- the  
9 conversation with the police, the interrogation, could  
10 begin before that 24 hours or 72 hours expires.

11 MR. GARTLAN: And our reading of the article  
12 is that once the -- the police know or have grounds to  
13 believe that the -- that the person is probably a  
14 foreign national, then that duty arises on the police  
15 to give him his rights.

16 JUSTICE GINSBURG: Yes.

17 JUSTICE SCALIA: That's fine, but --

18 JUSTICE SOUTER: It's a --

19 JUSTICE SCALIA: Go ahead.

20 JUSTICE SOUTER: We keep doing this.

21 JUSTICE SCALIA: Yes, we do.

22 JUSTICE SOUTER: It's -- it's a duty to  
23 advise him of -- of his right to have them notify the  
24 -- the consulate. It is not a duty to remain silent  
25 until the consulate responds. And even if you are

1 correct that the obligation to -- to advise him and to  
2 give the notice arises immediately upon the realization  
3 that he's a foreign national, I don't see anything in  
4 the treaty that requires them to defer interrogation  
5 until the -- the consulate has decided whether it wants  
6 to do anything or not.

7 MR. GARTLAN: Yes, Your Honor, but in -- in  
8 this case, the -- the statements that we're seeking to  
9 suppress, the harmful ones, occurred about 8 hours  
10 after the initial arrest. However --

11 JUSTICE SOUTER: Well, do you -- do you say,  
12 going back to -- to the point Justice Ginsburg made, if  
13 the United States follows a 48- to 72-hour rule, is --  
14 is that a violation of the treaty?

15 MR. GARTLAN: Yes, Your Honor, because our  
16 position is that once somebody says, yes, I -- I want  
17 to speak with the consulate, it's like saying I want to  
18 speak with my attorney or I want to invoke my right to  
19 silence. It's a signal that this person believes that  
20 they are being overwhelmed by the situation, that they  
21 are no longer in control, and they're trying to  
22 exercise some control.

23 Now, this Court doesn't have to make this  
24 ruling in this case, but our position would be if  
25 somebody invoked --

1 JUSTICE SOUTER: Well, we -- we might have to  
2 make it in this case.

3 JUSTICE SCALIA: We'd have to make an 8-hour  
4 ruling in this case anyway if -- if we agree with you.

5 MR. GARTLAN: Well, our -- our position is  
6 that if there's an indication of a right to have the  
7 consulate contacted, that's like a cry for help. It's  
8 like -- it's an alternative way of saying I want -- I  
9 can't deal with this anymore. I'm -- I'd like my right  
10 to silence. And --

11 JUSTICE SCALIA: Gee, what about -- what  
12 about countries that don't have an extensive telephone  
13 system, you know, where you -- you have to send a  
14 runner to notify the consul?

15 MR. GARTLAN: That would be a problem for  
16 that country and people in that country. But now we're  
17 dealing with --

18 JUSTICE SCALIA: Well, it -- it just makes me  
19 think that -- that instant contact is not what was  
20 envisioned by the treaty.

21 MR. GARTLAN: The treaty is supposed to be  
22 applied in every country, and there are going to be  
23 different results. The drafters recognized some --  
24 some countries have different systems, different  
25 waiting periods before there's interrogation or before

1 there's contact. And all this treaty does is it puts  
2 the foreign national on par with an American, with the  
3 United States citizen. That all intends to do.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
5 Gartlan.

6 MR. GARTLAN: Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: Mr. Stancil.

8 ORAL ARGUMENT OF MARK T. STANCIL  
9 ON BEHALF OF THE PETITIONER IN NO. 05-51

10 MR. STANCIL: Mr. Chief Justice, and may it  
11 please the Court:

12 Mario -- Mario Bustillo was not advised of  
13 his rights under article 36 in direct contravention of  
14 the treaty. As a result, he went to trial for first-  
15 degree murder, having had no contact with a consular  
16 officer from his home country and being completely  
17 unaware that he was entitled to do so.

18 The Virginia courts improperly relied upon  
19 the result of that violation, itself the product of  
20 failure to comply with the treaty, to refuse to  
21 consider critical exculpatory evidence that was  
22 uniquely in the possession and available with the  
23 assistance of the consular officers. That evidence  
24 would have included official government immigration  
25 records, corroborating a key defense witness, and

1 proving that the alternative suspect, a Honduran  
2 national, known as Sirena, fled to Honduras the day  
3 after the victim died. The Honduran consulate also  
4 would have provided Sirena's address and attempted to  
5 interview him. Indeed, once Bustillo's habeas counsel  
6 located Sirena in Honduras, he obtained a  
7 surreptitiously videotaped confession in which Sirena  
8 admitted, in chilling detail, to committing the crime  
9 and acknowledged that Mario Bustillo had been wrongly  
10 convicted.

11 JUSTICE KENNEDY: Has the Honduran Government  
12 offered to arrest and extradite that witness from  
13 Honduras to bring him back to the United States?

14 MR. STANCIL: Not on this record, Your Honor,  
15 but the Honduran consulate has offered -- has said it  
16 would have attempted to locate Sirena and interview  
17 him. And acting with far fewer resources, before the  
18 Honduran consulate was even aware of this case,  
19 Petitioner's habeas counsel got this confession, the  
20 point being it wasn't that hard to get, to trick this  
21 person into admitting, yes, he -- he committed the  
22 crime. And in the confession, which is on pages 33 to  
23 55 of the -- of the joint appendix, there are a number  
24 of -- of details in that confession he could have known  
25 no other way.

1           Moreover, the Honduran consulate would have  
2 provided, and ultimately did provide, a photograph of  
3 Sirena.

4           JUSTICE ALITO: Well, that, Mr. -- could your  
5 client's attorney have argued in the Virginia habeas  
6 proceeding that his procedural default should have been  
7 excused because of ineffective assistance of trial  
8 counsel at the time of the default?

9           MR. STANCIL: Yes. However, an ineffective  
10 assistance claim -- and I should back up. It was  
11 raised. The -- the habeas court disposed of it on two  
12 grounds, saying it was beyond the statute of  
13 limitations because an ineffective assistance claim,  
14 based on the Vienna Convention, did not relate back,  
15 but also denied it on the merits and said it wouldn't  
16 have met the Strickland standard anyway.

17           But the ineffective assistance claim is  
18 ineffective to address a treaty violation for two  
19 reasons. First, the treaty gives you a right to be  
20 notified. It protects the special relationship between  
21 a consular officer and the detained foreign national,  
22 and channeling these claims to ineffective assistance  
23 doesn't vindicate that separate Federal right.

24           CHIEF JUSTICE ROBERTS: Well, Miranda gives  
25 you the same, you know, right to -- to reach a counsel,

1 a right to remain silent, and yet, if your lawyer  
2 doesn't raise a Miranda violation in trial, it can be  
3 waived.

4 MR. STANCIL: Correct.

5 CHIEF JUSTICE ROBERTS: Why should this be  
6 elevated to a special status beyond that?

7 MR. STANCIL: It's not elevated, Your Honor.  
8 It's actually treated more like the right it  
9 resembles, like a Brady right, which is not defaulted  
10 if you don't raise it -- raise it at trial, for three  
11 reasons.

12 First, like a Brady case, a Vienna Convention  
13 violation resulting in the exclusion of exculpatory  
14 evidence is, by its nature, not known at the time of  
15 trial.

16 JUSTICE SOUTER: No, but isn't -- isn't the  
17 problem with your analogy that counsel do not advise  
18 their clients about Brady rights because, by definition  
19 or in the normal case by definition, counsel doesn't  
20 know whether there's a Brady violation. But counsel  
21 does know or, it seems to me, can properly be charged  
22 with knowing that when he's representing a foreign  
23 national, the foreign national has a Vienna Convention  
24 right, just as much as the foreign national has a  
25 Miranda right, and he can advise him of that. So it

1 seems to me the Brady analogy is -- is not apt.

2 MR. STANCIL: A Brady violation is a closer  
3 match than a -- for example, a Miranda violation, for  
4 the central reason that the consular officer and the  
5 foreign national, working together, know best whether  
6 to exercise those rights.

7 JUSTICE GINSBURG: But in this case, wasn't  
8 it true that the trial counsel knew about the Vienna  
9 Convention right and, for whatever reason, thought his  
10 client would not be aided by talking to the Honduran  
11 counsel -- consul.

12 MR. STANCIL: As an initial matter, it's --  
13 it's not perfectly clear in the record. He submitted  
14 an affidavit stating that he never advised clients of  
15 Vienna Convention violations, but it does not say on  
16 this record that he knew at the time of trial about the  
17 Vienna Convention.

18 But even granting that he did, the attorney  
19 is not in the position to make that decision. This  
20 case illustrates why, and this is my second reason why  
21 an ineffective assistance claim, Justice Alito, would  
22 be insufficient, which is ineffective assistance trusts  
23 strategic decisions about whether to invoke a right to  
24 the counsel, but the counsel, the lawyer, is not -- is  
25 not in a position to make that decision for his client.

