

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
3 FEDERAL REPUBLIC OF GERMANY, ET AL.,)
4 Petitioners,)
5 v.) No. 19-351
6 ALAN PHILIPP, ET AL.,)
7 Respondents.)
8 - - - - -

9
10 Washington, D.C.
11 Monday, December 7, 2020

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:24 a.m.

16
17 APPEARANCES:

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23 supporting the Petitioners.

24 NICHOLAS M. O'DONNELL, ESQUIRE, Boston, Massachusetts;
25 on behalf of the Respondents.

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P R O C E E D I N G S

(11:24 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 19-351, the Federal Republic of Germany versus Philipp.

Mr. Freiman.

ORAL ARGUMENT OF JONATHAN M. FREIMAN

ON BEHALF OF THE PETITIONERS

MR. FREIMAN: Thank you, Mr. Chief Justice, and may it please the Court:

When Congress enacted the expropriation exception in 1976, Communist states had been engaging in widespread expropriation of property from American nationals and denying that the international law of takings required them to pay compensation.

Congress enacted a series of targeted measures, including the expropriation exception, to counter these states' rejections of the law of takings. The exception lets U.S. courts hear claims against foreign sovereigns when "rights in property taken in violation of international law" are at issue.

That language invoked the established international law doctrine known as the law of

1 takings. As the Restatement and other sources
2 show, the doctrine addresses only nations'
3 takings of foreigners' property. And by
4 referring to it, Congress incorporated its
5 limits into the expropriation exception.

6 The plaintiffs ignore this context,
7 trying to turn this modest exception into a
8 novel tool for suing foreign sovereigns for
9 human rights and law of war violations occurring
10 in their own countries. That reading should be
11 rejected for three reasons.

12 First, it ignores the established
13 meaning of the exception's words when enacted in
14 1976.

15 Second, it creates a jurisdictional
16 mismatch with the exception's text. The
17 exception focuses on rights in property, giving
18 jurisdiction over property claims. It would be
19 bizarre for courts to decide if a state has
20 violated human rights law by murdering its own
21 nationals just as a jurisdictional hook to hear
22 a property claim.

23 Finally, every applicable canon points
24 away from a reading that would depart sharply
25 from the restrictive theory, put the U.S. deeply

1 in breach of the international law of state
2 immunity, blur the jurisdictional lines over
3 foreign sovereigns, where clarity is needed
4 most, cause friction in foreign relations, and
5 risk reciprocal treatment against the U.S.

6 Congress can take these risks if it
7 wants to, but it hasn't yet.

8 CHIEF JUSTICE ROBERTS: Counsel, just
9 to make sure, your position is because this suit
10 involves property rights, it should not be
11 regarded as a qualification of the international
12 -- of international law or a case in which
13 genocide is a pertinent issue in deciding the
14 question of jurisdiction?

15 MR. FREIMAN: That's right, Your
16 Honor. We believe that (a)(3) explicitly is
17 invoking and referring to the international law
18 of takings, that the legislators would have
19 known in 1976 when enacting the statute against
20 that backdrop.

21 CHIEF JUSTICE ROBERTS: Well, why then
22 do you -- why do you think that expropriation of
23 property can't be part of a campaign of
24 genocide?

25 MR. FREIMAN: Well, property can be

1 expropriated in a number of contexts, but the
2 gravamen of (a)(3) is the taking of property,
3 and the law that it's referring to is the
4 international law of taking.

5 I think a genocidal taking, as Your
6 Honor puts it, is unquestionably an act of
7 genocide if it inflicts conditions of life
8 calculated to physically destroy a people, but
9 it's not a taking of property within the meaning
10 of the expropriation exception.

11 CHIEF JUSTICE ROBERTS: Well, I guess
12 my question is why that is. If it is part of a
13 campaign of genocide, that doesn't alter the
14 fact that it's simply taking property?

