

SOUTER, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 04–5928

JOSE ERNESTO MEDELLIN, PETITIONER *v.* DOUG
DRETKE, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, CORRECTIONAL
INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[May 23, 2005]

JUSTICE SOUTER, dissenting.

After the Court of Appeals denied the certificate of appealability (COA) necessary for Medellín to appeal the District Court’s denial of his claim for relief under the Vienna Convention on Consular Relations, we granted certiorari on two questions bearing on the order barring further appeal: (1) whether the judgment of the International Court of Justice (ICJ) in *Case Concerning Avena and other Mexican Nationals (Mex. v. U. S.)*, 2004 I. C. J. No. 128 (Judgment of Mar. 31) (*Avena*), supporting petitioner’s right to litigate a claimed violation of the Convention, and to litigate free of state and federal procedural bars, is preclusive in our domestic courts; and (2) whether *Avena* and the ICJ’s earlier judgment in *LaGrand Case (F. R. G. v. U. S.)*, 2001 I. C. J. 466 (Judgment of June 27), are at least entitled to enforcement for the sake of comity or uniform treaty interpretation. Prior to argument here, the President advised the Attorney General that the United States would discharge its international obligations under the *Avena* judgment “by having State courts give effect to the decision.” Memorandum for the Attorney General (Feb. 28, 2005), App. 2 to Brief for United States as *Amicus Curiae* 9a. Medellín accordingly has gone back

SOUTER, J., dissenting

to state court in Texas to seek relief on the basis of the *Avena* judgment and the President's determination. Since action by the Texas courts could render moot the questions on which we granted certiorari (not to mention the subsidiary issues spotted in the *per curiam* and dissenting opinions), I think the best course for this Court would be to stay further action for a reasonable time as the Texas courts decide what to do; that way we would not wipe out the work done in this case so far, and we would not decide issues that may turn out to require no action. We would, however, remain in a position to address promptly the Nation's obligation under the judgment of the ICJ if that should prove necessary.

Because a majority of the Court does not agree to a stay, I think the next best course would be to take up the questions on which certiorari was granted, to the extent of their bearing on the conclusion of the Court of Appeals that there was no room for reasonable disagreement, meriting a COA, about Medellín's right to relief under the Convention. The Court of Appeals understandably thought itself constrained by our decision in *Breard v. Greene*, 523 U. S. 371 (1998) (*per curiam*), which the court viewed as binding until this Court said otherwise. It is of course correct to face the possibility of saying otherwise today, since Medellín's case now presents a Vienna Convention claim in the shadow of a final ICJ judgment that may be entitled to considerable weight, if not preclusive effect. This case is therefore not *Breard*, and the Court of Appeals should be free to take a fresh look.

That is one of several reasons why I join JUSTICE O'CONNOR's dissenting opinion, but I do so subject to caveats. We should not at this point limit the scope of proceedings on remand; the issues outlined in Part III-B of JUSTICE O'CONNOR's opinion are implicated here by Medellín's request that domestic courts defer to the ICJ for the sake of uniform treaty interpretation. Whether these

SOUTER, J., dissenting

issues would be open for consideration by the Court of Appeals in their own right, independent of the ICJ's judgment, is not before us here, nor should our discussion of them and other matters in Part III be taken as limiting the enquiry by the Court of Appeals, were a remand possible. I would, however, limit further proceedings by providing that the Court of Appeals should take no further action until the anticipated Texas litigation responding to the President's position had run its course, since action in the Texas courts might remove any occasion to proceed under the federal habeas petition. Taking JUSTICE O'CONNOR's proposed course subject to this limitation would eliminate the risk of further unnecessary federal rulings, but would retain federal jurisdiction and the option to act promptly, which petitioner deserves after litigating this far.