1 As this case illustrates, even assuming that the  
2 counsel knew about the Vienna Convention right, he  
3 said, well, that's more trouble than it's worth. This  
4 case illustrates precisely why we don't leave those  
5 decisions with the lawyers. First and foremost --

6 JUSTICE ALITO: That may or may not have been  
7 ineffective assistance of counsel. But I don't  
8 understand why -- if a jurisdiction in this country has  
9 a procedural default rule that can be overcome by a  
10 showing of cause and prejudice with ineffective  
11 assistance of counsel being cause, why isn't that a  
12 remedy that is sufficient to give full effect to the  
13 treaty, which is what the treaty requires?

14 MR. STANCIL: Because that cuts out an entire  
15 category of treaty violations where it may have been a  
16 strategic decision by counsel not to raise it, but  
17 where that decision is ultimately mistaken. And as the  
18 treaty is structured --

19 CHIEF JUSTICE ROBERTS: Well, that's true about  
20 the right to remain silent or any other rights that are  
21 very much the rights of the defendant, not the rights  
22 of the counsel, but they're exercised in consultation  
23 with the counsel, and if they make a determination not  
24 to contact the consul, then that's a decision that  
25 counsel made, and if it's ineffective, there are

1 remedies for that. I'm not sure how it's different  
2 than the right to remain silent.

3 MR. STANCIL: Well, I should back up and --  
4 and point to the first reason why a lawyer isn't  
5 effective in making this decision and -- and first,  
6 state that the lawyer here never told Mario Bustillo  
7 about the Vienna Convention. So it isn't that  
8 situation where he consulted with his client and  
9 elected not to raise it. He didn't even tell his  
10 client.

11 But more fundamentally, the lawyer operates  
12 under inherent conflict of interest. The first thing  
13 the consular officer does, when he makes contact with a  
14 foreign national, is decide is the lawyer that he has  
15 good enough. In fact, it's the only form of consular  
16 assistance that's specified in the text of the treaty.

17 In article 36(1)(c), it says to ensure that he can  
18 obtain adequate legal representation. So the lawyer,  
19 who's deciding whether to get the consulate involved,  
20 has to think in the back of his mind, well, is the  
21 first word out of this consular officer's mouth going  
22 to be, well, you know, fire this guy and get a new  
23 lawyer. That's why we don't trust those rights to the  
24 lawyer, and that's why the treaty doesn't trust those  
25 rights to the lawyer.

1 JUSTICE SOUTER: But once, at least --

2 JUSTICE BREYER: Why -- the ultimate question  
3 I think is the one Justice Alito asked. I think, as I  
4 read the ICJ treaty, we're under a legal obligation in  
5 this country to provide a reasonable, effective remedy.

6 And why isn't that a reasonably effective remedy? Treat  
7 it, you know, like any other problem where the client  
8 should have learned something and he didn't. If the  
9 lawyer is there, this is the obligation. The lawyer tells  
10 him, and if the lawyer fails to tell him, then that's  
11 ineffective assistance in an appropriate circumstance,  
12 or if it isn't, it isn't. But that's a good remedy.  
13 What's wrong with that?

14 And the other obligation is, counsel, you  
15 have to raise this issue as soon as everybody learns  
16 about it, in which case you might be out because I  
17 don't -- he's certainly learned about it by the time he  
18 was on appeal, and as I read your brief here, he didn't  
19 raise it on appeal either.

20 MR. STANCIL: I'd -- I'd like to correct that  
21 very clearly. As soon as Mr. Bustillo got new counsel  
22 on direct appeal --

23 JUSTICE BREYER: Yes.

24 MR. STANCIL: -- he submitted a motion to  
25 remand to -- back to the trial court, saying there's a

1 Vienna Convention violation --

2 JUSTICE BREYER: He said -- when I read that  
3 motion, which I'll do -- so it's in the record?

4 MR. STANCIL: Yes, sir.

5 JUSTICE BREYER: Where?

6 MR. STANCIL: It's -- the Virginia courts  
7 don't paginate the record --

8 JUSTICE BREYER: Do I have it in front of me  
9 somewhere?

10 MR. STANCIL: It's in the record, yes, Your  
11 Honor.

12 JUSTICE BREYER: Okay. Now, in other  
13 words, he did raise it. Okay. If he did raise it,  
14 then maybe he would be entitled to this relief.

15 MR. STANCIL: We would have --

16 JUSTICE BREYER: But is -- my general  
17 question is, is that approach sufficient under the law?

18 MR. STANCIL: Getting back -- is ineffective  
19 assistance sufficient? Yes.

20 JUSTICE BREYER: Say, in an appropriate case,  
21 I can't find a rule for every case -- but that our  
22 obligation, as interpreted by the ICJ, is that we have,  
23 as the law of the land, a treaty that says you tell the  
24 person about his Vienna Convention right, and if you  
25 don't, now says the ICJ, there has to be some kind of

1 -- of effective remedy. Now, assuming that's the law  
2 of the United States, why isn't this approach an  
3 effective remedy?

4 MR. STANCIL: Because relying on the lawyer  
5 to do the duty of the State does not effectuate the  
6 fundamental interest the treaty serves, which is  
7 establishing direct contact between the consular  
8 officer and the lawyer.

9 JUSTICE SOUTER: The -- the only thing in  
10 -- in the second part of Justice Breyer's question, the  
11 only thing that the lawyer has to be relied upon is to  
12 get the issue raised at the appropriate point in the  
13 trial process. And -- and so, at the very least, what  
14 Virginia is -- is arguing here is that he waived it  
15 because no objection was raised based upon a prior  
16 Vienna Convention failure. That is a very conventional  
17 obligation upon lawyers. It -- it's an obligation that  
18 goes to Miranda. It's an obligation that goes to any  
19 denial of rights of which counsel could or should be  
20 charged with knowing, and I don't see why there should  
21 be an exception made to -- to that obligation to raise  
22 the issue.

23 MR. STANCIL: Leaving aside the conflict of  
24 interest that the lawyer would suffer on two additional  
25 reasons why the -- why the lawyer is not --

1 JUSTICE SCALIA: Can I come back to the  
2 conflict of interest? Was -- was this lawyer a  
3 compensated lawyer, or was he a public defender?

4 MR. STANCIL: He was retained.

5 JUSTICE SCALIA: He was retained.

6 MR. STANCIL: Yes, Your Honor.

7 JUSTICE SCALIA: By whom?

8 MR. STANCIL: By the defendant's family.

9 JUSTICE BREYER: There -- there are rules on  
10 conflicts of interest too, you know. So following our  
11 normal rules, is there any country, is there any  
12 international law, is there anything in American law  
13 that would suggest, in respect to any kind of  
14 significant procedural failure, that the State has to  
15 do more than we're just talking about?

16 MR. STANCIL: I'm not sure I --

17 JUSTICE BREYER: And if so, what is it?

18 MR. STANCIL: Is there international  
19 authority required --

20 JUSTICE BREYER: Anywhere. I -- I just think  
21 --

22 MR. STANCIL: Well --

23 JUSTICE BREYER: -- think for our most severe  
24 violations, we provide an approach that you tell the  
25 lawyer. The lawyer brings it up. If the lawyer

1 doesn't bring it up and it's important or there's a  
2 conflict of interest or something terrible is going on,  
3 normally you'd say that's ineffective assistance. And  
4 I just wonder if that approach doesn't work here.

5 MR. STANCIL: It does not. First and  
6 foremost, it doesn't vindicate --

7 JUSTICE BREYER: Well, I'm not interested in,  
8 now at the moment, whether it does or does not work. I  
9 want to know if there's any country or anywhere else in  
10 American law or international law where people have  
11 gone further than that. And there might be. I'm  
12 asking it seriously.

13 MR. STANCIL: Well, the -- well, the ICJ has  
14 held that you can't rely -- that these procedural  
15 default rules are not adequate to vindicate the treaty  
16 interests.

17 JUSTICE BREYER: I'm not talking about a  
18 procedural default rule. I'm talking about the system  
19 that was suggested.

20 MR. STANCIL: In -- in terms of ineffective  
21 assistance?

22 JUSTICE BREYER: Yes, the procedural default  
23 rule would mean you get procedurally defaulted if you  
24 fail to bring it up, but I think you might say if you  
25 failed to bring it up the first time that the lawyer

1 knew about it. And if it's his fault for not bringing  
2 it up or he should have known about it, then he's out  
3 -- the client. But if it's not, he's not out.

4 MR. STANCIL: I believe that actually would  
5 not be the practice in civil law countries, for  
6 example, where a judge as the inquisitor has much more  
7 flexibility than he does in an adversarial system when  
8 and whether to consider evidence that may or may not  
9 have come in at the certain time.

10 But I'd like to get back to, Justice Souter,  
11 your question, with respect to two additional points  
12 why the treaty -- and I'm not saying this is our rule  
13 -- the treaty says the State has to notify and -- and  
14 it doesn't say the lawyer has to notify.

15 JUSTICE SOUTER: No. And I'm not -- I'm not  
16 suggesting anything that -- that affects that. Yes,  
17 the State does have to notify him, and if he wants, the  
18 State has to make the phone call.

19 What I am suggesting is that the lawyer  
20 should be taxed with knowing that that is the  
21 individual's right. The lawyer should be taxed with  
22 knowing that because it's the law of the land. It's a  
23 treaty. And -- and it seems to me the obligation is  
24 upon the lawyer to say, well, did they -- did they tell  
25 you, did they notify the consul, just as the lawyer

1 would say, did you get the Miranda warnings. And --  
2 and if the lawyer does not make that inquiry and does  
3 not raise an objection, whatever it may be, if in fact  
4 the individual didn't get his rights, then I don't see  
5 why there should be -- there should not be a waiver  
6 with respect to the Vienna Convention objection, just  
7 as there is a waiver with respect to a Miranda  
8 objection or a search and seizure objection and -- and  
9 other constitutional rights.