15 MR. FREIMAN: Well, I think there's --
16 there's three reasons, Your Honor, in terms of
17 the -- the evidence that Congress was intending
18 to invoke the international law of takings in
19 (a)(3). The text, of course, is referring to
20 language in international law, so the question
21 is, what takings are wrongful under
22 international law? And the Restatement
23 provision operable at the time answered that
24 question, what the section said -- say -- ask --
25 asking when are takings wrongful under

1 international law.

2 I think second is the statutory
3 context. You had the Sabbatino decision of this
4 Court followed by a series of targeted responses
5 of increasing force to foreign nations that
6 refused to recognize the existence of the
7 international law of takings.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas.

11 JUSTICE THOMAS: Thank you, Mr. Chief
12 Justice.

13 Counsel, the -- I -- I understand your
14 argument about -- with respect to taking, but
15 can't the -- just imagine that there's a
16 campaign, first of all, of genocide, but in
17 conjunction with and a part of that, there's an
18 effort to take all of the property, including
19 jewelry, art, and even the extraction of gold
20 teeth, for example, taking of things like
21 spectacles. You can go down the list of some of
22 the awful things that were done.

23 Can that be a part of genocide? Can
24 that taking be a part of genocide, not separate
25 from genocide?

1 MR. FREIMAN: Well, Your Honor, if, in
2 fact, a -- a country is taking property with the
3 intent of physically destroying a people or a
4 part of a people, it -- it's unquestionably a
5 genocidal act.

6 But the question, again, is what
7 Congress intended in (a)(3). Was it invoking
8 any kind of -- anything that could be described
9 as a taking, or does it have to be the gravamen
10 of the claim?

11 And, here, the gravamen of the claim
12 in the example you gave would be genocide. But
13 Congress did not see fit to create any kind of
14 exception for genocide claims or other
15 international human rights or law of war claims.

16 JUSTICE THOMAS: But don't you think
17 that 1605 aids in the way that it sort of allows
18 for a -- allows for the systematic campaigns, of
19 course, of confiscation from -- of cultural art,
20 doesn't that suggest that when it's aimed at a
21 -- at a vulnerable group, that it is actionable
22 under FSIA?

23 MR. FREIMAN: I think the important
24 thing to recognize about the Clarification Act
25 is that it did not amend (a)(3).

1 JUSTICE THOMAS: Yeah.

2 MR. FREIMAN: It took it as a given.
3 And -- and the key here is what (a)(3) says and
4 what the words meant then.

5 (h) clarified the commercial nexus
6 requirement in saying that in general, an art
7 loan from another country isn't commercial
8 activity in the U.S., but it created a carveout
9 for Nazi-era claims. That carveout just left
10 the preexisting commercial nexus definition, but
11 it also -- (h) expressly leaves the definition
12 of "property taken in violation of international
13 law" untouched. It changed nothing.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Breyer.

17 JUSTICE BREYER: Well, am I right in
18 thinking that a plaintiff, Mr. Smith, wants to
19 sue a foreign country because he was injured
20 during a genocide deliberately, seriously
21 injured.

22 Now he might be able to bring a suit
23 against a private person who participated,
24 perhaps, but he cannot sue the government. Is
25 that right?

1 MR. FREIMAN: That's correct.

2 JUSTICE BREYER: Okay. So now we're
3 looking for whether he could sue the government,
4 although otherwise he couldn't. If the
5 government, instead of hurting him, and maybe it
6 is hurting him too, then he might be able to sue
7 for some of his things of value, is that
8 correct?

9 MR. FREIMAN: That's the plaintiffs'
10 theory, Your Honor.

11 JUSTICE BREYER: That's the
12 plaintiffs' theory. All right.

13 So why is it -- this is a slightly
14 different question, and it's just to satisfy my
15 own curiosity -- really, 75, 85 years later,
16 this seems to be the first case that has -- that
17 has arisen on this theory. Am I right? Is
18 there precedent?

19 MR. FREIMAN: Your Honor, these cases
20 began to arise a few years ago, the -- the
21 Fischer and Abelesz cases in the Seventh Circuit
22 and then the two cases you're hearing today.

23 Until then, as Your Honor noted in the
24 Altmann case --

25 JUSTICE BREYER: Yeah.

1 MR. FREIMAN: -- the consensus view
2 was that these cases could not be brought.

3 JUSTICE BREYER: Well, how did
4 Mrs. Altmann recover?

5 MR. FREIMAN: Well, Mrs. Altmann, in
6 fact, was a Czech -- Czechoslovakian national.
7 And her property was taken --

8 JUSTICE BREYER: But still -- still
9 she's a Czech -- oh, I see. She -- Mrs. Altmann
10 was, but her aunt wasn't.

11 MR. FREIMAN: Well, the -- the
12 plaintiff in the case, the person from whom the
13 property was taken, was a Czechoslovakian
14 national.

15 JUSTICE BREYER: All right.

16 MR. FREIMAN: So that was a -- that
17 was not a --

18 JUSTICE BREYER: So that was an
19 expropriation in violation of the -- oh, okay.

20 MR. FREIMAN: Yeah.

21 JUSTICE BREYER: I see. Thank you.
22 Thank you.

23 MR. FREIMAN: And -- and -- and, Your
24 Honor, I would add that in -- in the Malewicz
25 case, which is the case that gave rise to the

1 Clarification Act, the same was true. That was
2 a Dutch taking from a Russian national, and --

3 CHIEF JUSTICE ROBERTS: Justice Alito.

4 JUSTICE ALITO: The ancestors of the
5 plaintiffs in this case were all German
6 nationals?

7 MR. FREIMAN: Yes, Your Honor.

8 CHIEF JUSTICE ROBERTS: What if they
9 were stripped of their citizenship prior to the
10 taking of the property?

11 MR. FREIMAN: Well, I'd say a few
12 things in response to that.

13 First of all, the entity from which
14 the property was allegedly taken was a -- was a
15 company, a consortium, which was itself owned by
16 three firms underneath that which were also
17 companies. So this is a case of claimed takings
18 from German national companies.

19 But, in response to your question as
20 to the individuals, the individuals here -- this
21 sales transaction was finalized in the summer of
22 1935 according to the amended complaint, which
23 is before the Nuremberg laws went into
24 existence, before -- before Jewish Germans were
25 stripped of German citizenship, so it wouldn't

1 be relevant here.

2 Finally, to the extent that they were
3 stripped of -- of citizenship, the question
4 under the international law of takings is not
5 the citizenship but is the nationality of the
6 individuals.

7 JUSTICE ALITO: Well, that would get
8 into some very difficult questions concerning
9 the nationality of people who lived in parts of
10 Eastern Europe that were -- that -- that had
11 been disputed among the countries in that region
12 for some time.

13 But getting -- get -- getting back to
14 the issue of timing, in the Clarification Act of
15 2016, Congress defined the covered period as
16 beginning in 1933.

17 So, in Germany, were there takings in
18 violation of international law under your
19 interpretation prior to 1938, in other words,
20 cases in which the property of non-German Jews
21 was taken by the Third Reich?

22 MR. FREIMAN: There's nothing in the
23 record with regard to that either way, Your
24 Honor, but I have no doubt that that occurred.

25 JUSTICE ALITO: Well, if it occurred,

1 would it be more than a trivial number of cases
2 and, if so, why would Congress have gone out of
3 its way to define the covered period as
4 beginning in 1933?

5 MR. FREIMAN: I can't speak as to the
6 number of cases that it was. That's a
7 historical question that, again, has not been
8 litigated here. But I would say as to why
9 Congress would define the covered period as
10 beginning in 1933, Congress was doing something
11 very simple. It was saying the entire Nazi era,
12 from the time that the Nazis came into power
13 until the time that they were defeated by allied
14 forces. And, again --

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor.

17 JUSTICE SOTOMAYOR: Counsel, what is
18 your position about the arguments Hungary makes,
19 the arguments presented in the Hungary case?

20 MR. FREIMAN: As -- as -- as you know,
21 Justice Sotomayor, we raised as the second
22 question presented the same comity issue that
23 this Court has just heard argument on in the
24 Simon case, and we, in -- in large part, agree
25 with the comments made by counsel for Hungary

1 and -- and for the Solicitor General in that
2 case.