10 MR. STANCIL: And again, ineffective -- an  
11 ineffective assistance claim doesn't give full effect  
12 because under this Court's cases, if it's -- if it's in  
13 the rubric of ineffective assistance, you leave  
14 strategic decisions to the lawyer, and so if --

15 JUSTICE GINSBURG: Well, the problem at the  
16 trial level, I think, is you would be -- you couldn't  
17 make it at that stage because it's the very lawyer  
18 who's ineffective. Here, it was raised by a new  
19 counsel on appeal, and that's really the first  
20 opportunity it could come up because the -- the lawyer  
21 who didn't give this advice certainly isn't going to  
22 say, in -- in the course of the trial, I was  
23 ineffective. So -- and that's I think the point that  
24 the ICJ was trying to make when it said you couldn't  
25 use the procedural default rule.

1           MR. STANCIL:  Yes, Justice Ginsburg, and in  
2   that sense, it's very much like the rule this Court  
3   laid down in Federal cases in Massaro where it -- it  
4   explained just the practical difficulties associated  
5   with requiring claims that need, for example, a  
6   prejudice record, and everybody believes that a  
7   prejudice showing would need to be made before you  
8   could establish a violation.

9           But here, we'd have to -- we have to go back  
10   and we need the tools of post-conviction review to  
11   establish prejudice.  And here, once we got there --  
12   this is -- this is not speculation.  This is a lawyer  
13   made a strategic decision, he says, not to tell his  
14   client.  And then we tried to raise an ineffective  
15   assistance claim, and the court said -- in addition to  
16   saying it was barred for other reasons, said that  
17   doesn't meet Strickland.  This is that category of  
18   treaty violations that, if you push these claims to  
19   ineffective assistance, they evaporate, and that does  
20   not get --

21           JUSTICE KENNEDY:  Well, it's the same point  
22   we've been covering, but all seem to concede that the  
23   particular characteristics of a national system have to  
24   be taken into account.  And the distinguishing feature  
25   of our system is that it's an adversary system.  And

1 you're asking us to make an exception to that system --

2 MR. STANCIL: I --

3 JUSTICE KENNEDY: -- an exception to the  
4 usual rules that prevail in that system, and that's not  
5 consistent with what the treaty requires.

6 MR. STANCIL: Your Honor, it's no more of an  
7 exception than Brady, which is exactly the same  
8 situation where you have a right that you don't know  
9 either the violation has occurred, because they didn't  
10 tell him and his lawyer didn't tell him, and you don't  
11 know the evidence that could have been developed.  
12 Here, once that -- once that missing piece, that one  
13 critical part of article 36, direct notification and  
14 contact with the consulate, once that key is removed,  
15 everything else follows.

16 JUSTICE KENNEDY: Well, but that's because in  
17 Brady, as Justice Souter has already pointed out,  
18 there's a factual piece of evidence that the State has  
19 withheld. Here, the lawyer is presumed to know the  
20 law. It's just not an apt analogy.

21 MR. STANCIL: We believe it is, in part,  
22 because this is an affirmative obligation on the State.  
23 Miranda is a rule, for example, that requires you to  
24 say what the -- the rules of the game are and this is  
25 how it works. This is different. This is

1 fundamentally different. This says, you've got to tell  
2 him individually to go out -- you've got to tell him  
3 that he has a right to go out and ask somebody for  
4 help, and it gets him access to resources that are  
5 uniquely within the possession and control of a  
6 consular officer. The government immigration records.  
7 The consular -- the lawyer could not have gotten those  
8 records. They were crucial to the defense. More  
9 fundamentally, the lawyer didn't even know those  
10 existed.

11 So even if you would assume that an  
12 ineffective assistance claim could remedy violations --  
13 and -- and we certainly believe this case and a large  
14 category of other cases could never be remedied through  
15 ineffective assistance claims as a practical matter.  
16 Even then, all it does is breed ineffective assistance  
17 claim after ineffective assistance claim because the  
18 trial lawyer doesn't know what's in the embassy's file.

19 JUSTICE SOUTER: Well, maybe after the first  
20 ineffective assistance claim is decided in the client's  
21 favor, people are going to wake up. I mean, you have  
22 to admit at this stage of the game -- and it's not your  
23 client's fault, but the -- this is a fairly rare bird.

24 And -- and if, in fact, it were held to be --  
25 let's -- let's assume that -- that on -- on collateral

1 review, someone in your client's position made the  
2 following claim. Number one, the State didn't tell me.  
3 They -- they failed in their Vienna Convention right.  
4 Number two, my lawyer never inquired of me or of  
5 anybody else whether the State had given me my -- my  
6 Vienna Convention rights. And therefore, my -- my  
7 lawyer was ineffective. If on collateral review a  
8 claim like that is made, it is accepted and prejudice  
9 is found, I would imagine the bar is going to wake up  
10 fairly fast to what's going on. Don't you?

11 MR. STANCIL: It doesn't seem to be the case.  
12 In fact -- and our research has revealed that about 60  
13 ineffective assistance claims based on the Vienna  
14 Convention violations -- it's ambiguous as to whether  
15 there's one or none where the court has granted relief  
16 either on prejudice grounds or performance grounds. So  
17 litigants have tried, but that just shows what a poor  
18 fit ineffective assistance claims are.

19 JUSTICE SOUTER: May I ask you one factual  
20 question? And I -- I should know this. I just -- if  
21 -- if I did know it, I can't remember it now.

22 Was any ineffective assistance claim raised  
23 -- I -- I take it there's no ineffective assistance  
24 claim that was ever raised on collateral review here  
25 because you've never gotten to a collateral review

1 stage. Is that correct?

2 MR. STANCIL: We did file an ineffective  
3 assistance claim in the State habeas petition.

4 JUSTICE SOUTER: But that -- wasn't -- I'm --  
5 I'm sorry?

6 MR. STANCIL: The -- the circuit court -- we  
7 then tried to amend -- habeas counsel tried to amend  
8 the petition to specify an additional -- that to  
9 include within that ineffective assistance claim the  
10 failure to notify.

11 JUSTICE SOUTER: But you did that on  
12 collateral review as opposed to trying to supplement  
13 the direct appeal?

14 MR. STANCIL: Yes, Your Honor.

15 JUSTICE SOUTER: Okay.

16 MR. STANCIL: If I may, I'd like to reserve  
17 the remainder of my time.

18 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
19 Stancil.

20 Ms. Williams.

21 ORAL ARGUMENT OF MARY H. WILLIAMS

22 ON BEHALF OF THE RESPONDENT IN NO. 04-10566

23 MS. WILLIAMS: Mr. Chief Justice, and may it  
24 please the Court:

25 Counsel describes the rule that he asks this

1 Court to announce under article 36 as revolutionary,  
2 and I think that's accurate. It would be revolutionary  
3 for this Court to construe the article 36 of the Vienna  
4 Convention to grant an individual foreign national a  
5 right to obtain a judicially created sanction against  
6 the State for its failure to provide the information  
7 that it is obliged to -- to provide under article 36.  
8 No other signatory's court has construed the treaty to  
9 permit an individual in a criminal proceeding to raise  
10 the kind of challenge that Petitioner seeks to raise  
11 here, and certainly no other court has suggested that  
12 exclusion of lawfully obtained evidence would be the  
13 appropriate remedy for that violation.

14 JUSTICE BREYER: Have there been courts  
15 that have held the contrary? Have there been courts  
16 that said when somebody wasn't notified and they sought  
17 to obtain some remedy for that, that even though the  
18 treaty has been violated, you have no remedy under our  
19 system?

20 MS. WILLIAMS: There have been only a handful  
21 of courts that have dealt with the issue.

22 JUSTICE BREYER: Which are -- which is the  
23 best authority abroad for you that -- where they say,  
24 no, we're sorry, we give you no remedy, even though we  
25 violated the treaty?

1 MS. WILLIAMS: Yes, Your Honor. The -- a  
2 Canadian court has said that the -- that there is no --  
3 no remedy for -- in a criminal proceeding for that sort  
4 of remedy. And there are, in fact --

5 JUSTICE BREYER: That's a holding? They --  
6 they held that?

7 MS. WILLIAMS: It is a holding. It's a lower  
8 court opinion. It's not the --

9 JUSTICE BREYER: So we have a lower court  
10 opinion in Canada, and you -- and they have a lower  
11 court opinion in Australia. Is it fair if I come to  
12 the conclusion no one has ever really decided this?

13 MS. WILLIAMS: I think that's absolutely  
14 fair, and what's --

15 JUSTICE BREYER: All right. If -- then if  
16 that's fair, is it fair also for us to say that -- that  
17 we have to take this treaty, since it's self-executing,  
18 as if it were written into American law?

19 MS. WILLIAMS: I think, though, it is --

20 JUSTICE BREYER: Is that fair?

21 MS. WILLIAMS: Yes, that is fair, but I think  
22 it --

23 JUSTICE BREYER: Okay. If that's fair, then  
24 suppose you're coming -- suppose the treaty had said --  
25 and it's part of American law.