3 JUSTICE SOTOMAYOR: You do not have,
4 however, a remaining claim in which we would
5 have to decide the comity issue if we decide
6 against you on this main issue, hypothetically?

7 MR. FREIMAN: If you decided in our
8 favor in this case, there would be no --

9 JUSTICE SOTOMAYOR: No, I'm -- I'm
10 sorry. I misspoke, yes.

11 MR. FREIMAN: If you decided in our
12 favor on this issue, then there would be no
13 reason for you to reach the comity question in
14 our case.

15 JUSTICE SOTOMAYOR: Number two, we are
16 generally instructed, self-guided, to rely on
17 the plain meaning of the words that are
18 presented in the statute, and the plain words in
19 the statute here is "in violation of
20 international law."

21 And it's clear to me that genocidal
22 acts of taking property, even from
23 non-nationals -- from -- from nationals would be
24 an act of genocide. I think that's clear from
25 the Clarification Act today.

1 So why don't we follow the plain
2 meaning of the statute, and why should we look
3 to customary international law as opposed to
4 simply the plain meaning of the words?

5 MR. FREIMAN: Well, I think, Your
6 Honor, you have to look at the plain meaning of
7 the words in their context and in their time.
8 And as Bostock made clear recently, when there's
9 a difference in the meaning at the time of
10 enactment as opposed to the present day and
11 there's evidence of that, you do need to look to
12 that.

13 Here, we have a situation where the --
14 the House Report specifically refers to a taking
15 in violation of international law as a term,
16 which means that it's referring to a body of
17 law. And it cites the second Hickenlooper
18 Amendment. It cites this Court's decision in
19 Alfred Dunhill, which was involving Cuban
20 expropriations, came down just months before the
21 FSIA, which --

22 CHIEF JUSTICE ROBERTS: Justice Kagan.

23 JUSTICE KAGAN: You know, yes, Mr.
24 Freiman, we look to the meaning in its time, but
25 I guess I don't quite understand what words in

1 the statute meant something different in its
2 time. "Rights" and "property" mean the same
3 thing. And then you have, you know, "taken in
4 violation of international law."

5 I understood you to concede the point
6 the property can be taken in -- as -- as -- as
7 -- as part of, as an important element of
8 genocide, so that property can be taken in -- in
9 violation of international law.

10 So why doesn't that just solve the
11 problem? It's a matter of reading the plain
12 meaning of the text, what it meant then as well
13 as what it meant now, means now?

14 MR. FREIMAN: I think the important
15 thing is to read the clause as a whole, and the
16 term here is "taken in violation of
17 international law," which, as noted, was
18 something that had a defined meaning in the
19 international law of takings, which is what
20 Congress was addressing in responding to the
21 Communist expropriations.

22 I -- I think it's also --

23 JUSTICE KAGAN: Well, I mean, I
24 guess -- I guess, Mr. Freiman, it's clear that
25 Congress was thinking about a certain thing

1 primarily, which is the -- which was the
2 expropriation context. But Congress wrote words
3 which didn't deal only with that thing but which
4 applied more broadly and seems to cover the kind
5 of property taking at issue in this case.

6 MR. FREIMAN: I don't think so, Your
7 Honor, because I think the question is what's
8 the gravamen. If there's a claim that there
9 were conditions of life that were created that
10 led to the potential destruction of a people,
11 that's a claim of genocide. That's not a claim
12 of a taking. And -- and -- and (a)(3) is
13 involved with taking claims.

14 Now, if you look at the other parts of
15 --

16 JUSTICE KAGAN: I understood you to
17 say the opposite a little while ago, that you
18 weren't contesting that -- that the taking of
19 property rights can constitute genocidal acts.

20 MR. FREIMAN: Certainly, taking
21 property can create conditions of life that are
22 intended to destroy a people, and that clearly
23 is a violation of the law of genocide. But that
24 doesn't mean that it's a violation of the law of
25 takings.

1 And this provision of the FSIA is
2 creating a narrow exception for violations of
3 the law of takings. There are other parts of
4 the F --

5 JUSTICE KAGAN: Thank you. Thank you,
6 Mr. Freiman.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch.

9 JUSTICE GORSUCH: Good morning,
10 counsel. I'd -- I'd like to return to the
11 question of what do we do about a stateless
12 people.

13 You indicated that the Jewish victims
14 of the Holocaust were stripped of their
15 citizenship but not nationality and are,
16 therefore, still barred by the domestic takings
17 rule.

18 But, if they can't access the domestic
19 takings laws because they are no longer
20 citizens, in -- in what respect could that --
21 could that rule bar them?

22 MR. FREIMAN: Let me respond in -- in
23 -- in three parts, Your Honor.

24 First of all, the question of
25 statelessness is not a question that was raised

1 by the plaintiffs in this case in the district
2 court, court of appeals, or here. So this is
3 entirely a forfeited question, one that the
4 Court need not address, and, in fact, hasn't
5 been developed in any way.

6 The second -- the second -- the second
7 point is that, just to remind you, historically
8 here the claims are that this transaction
9 occurred in the summer of 1935, which is --

10 JUSTICE GORSUCH: Let -- let -- let --
11 let's put aside the -- the dates and the facts.
12 Your third answer to Justice Alito supposed that
13 they were, in fact, stripped of their
14 citizenship before the taking, but that -- you
15 said that doesn't matter because they're still
16 nationals.

17 MR. FREIMAN: Well --

18 JUSTICE GORSUCH: And I'm asking you,
19 well, in what relevant sense does that make a
20 difference?

21 MR. FREIMAN: That would require this
22 Court to go down the path of determining the
23 international law of nationality. I will say
24 that there's no bad treatment exception under
25 the international law of nationality, and if it

1 were read -- it's not a -- the international law
2 of takings is not a human rights principle.
3 It's a principle of nation-to-nation rights and
4 of the transfer of wealth.

5 And in that sense, this would create
6 an enormous expansion of the international law
7 of takings if you viewed people who were
8 stateless as being somehow immune from the
9 ordinary rules of the international law of
10 takings.

11 JUSTICE GORSUCH: So the domestic
12 law -- taking law, as far as you're concerned,
13 would permit a state to forbid almost everybody
14 in -- in its jurisdiction from -- from any --
15 any recourse and -- and that would pose no
16 problem?

17 MR. FREIMAN: I mean, to be fair, Your
18 Honor, again, this is not something that's been
19 briefed, so I -- I can't really say. I can only
20 say that, here, where there's no question that
21 people were citizens and nationals, the
22 international --

23 JUSTICE GORSUCH: All right. Last
24 question -- I'm sorry to interrupt, but time
25 requires me to do so.

1 What do we -- you say it wasn't -- it
2 was forfeited, but, of course, the plaintiffs
3 won their subject matter jurisdiction on other
4 grounds. If we were to -- if we were to find in
5 your favor here, shouldn't they be given a shot
6 to -- to make this argument on remand?

7 MR. FREIMAN: I don't think so, Your
8 Honor. I mean, they could have raised it at any
9 point in response to our arguments that this was
10 beyond the scope of the international law of
11 takings. They never did. Matter of fact, even
12 in their opposition brief here, they don't.
13 They just point out that they believe that the
14 rule shouldn't apply in the context of genocide.

15 CHIEF JUSTICE ROBERTS: Justice
16 Kavanaugh.

17 JUSTICE KAVANAUGH: Thank you.

18 And good morning, counsel. At page 10
19 of your reply brief, you say, and I'm quoting,
20 "It is literally possible to read the exception
21 to mean takings that violate any principle of
22 international law."

23 And to follow up on questions asked by
24 Justices Sotomayor and Kagan, why isn't that the
25 end of the case?

1 MR. FREIMAN: This Court held in
2 Samantar that the mere fact that something is
3 literally possible does not mean it's what --
4 it's what the text meant. And in Dolan, this
5 Court has noted that reading a statute to the
6 outer limits of its definitional possibilities
7 is sometimes in error.