1 MS. WILLIAMS: Yes.

2 JUSTICE BREYER: It didn't say this, but  
3 suppose it had. You have to inform this individual,  
4 and if you don't inform the individual, you have to  
5 give him a remedy so that he is not prejudiced thereby.

6 Now, if it had said that and the State or the Federal  
7 Government refused to give him a remedy and it's part  
8 of American law, wouldn't we have to say that American  
9 law, Federal law, treaty law requires you to do that  
10 rather than what you're doing, if it had said that?

11 MS. WILLIAMS: If it had said that --

12 JUSTICE BREYER: Okay.

13 MS. WILLIAMS: -- I would agree with you.

14 JUSTICE BREYER: And once we're there, it  
15 seems to me what we're arguing about is not this  
16 metaphysical thing about rights. We're arguing about  
17 what the treaty says. Now, if that's so, I -- I think  
18 we're back to where we were in the last case and say  
19 does this treaty or does it not, as a matter of  
20 American law, say that the person is entitled to some  
21 kind of remedy. And our problem there is that the ICJ  
22 has said, yes, it does, but it doesn't mention it, but  
23 it does say that you cannot have procedural rights that  
24 do not give full effect to the purpose of -- of this  
25 section. So where are we?

1 MS. WILLIAMS: I think the starting point is  
2 with the text and context of the treaty, and beginning  
3 with the preamble that makes it very clear that this  
4 treaty, like other international treaties, is an  
5 international agreement concerned with the obligations  
6 of the signatories, not with any particular granting of  
7 rights for the individuals who may benefit from those  
8 obligations.

9 And one thing that the preamble makes very  
10 clear is that matters not expressly regulated by the  
11 provisions of the treaty are left to the rules of  
12 customary international law.

13 The only remedy that is discussed as part of  
14 the -- the treaty negotiation is the optional protocol  
15 that would permit signatories, not individuals, to take  
16 a dispute under the treaty to the International Court  
17 of Justice. So there is little evidence in the context  
18 of the treaty and there is evidence contrary --

19 JUSTICE BREYER: Well, the -- the thing is, I  
20 found stronger the other way, which you can answer, is  
21 that ordinarily, I guess, since they quote in one these  
22 amicus briefs, since at least 1927 we consider -- our  
23 State Department -- the treaties that have obligations  
24 are -- also require appropriate enforcement remedies,  
25 et cetera. And we have Avena and we have LaGrand, and

1 there the ICJ, as I read it, has said you have to have  
2 some kind of remedy, being pretty vague about what kind  
3 it is. All right. So normally we follow the ICJ, if  
4 we can. Schooner Betsy and go back forever.

5 All right. So why not? Just follow what  
6 they say, say there has to be some kind of remedy. And  
7 then we put our minds to figuring out what that kind  
8 is.

9 MS. WILLIAMS: Your Honor, even following the  
10 ICJ opinion in Avena does not get Petitioner the relief  
11 that he seeks in this Court or that he sought below.  
12 It does not get you to suppression of the statements  
13 that were made.

14 It's -- it's -- there are a couple of very  
15 important things to consider in the Avena decision from  
16 the ICJ. They discuss suppression and the exclusionary  
17 rule, and they specifically reject Mexico's assertion  
18 that there's a connection somehow between the provision  
19 of information and -- under the article 36 and the  
20 ongoing criminal interrogation. So -- and they also  
21 discuss the -- the concept of without delay and what  
22 that meant to -- to those who put together the treaty.

23 And it does not mean immediately. So there -- under  
24 the ICJ's reading of the treaty, there would not be a  
25 basis to suppress the statements that Petitioner seeks

1 to suppress in our court.

2 I think --

3 JUSTICE GINSBURG: Is there any other relief  
4 sought by the Petitioner? There was the suppression  
5 request. Was there any other? Was there a request of  
6 the kind that the ICJ thought would be appropriate,  
7 which was, court, reconsider this and determine whether  
8 the defendant was prejudiced by the absence of Vienna  
9 Convention notice?

10 MS. WILLIAMS: There -- there was not, Your  
11 Honor. The only remedy that Petitioner has sought in  
12 this case is suppression of the statements.

13 And it's also important, I think, to make the  
14 distinction between the Oregon case and the Virginia  
15 case. In the Oregon case, it's clear that counsel for  
16 Petitioner knew about the obligations under article 36  
17 and raised them in the motion to suppress. And so  
18 there's no question about the State's obligation to --  
19 to inform the consul that the -- that Petitioner was  
20 being detained or any concern with interference with  
21 consular access and communication. The only violation  
22 that we have in the case is that the State failed to  
23 provide the information that it was obligated to  
24 provide under article 36.

25 JUSTICE GINSBURG: There's a question I would

1 like to ask you about the State. Now, if everything  
2 worked ideally, it would be the police officer, along  
3 with the Miranda warnings, says, would you like to call  
4 your consulate. You could do that if you wish. If it  
5 -- if the State has an obligation to give this  
6 information under the treaty, but many police officers  
7 don't know anything about any Vienna Convention, do  
8 judges, Federal judges, State judges, have an  
9 obligation, when they see that an alien defendant is  
10 before them, to, on the judge's own motion, ask the  
11 prosecutor has he been told about the Vienna  
12 Convention, and if not, the judge would have an  
13 obligation to do so?

14 MS. WILLIAMS: I think that would be one way  
15 to ensure better compliance with our obligations under  
16 the treaty. The treaty requires competent authorities  
17 to provide the information and doesn't specify exactly  
18 who is included and who is not included in that  
19 category.

20 Oregon and other States, along with --

21 CHIEF JUSTICE ROBERTS: So State -- you don't  
22 have any problem with State judges being enlisted as  
23 officers to execute Federal treaty obligations on  
24 behalf of the State Department or someone?

25 MS. WILLIAMS: I -- I was hearing the

1 question, I guess, of whether that would be something  
2 that judges could do, and I -- and I was responding to  
3 -- to that part of it. I don't think that -- that  
4 judges are obligated to provide that as a requirement  
5 of the treaty. I think it does fall on the State  
6 authorities to provide that information.

7 JUSTICE KENNEDY: Can you tell us what the  
8 State of Oregon has done in this regard --

9 MS. WILLIAMS: This --

10 JUSTICE KENNEDY: -- or other States?

11 MS. WILLIAMS: We have done a number of  
12 things. In 2000, the Attorney General put together a  
13 task force that included consular officials, law  
14 enforcement officials, jail managers and, working  
15 together, devised some better education tools so that  
16 -- that there could be more education in terms of the  
17 -- the competent authorities who need to provide this  
18 information.

19 JUSTICE KENNEDY: Well, how do you think it  
20 should -- you think the police officer should give it  
21 as part of the Miranda warnings, or what's -- what's  
22 your conclusion as to how it should be implemented?

23 MS. WILLIAMS: The State Department has  
24 recommended that as soon as it is known that the  
25 individual is a foreign national, that the information

1 be given. I think that it is not --

2 JUSTICE KENNEDY: Does this mean that the --  
3 the desk sergeant in the police station or who?

4 MS. WILLIAMS: We've actually worked with our  
5 jail managers to develop a form that could be used as  
6 part of the booking process to provide the information.

7 And the -- I mean, I think the more we do the  
8 education, probably the better the compliance will be.

9 But what's important is that we're attempting to do  
10 that not because the treaty obligates that sort of  
11 immediate notification at the risk of not being able to  
12 use evidence obtained in a later criminal proceeding.

13 JUSTICE STEVENS: Well, it does obligate  
14 immediate notification to the defendant, doesn't it?

15 MS. WILLIAMS: It says without delay that the  
16 information should be provided, but that phrase,  
17 without delay, when you look at the prefatory materials  
18 and how the ICJ has construed it, doesn't mean  
19 immediately.

20 JUSTICE STEVENS: Well, but there are two  
21 different without delay points: one, when you tell the  
22 -- the defendant; and secondly, whether or not he wants  
23 the consulate notified, and there's the second delay.

24 MS. WILLIAMS: And the way the ICJ has  
25 construed that, after reviewing the materials, is that

1 the phrase, without delay, means the same thing in the  
2 three places that it's used in the treaty. And so  
3 there is -- it's not an immediate requirement. There  
4 is some time that can pass, and in some countries,  
5 there may be considerable time.

6 JUSTICE KENNEDY: So you think it's -- it's  
7 not -- it's not required for police interrogators in  
8 the station to include this? They can -- they can  
9 wait?

10 MS. WILLIAMS: It is not required under the  
11 treaty that the advice be given prior to interrogation.  
12 That's correct.

13 JUSTICE KENNEDY: Well, how about during the  
14 interrogation?

15 MS. WILLIAMS: At some point in a prolonged  
16 interrogation, that right is -- that obligation will  
17 arise.

18 JUSTICE KENNEDY: I mean, it seems to me it's  
19 not like rocket science. You've had study groups and  
20 everything. Well, you just tell the policemen give  
21 them -- give them the advice. End of case.

22 MS. WILLIAMS: Well, and part of the  
23 difficulty is it's not so easy to give simply a simple  
24 advice because it's not always clear that someone is a  
25 foreign national, and even if there's a suggestion that

1 someone might be --

2 JUSTICE KENNEDY: Well, that's easy. If you  
3 are a foreign national, you -- that's easy too. I  
4 don't -- I don't see why this is so complicated.