8 In the context of the FSIA, this Court
9 has made repeatedly clear that it's important to
10 remember what Congress was going after. What
11 Congress was going after was codifying the
12 restrictive theory and avoiding friction in
13 international relations.

14 To read this to the outer limits of
15 its definitional possibilities, to -- to -- to
16 cut this phrase apart into different pieces and
17 say it can cover this is to create friction in
18 international relations. It's to risk
19 reciprocity in the ways discussed in the
20 previous case.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett.

24 JUSTICE BARRETT: So, counsel, you
25 said earlier that the expropriation exception,

1 there would be jurisdiction for a U.S. court to
2 hear a claim by a foreign national against, say,
3 Germany for the -- for a claim that Germany took
4 that foreign national's property as part of the
5 genocide of the Holocaust under the
6 international law of takings.

7 Judge Katsas pointed out in his
8 dissent from denial of rehearing en banc that in
9 the context of the kinds of claims that the
10 plaintiffs asserted here, that the scheme they
11 propose oddly matches the jurisdictional
12 equivalent of a thermonuclear weapon,
13 determining the scope of genocide, to the merits
14 equivalent of swatting a fly, which is looking
15 at the underlying merits, determining whether
16 there was a common law conversion.

17 Would -- in the private context that
18 -- that everybody agrees could go forward under
19 the international law of takings if this were a
20 suit brought by foreign nationals, would that
21 involve the court in the same kind of quagmire
22 that Judge Katsas is identifying here, having to
23 determine the scope of a genocide, or does
24 resort to the international law of takings give
25 the court a clean way of deciding it without

1 having to get into the human rights aspect?

2 MR. FREIMAN: It gives the court the
3 clean way, Your Honor, because the court just
4 has to decide was the claimant a national of
5 another state, and then the basic parameters of
6 the international law of takings, was there --
7 was there compensation given, was it prompt and
8 effective? So it doesn't raise those kinds of
9 extraordinary foreign relations concerns that
10 are raised when district courts are asked to
11 determine whether there was a violation of the
12 law of genocide or systematic racial
13 discrimination or the laws of war.

14 JUSTICE BARRETT: Would it still raise
15 the concerns implicated by a very, very large
16 judgment against a foreign country?

17 MR. FREIMAN: Well, there's the
18 possibility of -- of a large judgment, depending
19 on the circumstances, Your Honor. I don't think
20 the FSIA puts any limit on that except to
21 preclude punitive damages.

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: A minute to
24 wrap up, Mr. Freiman.

25 MR. FREIMAN: Thank you.

1 I'd like to, I guess, raise three
2 reasons for skepticism about the broad reading
3 of (a)(3) that plaintiffs provide, and the first
4 two track what you heard earlier of Simon.

5 Under plaintiffs' view of the
6 expropriation exception, it's easier to sue a
7 foreign sovereign than it is to sue a private
8 defendant under the ATS because, under the ATS,
9 Kiobel makes clear that foreign-cubed cases
10 don't belong in U.S. courts.

11 The second is there's no serious
12 account of reciprocity concerns. Those were
13 laid out ably by counsel for Hungary. I need
14 not repeat them. But they're extraordinary here
15 when we're talking about subjecting a foreign
16 sovereign to potential liability for the gravest
17 human rights abuses in history.

18 The third is clarity with regard to
19 jurisdiction, especially for foreigners. In
20 Helmerich, in the context of the expropriation
21 exception, this Court made clear that clarity is
22 particularly important. In our view, it's
23 there. It's the international law of taking.

24 In their view, it's unbounded: any
25 international law that anyone can think of in

1 the human rights or law of war context.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Kneedler.

5 ORAL ARGUMENT OF EDWIN S. KNEEDLER
6 FOR THE UNITED STATES, AS AMICUS CURIAE,
7 SUPPORTING THE PETITIONERS

8 MR. KNEEDLER: Mr. Chief Justice, and
9 may it please the Court:

10 The United States deplores the
11 atrocities committed against victims of the Nazi
12 regime and has long had a policy of encouraging
13 Germany and other countries to provide
14 mechanisms to afford a measure of justice.

15 Respondents, though, have sought to
16 sue in U.S. court, but the exception to
17 sovereign immunity on which they rely is limited
18 to violations of the international law of
19 takings or expropriations, which has long
20 prohibited only the taking of a foreign
21 national's property if done without
22 compensation.

23 That interpretation is confirmed by
24 the parallel provision of the Restatement in
25 effect when the FSIA was enacted, and the

1 exception's statutory history is part of
2 Congress's response to the uncompensated
3 expropriation of Americans' property by Cuba and
4 others.

5 By contrast, to read the expropriation
6 exception as opening U.S. courts to suits based
7 on human rights violation would constitute a
8 major departure -- departure from the FSIA's
9 text, structure, and context, and require U.S.
10 courts to make sensitive judgments about a
11 foreign state's treatment of the persons within
12 its territory.

13 CHIEF JUSTICE ROBERTS: Mr. Kneedler,
14 you -- you began by mentioning the United
15 States' policy of encouraging dispute resolution
16 mechanisms to address questions such as the one
17 before us.

18 How do you judge the adequacy of those
19 alternatives? And isn't that something that
20 should enter into our determination about
21 whether the takings remedy should be available
22 under international law?

23 MR. KNEEDLER: No, I -- I -- I don't
24 think so. The -- the -- it -- it -- it seems
25 pretty clear at the time that the only -- the

1 only international law addressing takings was
2 the law of expropriation, which had to do with
3 -- with whether compensation was awarded to a
4 foreign national.

5 So the question -- question of any
6 remedies between a state and its nationals was
7 entirely internal --

8 CHIEF JUSTICE ROBERTS: Well, but
9 that's the --

10 MR. KNEEDLER: -- and there the law --

11 CHIEF JUSTICE ROBERTS: -- that's the
12 main policy, as I gather, of -- of the United
13 States, is simply to -- to encourage other
14 countries to provide mechanisms for
15 compensation. And if -- if that fails, then
16 that's just too bad?

17 MR. KNEEDLER: Well, that's the --
18 again, under the -- the international law of
19 expropriations, to which the FSIA was referring,
20 that -- that is right. The relationship between
21 a state and its own nationals was a matter that
22 other nations had no right to complain about.

23 The -- the domestic takings law was
24 really the converse of -- of the rule that
25 international law does prohibit the

1 uncompensated taking of the property of
2 nationals of another country because that
3 violates the rights of that other country.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas.

7 JUSTICE THOMAS: Thank you, Mr. Chief
8 Justice.

9 Mr. Kneedler, I'm interested in what
10 you think of this -- of the stateless people or
11 people who have been denaturalized, as Justice
12 Alito brought up.

13 MR. KNEEDLER: We -- we have not
14 addressed that, and that issue has not been
15 developed in this case. And I -- I -- I don't
16 feel that I'm in a position to address it at --
17 here in this Court.

18 If the -- if the Court thinks that it
19 -- it is worth focusing on or should be focused
20 on, it could -- it would be open on remand to
21 see whether that has been waived and what the
22 ramifications are.

23 But there -- there are, you know,
24 perhaps sensitive questions about that and would
25 -- I think the question would have to take into

1 account the formulation of the -- of the rule,
2 which is that international law prohibited the
3 uncompensated taking of a foreign -- of an
4 alien's property or the national of another
5 nation.

6 Now how that would play out, whether
7 -- whether there's some other way to look at it
8 with respect to stateless persons or persons
9 deprived of citizenship, that is something that
10 the -- that the courts on remand could consider
11 if -- if that issue has been preserved.

12 JUSTICE THOMAS: I know, but doesn't
13 it draw into question, Mr. Kneedler, the
14 difference in treatment between a citizen of a
15 sovereign and the non-citizen of a sovereign,
16 with the non-citizen, of course, being able to
17 -- to -- to sue that sovereign under FSIA but
18 the citizen not being able to, and then a big
19 question mark with respect to the denaturalized
20 or stateless person?