5 MS. WILLIAMS: The other difficulty is that  
6 for some foreign nationals, this is not -- this is not  
7 the case where the detainee controls the contact with  
8 consular officials. We have mandatory notification  
9 obligations. So it's important to establish what  
10 country the individual is from, and some individuals  
11 would prefer that the officials not know what country  
12 they are from.

13 JUSTICE SOUTER: Well, but --I mean, all  
14 you've got to do is --

15 JUSTICE KENNEDY: That's their problem.

16 JUSTICE SOUTER: You ask him what his name  
17 is. Why don't you ask him whether he's an American  
18 citizen? If he says no, say what country are you a  
19 citizen of. I mean, I -- I don't see the difficulty of  
20 that.

21 MS. WILLIAMS: And certainly we're hoping to  
22 move toward better compliance by moving toward that  
23 goal. But the question in this case --

24 JUSTICE SOUTER: But, I mean, why does it  
25 have to be a distant goal? I mean, it seems easy.

1 MS. WILLIAMS: And I think it gets easier as  
2 more cases like this one certainly get the message out.

3 CHIEF JUSTICE ROBERTS: Of course, he doesn't  
4 have to answer that.

5 JUSTICE KENNEDY: Your answer -- your answer  
6 doesn't give me confidence that you're implementing the  
7 treaty.

8 MS. WILLIAMS: But the question is when there  
9 is a violation and -- and if it's from lack of  
10 education or lack of effort on the State's part to  
11 ensure that people understand the obligation, then does  
12 the treaty give the individual the right in a criminal  
13 proceeding to have that lawfully obtained evidence kept  
14 out of the proceeding. And so certainly we can make  
15 better efforts to improve compliance with what is an  
16 obligation that we have under the treaty, but that  
17 doesn't take this Court to suppressing the evidence in  
18 the criminal proceeding, and that's what Petitioner has  
19 sought from the Court.

20 JUSTICE STEVENS: A little while ago you were  
21 asked about the judge asking whether or not to ask the  
22 defendant if the advice was given him. And the  
23 suggestion was made there's no duty on the State judge  
24 to enforce a Federal treaty, but if it's a matter of  
25 Federal law, why wouldn't it be a duty to -- on the

1 judge to obey Federal law if -- if it is part of our  
2 Federal requirement?

3 MS. WILLIAMS: I think the question would  
4 come down to whether the judge falls in the category of  
5 competent authorities under the treaty, and I'm not  
6 sure how that would be construed, whether it would be  
7 construed to include the judge or if it's primarily  
8 focused on the -- the State government officials who  
9 would be involved in the -- the criminal proceeding.

10 Unless the Court has further questions, thank  
11 you.

12 CHIEF JUSTICE ROBERTS: Thank you, Ms.  
13 Williams.

14 Mr. Thro.

15 ORAL ARGUMENT OF WILLIAM E. THRO  
16 ON BEHALF OF THE RESPONDENT IN NO. 05-51

17 MR. THRO: Mr. Chief Justice, and may it  
18 please the Court:

19 The Vienna Convention does not create  
20 judicially enforceable individual rights.  
21 Nevertheless, if this Court were to hold that it does  
22 create individual rights, those treaty claims should  
23 not be treated more favorably than constitutional  
24 claims.

25 In Virginia, if a criminal defendant has a

1 Miranda claim or a Fourth Amendment claim and fails to  
2 raise it at trial, he may not raise it on collateral  
3 review. The same reasoning should apply with respect  
4 to any violation of the Vienna Convention. There's no  
5 reason to elevate a treaty claim above a Miranda claim  
6 or a Fourth Amendment claim.

7 JUSTICE SOUTER: Does -- does -- would  
8 Virginia allow the -- a claim of ineffective assistance  
9 of counsel to be raised on collateral review for a  
10 failure of counsel to -- to advise the client or take  
11 action on the client's behalf under the Virginia  
12 Convention -- the Vienna Convention during -- during  
13 the -- the direct proceedings?

14 MR. THRO: Yes, Your Honor. If -- if this  
15 Court were to announce a new rule that the Vienna  
16 Convention confers individual rights, and if counsel  
17 failed to raise that at trial, and if that failure  
18 constituted ineffective assistance under the standard  
19 articulated in Strickland v. Washington, then it would  
20 be permissible for that criminal defendant to raise it  
21 in his collateral review. Yes.

22 And in fact, Mr. Bustillo attempted to raise  
23 an ineffective assistance of counsel claim, did raise  
24 an ineffective assistance of counsel claim in the State  
25 trial court. That claim was denied, and for whatever

1 reason, he chose not to appeal that to the Virginia  
2 Supreme Court.

3 JUSTICE BREYER: I have a couple --

4 CHIEF JUSTICE ROBERTS: There was a State  
5 collateral review?

6 MR. THRO: Yes. It was on State collateral  
7 review, Your Honor.

8 JUSTICE BREYER: -- thinking of the wrong  
9 thing, but it seemed to me I have a couple of opinions  
10 here on habeas, State habeas, where they did raise it.

11 Am I thinking of the other case?

12 MR. THRO: It -- it was raised in the -- in  
13 the State trial court, Your Honor.

14 JUSTICE BREYER: And -- and not on --

15 MR. THRO: But -- but what was -- and the  
16 State trial court chose to deny the ineffective  
17 assistance of counsel claim on a variety of reasons,  
18 and it was chosen -- he chose not to appeal that to the  
19 Supreme Court of Virginia.

20 JUSTICE GINSBURG: I thought the first time  
21 it was raised was on direct appeal by appellate  
22 counsel.

23 MR. THRO: Appellate counsel on direct appeal  
24 attempted to raise it. He filed a motion requesting a  
25 -- a remand. That motion was denied as -- as improper.

1           Then in -- once the conviction had been  
2 affirmed by the Virginia Court of Appeals, by the  
3 Supreme Court of Virginia, and review had been denied  
4 by this Court, he went back and filed a collateral  
5 review claiming ineffective assistance of counsel for,  
6 among other things, failure to raise the Vienna  
7 Convention. The trial court denied that ineffective  
8 assistance of counsel claim, and then there was no --  
9 and then the decision was made not to pursue that --  
10 the appeal of the denial of the ineffective assistance  
11 of counsel claim to the Supreme Court of Virginia.

12           JUSTICE GINSBURG: And the reason for the  
13 denial?

14           MR. THRO: There were several reasons for the  
15 denial, one of which was statute of limitations, but  
16 the court also noted that even if it had been made  
17 within the statute of limitations, there was no merit  
18 to it.

19           The record reflects, Your Honor, that Mr.  
20 Bustillo's retained trial counsel was fully aware of  
21 the Vienna Convention claim. In fact, he was the son  
22 of Salvadoran diplomats and was familiar with Vienna  
23 Convention issues. He made a strategic decision that  
24 it would be better to -- to contain his client and to  
25 contain the amount of people talking to his client and,

1     therefore, he should not raise the Vienna Convention  
2     issue at trial. And that is set forth in the affidavit  
3     of retained counsel, set forth on pages 318 through 319  
4     of the habeas record in the Fairfax County Circuit  
5     Court.

6             JUSTICE GINSBURG: I think that counsel said  
7     that the -- the people at the consulate -- they tend to  
8     talk a lot?

9             MR. THRO: Yes, he -- yes, he did, Your  
10    Honor, and having grown up as the son of diplomats, he  
11    was obviously familiar with diplomats and their  
12    behavior in social settings. And it was his feeling and  
13    his strategic view that his client was better off not  
14    raising and not contacting the consulate.

15            But, again, this goes back to the basic point  
16    that Justice Kennedy raised earlier. In America, we  
17    give all criminal defendants, regardless of  
18    nationality, a lawyer to represent them. We charge  
19    that lawyer with knowing their rights and with  
20    vindicating their rights, with making the objections  
21    necessary to vindicate Miranda rights, with making the  
22    necessary objections with respect to the Fourth  
23    Amendment.

24            The Vienna Convention should be no different.  
25    If this treaty does, in fact, create judicially

1 enforceable individual rights, then the attorneys who  
2 are appointed or to represent these people will know  
3 about that and will be responsible for vindicating.  
4 That's how we do things in the American system.

5 JUSTICE BREYER: So then the -- then the only  
6 question really is this thing that I find metaphysical,  
7 and maybe you can explain it. To start talking about  
8 the individual rights that -- enforceable, that sounds  
9 to me like a -- you know, a case that arises under 1983  
10 or something. But I thought we don't need that  
11 concept. We all agree that -- that this -- this is the  
12 law of the United States. It's self-executing. And  
13 the only question is whether the action here violates a  
14 provision of the treaty, which is the law of the land.  
15 What else is there?

16 And -- and the only thing I read that the ICJ  
17 said, it said, by the way, I'll tell you what kind of  
18 procedural rule you can't have. You can't have a  
19 procedural rule that says after you failed to inform  
20 him of the right and after he's unbelievably  
21 prejudiced, you say he can't raise it because he didn't  
22 raise it before he could possibly have found out about  
23 the right. That would be self-defeating. So you can't  
24 have that kind of a rule.

25 Now, do you agree with that?

1 MR. THRO: No. No, Your Honor. We --

2 JUSTICE BREYER: You explain to me where I --

3 where I --

4 MR. THRO: Well, I will certainly attempt to

5 do so.

6 I -- I think the flaw in the ICJ's reasoning  
7 is failure to recognize that in the United States all  
8 criminal defendants are -- are given an attorney, and  
9 that that attorney is charged with providing  
10 constitutionally effective assistance of counsel,  
11 meaning being aware of all of the constitutional rights  
12 and all of the Federal and State statutory, and presumably  
13 Federal -- Federal treaty rights as well.

14 There's no doubt that no Virginia official  
15 informed Mr. Bustillo of his opportunity to contact the  
16 consulate, but it is also clear that his retained  
17 counsel knew of it and chose not to pursue it. Now,  
18 that may or may not be ineffective assistance of  
19 counsel, but it does not justify setting aside the  
20 State's procedural bars on collateral review, which  
21 would apply for a Miranda violation or a Fourth  
22 Amendment violation.

23 I would also note, Your Honor, that the  
24 United States is unique in the world in having an  
25 extensive system of collateral review for criminal

1 convictions. Most of the rest of the world doesn't  
2 have a method of collateral attack. So if the rest of  
3 the world doesn't have to have a method of collateral  
4 attack, it seems rather disingenuous to suggest that  
5 the United States has to modify our rules of collateral  
6 attack in order to accommodate the treaty.

7 CHIEF JUSTICE ROBERTS: Is -- is a defense  
8 counsel a competent authority under the treaty for the  
9 purposes of notifying the accused?

10 MR. THRO: I -- I don't think that -- that he  
11 is, Your Honor. However, the -- a defense counsel  
12 would be, if this Court were to announce a new rule --  
13 would be charged with the knowledge and, therefore,  
14 could I think correct any error that may have been made  
15 by the failure of the local officials or the national  
16 officials to inform the criminal defendant of his  
17 opportunity to contact the consulate.

18 JUSTICE STEVENS: You know, one thing I find  
19 difficulty understanding in this case is I just can't  
20 understand how a lawyer thought it would be to his  
21 client's advantage not to consul -- not to tell the  
22 consul because the facts are quite persuasive that he  
23 really was severely prejudiced by the fact he didn't  
24 get all the help he could have gotten.

25 MR. THRO: Your -- Your Honor, I would refer

1 -- I -- the only thing in the record is the affidavits  
2 of -- of the retained counsel. He made that as a  
3 strategic judgment. Obviously --

4 JUSTICE STEVENS: How -- how could he make  
5 such a judgment? I just don't understand it. You know  
6 --

7 MR. THRO: I --

8 JUSTICE STEVENS: Because the prejudice is  
9 just stark in -- in this case. It just stands out and  
10 -- and you just wonder what was going on here.

11 MR. THRO: Well, with all due respect, Your  
12 Honor, we would disagree as to whether -- as to the  
13 extent of the prejudice. I believe that his affidavit  
14 in -- both with respect to the Vienna Convention claim  
15 and his previous affidavit with respect to just other  
16 varieties of ineffective assistance of counsel claims,  
17 indicates that he had some concern about the  
18 credibility of some these witnesses who were  
19 identifying Mr. Sirena.

20 But in any event, he made that strategic  
21 judgment. The trial court said that it was not  
22 ineffective assistance of counsel, and for whatever  
23 reason, that judgment was not appealed to the Virginia  
24 Supreme Court.

25 CHIEF JUSTICE ROBERTS: You know, that's kind

1 of a tough position to put the lawyer in. If he's not  
2 a competent authority for notification purposes and he  
3 makes the judgment that, you know, I don't think it's  
4 going to do any good to notify the consulate, wouldn't  
5 he be better advised not to tell his client about it?  
6 Because if he does, then it's, I guess, harmless error  
7 that the State hasn't notified him, and if he doesn't,  
8 it's kind of an ace in the hole. You see how the trial  
9 goes, and at the end say, by the way, the State never  
10 notified my client.

11 MR. THRO: That's perhaps so, Your Honor, and  
12 that's one thing -- thing that, whatever rule you  
13 craft, you need to be very careful of and that is  
14 preventing gamesmanship on -- on the part of attorneys  
15 and criminal defendants so that these Vienna Convention  
16 claims are not raised after the fact, which is another  
17 reason to -- to --

18 CHIEF JUSTICE ROBERTS: It's kind of like a  
19 speedy trial claim. Right? I mean, if the lawyer knows  
20 he has a right to a trial within a certain number of  
21 days, and he doesn't -- it's not his obligation to  
22 notify the State. He just kind of watches the clock  
23 and lets the clock run out, and then he has a claim  
24 based on that. Right?

25 MR. THRO: Yes, Your Honor, he would.

1 JUSTICE STEVENS: Of course, that might be  
2 likely if there had been a history of these claims  
3 being successful, but none has ever prevailed. So I  
4 doubt if that would be very -- very good to figure you  
5 can, you know, save your -- your key argument that has  
6 no precedent of winning.

7 MR. THRO: Yes, Your Honor, and that would  
8 obviously be if your -- if this Court announced a new  
9 rule, then that would perhaps change the thing.

10 If there are no further questions, thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr. Thro.  
12 Mr. Garre.

13 ORAL ARGUMENT OF GREGORY G. GARRE

14 ON BEHALF OF THE UNITED STATES,

15 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

16 MR. GARRE: Thank you, Mr. Chief Justice, and  
17 may it please the Court:

18 The failure to inform a foreign national that  
19 his consulate may be notified in the event of his  
20 arrest gives rise to a treaty violation between  
21 sovereign states, but it does not give rise to an  
22 individually enforceable right. That follows from the  
23 text of the Vienna Convention and its ratification  
24 history --

25 JUSTICE BREYER: I wonder what that means.

1 Suppose that the treaty provides that if the individual  
2 sends a letter to the counsel, they have to deliver it.  
3 Doesn't it?

4 MR. GARRE: It does, Your Honor.

5 JUSTICE BREYER: Well, suppose a sheriff  
6 somewhere grabs the letter, keeps it, and the counsel  
7 sues him under State property law. And State property  
8 law, they say, entitles me, says the counsel, to this  
9 letter. It's mine. It was sent to me. Now, if that  
10 happens to be the interpretation of the judge in the  
11 State of X the sheriff can keep the letter, wouldn't  
12 you say that that property law of the State is invalid  
13 in light of this provision of the treaty, which is the  
14 law of the United States self-executing?

15 MR. GARRE: I think in that situation you  
16 would have -- you wouldn't be asserting an individual  
17 right under the treaty. You ultimately --

18 JUSTICE BREYER: No. I just would like an  
19 answer to my question.

20 MR. GARRE: There could be situations --

21 JUSTICE BREYER: No. I've given you the  
22 straight facts. The straight facts are they sue -- I  
23 don't have to repeat them. I want to know under --  
24 under my straight facts, wouldn't you say that -- you  
25 got the question.

1 MR. GARRE: The straight -- I think the  
2 answer would be is you would have a treaty violation if  
3 you had a State law which prevented our Nation from  
4 giving effect to our obligations under the Vienna  
5 Convention --

6 JUSTICE BREYER: But I'm not saying a treaty.  
7 I'm saying there's a letter and wouldn't it be the  
8 case that the judge would have to say, here, Mr.  
9 Sheriff, you take the letter and you hand it to the  
10 counsel? It's his property.

11 MR. GARRE: If they were asserting a cause of  
12 action under State property law and that were the  
13 result, then yes.

14 JUSTICE BREYER: That's correct.

15 MR. GARRE: That would be the case, Your  
16 Honor.

17 JUSTICE BREYER: Okay, fine.

18 MR. GARRE: But -- but --

19 JUSTICE BREYER: And now what they're doing  
20 here is they're saying we have a cause of action. It's  
21 called habeas corpus. And we're asking for a rule of  
22 decision in that cause of action, and the rule of  
23 decision in this cause of action, just like mine, was  
24 in property. Is the decision -- the rule of decision  
25 is the rule written into the treaty, just like in the

1 property case, and you cannot do anything that  
2 contravenes it though, of course, you can argue about  
3 the content of that rule of decision.

4 MR. GARRE: In these -- in these two cases --  
5 one you have on Federal habeas, one you had on direct  
6 appeal -- individuals are seeking to affirmatively  
7 invoke rights that they claim that they can enforce  
8 under the Vienna Convention, and we don't think that  
9 the Vienna Convention confers those individual rights.

10 If -- if I could try to explain the -- the --  
11 what you referred to as a metaphysical question  
12 earlier. We agree that the Vienna Convention, as a  
13 self-executing treaty, is part of our Federal law.

14 JUSTICE ALITO: But is there a difference  
15 between the rights that could be asserted by the consul  
16 or a consulate official and the rights that could be  
17 asserted by a criminal defendant?

18 MR. GARRE: I don't think so, Justice Alito.  
19 The -- the treaty has an enforcement mechanism, and  
20 that's -- that's an important thing to keep in mind.  
21 The -- the signatories to this treaty permitted for a  
22 judicial enforcement mechanism.

23 JUSTICE ALITO: If the consulate official  
24 knew that a national of that country was being detained  
25 and wanted access to that person and that was being

1 denied by -- by the State officials, there would be no  
2 remedy in Federal court? The consulate -- the foreign  
3 country could not obtain -- could not get Federal  
4 enforcement of that right to get access?

5 MR. GARRE: That's right, Justice Alito. The  
6 remedy would be the traditional remedy for enforcement  
7 of treaties, diplomatic repercussions, diplomatic  
8 protests, and that happens all the time. That happens  
9 in this country where -- where consulates complain to  
10 the United States State Department. It happens  
11 overseas where the State Department complains about the  
12 treatment of American citizens. This -- this --

13 CHIEF JUSTICE ROBERTS: Are there any  
14 countries that recognize individually enforceable  
15 rights under this convention overseas on behalf of  
16 American citizens?

17 MR. GARRE: No, Your Honor, and what -- the  
18 Petitioners and their amici here are asking this Court  
19 to be the first court to recognize an individually  
20 enforceable right under this treaty.

21 JUSTICE SCALIA: What about that Australian  
22 case that was mentioned, I believe one case where they  
23 say --

24 MR. GARRE: Well, Your Honor --

25 JUSTICE SCALIA: -- evidence was excluded?

1 That would have been a --

2 MR. GARRE: There -- there is Australian  
3 authority going directly to the contrary. It's -- it's  
4 the R. v. Abbrederis case which we cite, which -- which  
5 recognizes that the article 36 is individually  
6 enforceable.

7 The -- the other cases that are referred to  
8 by some of Petitioners' amici are -- are addressed at  
9 length in the Criminal Justice Legal Foundation amicus  
10 brief. And they explain that in those situations,  
11 there -- first of all, the cases are a little bit vague  
12 as to which provisions they're purporting to enforce.  
13 But, second of all, there are domestic statutes which  
14 we think that the correct reading of the cases is in  
15 those cases they were giving effect to the domestic  
16 statutes.

17 There's certainly no -- no unambiguous  
18 example that --

19 JUSTICE BREYER: I imagine there's not --  
20 there's some little authority both ways. To put it in  
21 my perhaps -- I know you disagree with this way of  
22 thinking about it. But I'm -- I'm thinking about this  
23 article 36 and thinking that you're reading it as if it  
24 said, inform the individual, but if you don't, he can't  
25 do anything about it. And the other way is to read the

1 silence as if it said, inform the individual, but if  
2 you don't, he can do something about it. We're not  
3 saying what. Okay.

4 Now, between those two interpretations, we  
5 have the ICJ picking interpretation two and rejecting  
6 interpretation one in, I grant you, a different case.  
7 But I guess since a lot of these amicus briefs tell us  
8 throughout history, a long history, we've tried to  
9 follow ICJ interpretations of treaties to which we are  
10 parties. Why -- it's all up to us, but we've tried to.

11 Why -- why should we not, given the two possible  
12 interpretations -- they choose one. Why should we not  
13 choose to follow theirs here?

14 MR. GARRE: Because, to be blunt, the ICJ  
15 decision is wrong. This Court gives respectful  
16 consideration to the decisions of the ICJ and other  
17 international tribunals, but it's certainly not bound  
18 by those decisions. This Court should look carefully  
19 to the text of the treaty itself, to the ratification  
20 history, to the consistent interpretation of the  
21 executive branch, and to implementing practice in other  
22 states.

23 At best, they -- Petitioners and their amici  
24 have suggested that there's some ambiguity in -- in two  
25 states, Australia and Great Britain. There are more

1 than 160 contracting states to this -- to this treaty.

2 JUSTICE BREYER: Well, then you're going back  
3 to putting weight on the absence of authority. In  
4 those contracting states, most of which I guess are  
5 civil system states, and in civil systems, you'll have  
6 magistrates who do take this kind of thing into  
7 account, but you won't find a case on it. So -- so --

8 MR. GARRE: What you don't --

9 JUSTICE BREYER: -- are there authorities in  
10 these other states to the contrary? I'm surprised if  
11 there is.

12 MR. GARRE: There are authorities that we've  
13 cited where courts have rejected the notion that  
14 article 36 creates individually enforceable rights, in  
15 Canada and Australia, and there's a case in Germany  
16 where they refused to provide for a suppression remedy.  
17 So there are authorities going the other way.

18 The manner in which this treaty is  
19 implemented by the State Department overseas and by the  
20 State Department here is to provide for enforcement  
21 through the traditional means. This Court, as long  
22 back as the *Head Money Cases*, said that the traditional  
23 -- treaties are compacts between states. The  
24 traditional means of enforcing those obligations is  
25 through diplomatic repercussions.

1 JUSTICE KENNEDY: In your view, just as a  
2 practical matter, what we have here, how -- how should  
3 the States enforce this obligation?

4 MR. GARRE: Well, the States should enforce  
5 it generally by giving information to the detainee at  
6 the point in time when they realize -- determine that  
7 he's a foreign national. The State Department is  
8 engaged in extensive --

9 JUSTICE KENNEDY: Do they have any obligation  
10 to inquire whether he is? And -- and can you be more  
11 specific? Should it happen --

12 MR. GARRE: Generally --

13 JUSTICE KENNEDY: -- when you first give him  
14 the Miranda warnings, or tell me how you think it  
15 should work?

16 MR. GARRE: Generally it happens during the  
17 arrest process. If -- if, during the course of  
18 questioning, they determine that a detainee or arrestee  
19 is a foreign national, then at that point in time,  
20 generally they would provide consular notification.  
21 The State --

22 JUSTICE KENNEDY: Do you think they have the  
23 affirmative obligation to ask him if he is a foreign  
24 national?

25 MR. GARRE: The State Department advises law

1 enforcement officers at the Federal and State and local  
2 level that ordinarily they should make that  
3 determination.

4 CHIEF JUSTICE ROBERTS: If they don't -- if  
5 they can't ask him -- I mean, I assume many foreign  
6 nationals are detained fairly close to the border, and  
7 if you start saying, well, my first question is, are  
8 you a citizen or not, you've got to give Miranda  
9 warnings first saying you don't have to answer any  
10 question that might incriminate you.

11 MR. GARRE: That's right.

12 CHIEF JUSTICE ROBERTS: It's kind of a catch  
13 22.

14 MR. GARRE: That's right, Mr. Chief Justice.  
15 And many foreign nationals are reluctant to provide  
16 information about their citizenship because they fear  
17 that that could result in other legal jeopardy.

18 Importantly, Justice Kennedy, article 36 is  
19 in no way an interrogation right. It has no connection  
20 to interrogation. The International Court of Justice  
21 in the Avena decision, at page -- at paragraph 87,  
22 specifically made that point, that this was not related  
23 to interrogation. In many European countries,  
24 detainees who are arrested not only can't have access  
25 to consular officials during questioning, they don't

1 even have access to lawyers during questioning. So --  
2 so this --

3 JUSTICE KENNEDY: Well, I thought you  
4 indicated that you advise the States that they do have  
5 to advise him of this right during the booking process  
6 or the interrogation.

7 MR. GARRE: Well, when they -- when they  
8 learn that the person is a foreign national.  
9 Oftentimes, that could happen -- that could happen  
10 during questioning, although oftentimes it doesn't. It  
11 could happen at booking. It could happen later in the  
12 process. That's what the State Department advises law  
13 enforcement officials.

14 The State Department has engaged in extensive  
15 efforts to ensure compliance with this treaty in order  
16 to abide by our international obligations. We -- we  
17 have sent information to State and local law  
18 enforcement officers how to comply with this treaty.  
19 There have been training videos. There have been cards  
20 similar to Miranda cards. More than 600,000 of those  
21 cards have been sent out to local officials, and -- and  
22 the initial indications that we've received is that  
23 these efforts are working. In fact, these indicate --  
24 these efforts are -- are outlined in the Hardy  
25 affidavit, which is in volume II of the Counter

1 Memorial and Avena decision, which we've offered to  
2 lodge with the Court.

3 But -- but we -- the feedback we've gotten is  
4 that in some offices, they're being overwhelmed by  
5 notifications. So the United States is seeking to  
6 abide by its treaty obligations. Those efforts are  
7 working.

8 This --

9 JUSTICE GINSBURG: Has it worked the other  
10 way around when a young American citizen is detained in  
11 -- in a jail someplace abroad, and has the United  
12 States ever then -- what efforts have been made?

13 MR. GARRE: Your Honor, the efforts that we  
14 undertake are diplomatic efforts. We do not go into  
15 foreign courts and assert or suggest that American  
16 citizens should go into foreign courts and assert a  
17 right to individually enforce this treaty either  
18 through suppression or any of the other remedies that  
19 have been suggested.

20 JUSTICE GINSBURG: Has it worked anyplace?  
21 Take Mexico, Turkey, any country you'd like.

22 MR. GARRE: Yes, Your Honor. In fact, during  
23 the 1980's the United States complained to Mexico about  
24 the fact that American citizens had not received  
25 consular notification, and through the result of those

1 diplomatic discourses, they negotiated an -- a  
2 agreement whereby American citizens were brought back  
3 to the United States for custody. But significantly  
4 there, the -- the United States didn't take the  
5 position that those convictions were unlawful or could  
6 be set aside under the Vienna Convention. They simply,  
7 through diplomatic discourse, the traditional means of  
8 enforcing a treaty, provided for the -- the transfer of  
9 these citizens back to the United States to serve out  
10 their custody.

11           The -- the traditional rule in international  
12 law is that treaties don't create individually  
13 enforceable rights. Many treaties, by their terms, do  
14 expressly contemplate private enforcement in domestic  
15 courts. Look at article 28 of the Warsaw Convention.  
16 Look at article 2, subsection 3 of the International  
17 Covenant on Civil and Political Rights. These treaties  
18 do expressly contemplate that theirs -- their  
19 provisions will be individually enforceable in the  
20 domestic courts. It would have been --

21           JUSTICE SOUTER: When you say they -- they  
22 contemplate it, how do they express that contemplation?

23           I mean, are -- are there magic words that diplomats  
24 understand or -- or what?

25           MR. GARRE: Your Honor, they refer to rights

1 that individuals can assert or should be able to assert  
2 in judicial courts, in the domestic courts.

3 JUSTICE SOUTER: But they -- they provide  
4 expressly that these are rights that may be asserted  
5 individually in national courts?

6 MR. GARRE: There -- Your Honor, there are  
7 varying degrees of specificity, but yes, they -- in  
8 some cases they do provide for that explicitly.

9 JUSTICE SOUTER: But they -- they go beyond  
10 the reference to rights as -- as in article 36.

11 MR. GARRE: Yes. They -- they refer to  
12 domestic enforcement.

13 JUSTICE BREYER: Do they, in all those  
14 property cases, you know, from like the early part of  
15 this republic where property law was determined in  
16 accordance with -- you know all those cases that are  
17 cited.

18 MR. GARRE: Right.

19 JUSTICE BREYER: In those treaties where the  
20 courts then looked to the treaty to help decide who  
21 owned what property, they used it as a rule of  
22 decision. Do those cases -- treaties all use the word  
23 individually enforceable rights?

24 MR. GARRE: They didn't, Your Honor, but  
25 those treaties, as we explain in our brief, are dealing

1 with commercial relations, property rights, and -- and  
2 are almost entirely dealing with individuals and how  
3 they should be treated in foreign states, are much more  
4 amenable to a construction that they create  
5 individually enforceable rights. And the Vienna  
6 Convention, which after all is a convention about the  
7 quintessential matter of interstate relations, consular  
8 functions between states -- we don't think that that  
9 treaty can be interpreted to confer individually  
10 enforceable rights.

11 JUSTICE BREYER: Where does this term come  
12 from as applied to a rule of decision? I mean, when  
13 somebody is arguing that the treaty should apply a rule  
14 of decision in a case brought under some other cause of  
15 action, what's the best thing I could read? I'm not an  
16 expert.

17 MR. GARRE: Your Honor --

18 JUSTICE BREYER: You say the way to think  
19 about that --

20 MR. GARRE: -- read --

21 JUSTICE BREYER: -- is the, quote,  
22 individually enforceable rights.

23 MR. GARRE: We would suggest read the treaty.  
24 It's -- it's -- we agree with you that you get back to  
25 the treaty and you have to make the determination that

1 the signatory states to the treaty intended for private  
2 enforcement in domestic courts.

3 The signatory states to this treaty provided  
4 for a very limited judicial enforcement mechanism, only  
5 contracting states that join the optional protocol and  
6 only in the ICJ. It would have been an extraordinary  
7 thing for those contracting states that so carefully  
8 limited that remedy to -- to subject themselves to suit  
9 in their own courts to any number of foreign nationals  
10 who went abroad into their countries.

11 JUSTICE SOUTER: Well, I -- I would agree  
12 there, but we're not -- this -- this isn't a case about  
13 subjecting them to suit.

14 MR. GARRE: What you -- what you -- what  
15 they're asking you to do, Your Honor, is to say that  
16 this treaty is individually enforceable in our courts.

17 JUSTICE SOUTER: Well, yes, but -- but that  
18 is -- that's not equivalent to saying that it's -- it  
19 is subjecting the United States to suit.

20 MR. GARRE: May I answer the question?

21 CHIEF JUSTICE ROBERTS: Yes.

22 MR. GARRE: It is, Your Honor, insofar as if  
23 you think it in waiver of sovereign immunity terms. A  
24 state may waive its sovereign immunities from some  
25 types of claims, but not other types of claims. And

1 what they're claiming here is that these claims are  
2 enforceable, and we think that they are incorrect.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Stancil, you have 4 minutes remaining.

5 REBUTTAL ARGUMENT OF MARK T. STANCIL

6 ON BEHALF OF THE PETITIONER IN NO. 05-51

7 MR. STANCIL: Thank you. I'd like to first  
8 briefly address two points on behalf of Mr. Sanchez-  
9 Llamas.

10 First, with -- with respect to him, the  
11 question is how to give full effect to the treaty in  
12 the context of custodial interrogation, and his  
13 position is that suppression is necessary to give full  
14 effect. And we need look no further than the fact that  
15 the custodial -- that the remedies that are currently  
16 afforded in a context of custodial interrogation are  
17 ineffective.

18 And secondly, admitting evidence encourages  
19 violations, and that's been the -- the result that's  
20 been a constant pattern and practice of violations.

21 If I could switch back to Mr. Bustillo's  
22 case, and I'd like to address what Mr. Garre just said,  
23 which is that there's a presumption or that -- that  
24 treaties don't create individually enforceable rights.

25 Every decision of this Court is unambiguously

1 clear. Where you have a treaty that becomes part of  
2 the domestic law -- here it is. Where that treaty  
3 creates rights -- here the treaty says his rights. And  
4 third and critically, where you have a cause of action  
5 to enforce those rights, it is judicially enforceable  
6 as a matter of domestic law. Regardless of the  
7 international dimension of the treaty, as a matter of  
8 domestic law, it is enforceable.

9 CHIEF JUSTICE ROBERTS: But it refers to his  
10 rights, to make it clear that the consular office does  
11 not have the right to contact him in the situations  
12 where he would prefer not to be contacted by his  
13 consul.

14 MR. STANCIL: I disagree, Your Honor. If --  
15 if you look at the treaty's text, it says, you shall  
16 notify the person affected of his rights. It's  
17 referring to the foreign national specifically. And  
18 twice more, article 36(2) talks about the rights that  
19 are created. These all flow directly to the foreign  
20 national. He decides whether to exercise them. This  
21 is a classic rights-creating piece of -- it's not a --  
22 it's not a statute, but it's treated on par.

23 And if you look at the --

24 JUSTICE SCALIA: I -- I thought you said the  
25 third condition was creation of a cause of action.

1 MR. STANCIL: Availability of a cause of  
2 action. Here --

3 JUSTICE SCALIA: Where -- where is that in  
4 this statute?

5 MR. STANCIL: The Virginia habeas statute  
6 provides a cause of action if you are held in violation  
7 of Federal law, and in Sanchez-Llamas, the cause of  
8 action is the criminal prosecution. That's what the  
9 Court did in Rauscher where it allowed him to --

10 JUSTICE SCALIA: You meant the statute has to  
11 create a cause of action.

12 MR. STANCIL: The cause of action, just like  
13 1983, allows --

14 JUSTICE SCALIA: I mean, the -- the treaty  
15 has to create a cause of action.

16 MR. STANCIL: That's not correct. Just like  
17 1983 has to create a cause of action to vindicate  
18 Federal rights, here --

19 CHIEF JUSTICE ROBERTS: Well, 1983 is a good  
20 example. If you have a -- a treaty between a State and  
21 the Federal Government, a Spending Clause provision,  
22 that says you've got to spend the money this way, give  
23 certain rights to the individuals, we don't always  
24 automatically hold that the individuals have  
25 enforceable rights even under 1983.

1 MR. STANCIL: Not automatically, but if you  
2 have a statute that said his rights and refers rights  
3 and makes it his obligation and his decision whether to  
4 invoke them, it would be classic rights-creating.

5 If I --

6 CHIEF JUSTICE ROBERTS: It said his rights in  
7 *Gonzaga v. Doe*, which dealt with the student privacy  
8 rights act, and we held -- and the -- we -- the Court  
9 held that that was -- did not give rise to individually  
10 enforceable rights.

11 MR. STANCIL: I would -- I would compare the  
12 language of article 36(2) to any of the rights cases  
13 this Court has decided.

14 If I could, in my remaining minute, describe  
15 why -- and this goes to the heart of what we were  
16 talking about with the procedural bar. If the question  
17 is, as Justice Breyer put it, whether pushing these  
18 claims to ineffective assistance is self-defeating, we  
19 have ample evidence here that it is. The State says,  
20 well, it may or may not be ineffective assistance. The  
21 State court said it wasn't ineffective assistance.  
22 That's because trial counsel doesn't have unique  
23 experience and knowledge necessary to make these  
24 decisions. That's why the treaty expressly puts it in  
25 the hands of the foreign national to make these

1 decisions, not the lawyer.

2           And, with respect, if -- if -- the State has  
3 asserted that we haven't raised an ineffective  
4 assistance claim. We did -- we did recharacterize in  
5 the Virginia Supreme Court, on pages -- page 203, note  
6 4 of the joint appendix, that if you wanted to flip all  
7 this on its head, you could certainly -- you would  
8 certainly have to conclude that he created -- that he  
9 committed ineffective assistance of counsel.

10           CHIEF JUSTICE ROBERTS: Thank you, Mr.  
11 Stancil.

12           MR. STANCIL: Thank you.

13           CHIEF JUSTICE ROBERTS: The case is  
14 submitted.

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

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