21 MR. KNEEDLER: Well, that -- again,
22 that question has not -- how that plays out has
23 not been developed, but the reason why the
24 national of another nation can sue is because
25 the domestic takings rule, it is a product of

1 state responsibility to another state, and an
2 individual national of that state can sue for --
3 for an expropriation.

4 Now how the loss of citizenship or
5 deprivation of citizenship would play out within
6 the -- within the expropriating country is
7 something that has not been developed -- has not
8 been developed in this case, but --

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer.

11 JUSTICE BREYER: This is a 30,000-foot
12 question, so you may not have an answer, but, in
13 reading this, I thought, well, it's been for
14 quite a long time that the United States has
15 favored some kind of reparation for victims of
16 all kinds of real horrors in the world --
17 genocide, apartheid, slavery -- we heard that
18 the other day -- and they still go on.

19 All right. Certainly, here, the --
20 the disadvantage is, you point out, of reading
21 this statute the way you don't want it read, but
22 we have not joined the International Court. It
23 is more difficult for a private person to bring
24 a case under the ATS as now interpreted.

25 Stuart Eizenstat said these things

1 should be worked out through informal mediation
2 and other kinds of negotiations. I'm not sure
3 if they've been done.

4 So has it now turned that this is the
5 only way -- it's either nothing to deal with
6 these problems and to get -- to get some kind of
7 compensation, or we're left with our great
8 efforts to have achieved almost nothing?

9 MR. KNEEDLER: The United States for
10 20 years has been urging countries to adopt --
11 first of all, right after the war, there were a
12 number of reparations and compensation programs
13 for victims.

14 In more recent times, starting with
15 the Washington Principles, the United States has
16 been a leader in urging other countries to
17 establish other mechanisms for the restitution
18 -- tracking down and restitution or compensation
19 for property that has been taken.

20 Different countries have responded,
21 some more fully; others less so. The United
22 States continues to urge and work with those
23 countries, particularly Germany. There was a
24 joint statement issued in 2018 in which the
25 United States recognized that more needed to be

1 done with respect to the Advisory Commission
2 that Germany has set up.

3 There are questions about whether
4 remedies would be available in German law. The
5 Washington Principles rest on an understanding
6 that different countries may have different
7 approaches to these questions: Some could be
8 lawsuits; some could be mediation panels,
9 arbitration panels, things like that, and --

10 CHIEF JUSTICE ROBERTS: Justice Alito.

11 JUSTICE ALITO: We've talked about the
12 -- the stripping of citizenship. What about the
13 acquisition or the forced acquisition of -- of
14 citizenship?

15 So was a Jew who lived in Austria
16 barred by the domestic takings rule after
17 Germany forcibly -- annexed Austria? What about
18 a Jew living in the Sudetenland, for example?

19 MR. KNEEDLER: Well, I think there
20 could be questions about who was the government
21 of that territory at the time. Was there a
22 Vichy government that would be the responsible
23 government, or was it directly governed by -- by
24 Germany?

25 So there are -- you know, there could

1 be questions like that that -- that would
2 involve questions, you know, not directly
3 involved -- involved here.

4 JUSTICE ALITO: Yeah. No, I
5 understand. Perhaps that's not a fair question
6 to require you to respond to, but I -- I think
7 this is.

8 Could you address the question that I
9 asked earlier about the definition of "covered
10 period" in the 2016 Clarification Act?

11 MR. KNEEDLER: Yeah, I -- I -- I think
12 it's important to recognize that -- that what
13 the 2016 Clarification Act did was really
14 preserve the ability of someone cut in that --
15 who had a claim in that covered period to rely
16 on the loaning of property for the commercial
17 nexus.

18 It left un- -- it left untouched
19 whether there was a violation of international
20 law and what that term means. It really -- it
21 really, rather than bringing those claims within
22 the immunity that was granted under that special
23 statute when property was brought into the
24 United States, it excepted these claims for that
25 period from that -- from that due immunity, but

1 it left them otherwise as they were.

2 Therefore, it -- it's necessary to go
3 -- and Congress was being comprehensive by
4 including the entire period of the Nazi regime
5 so that all those claims would be able to take
6 advantage of that jurisdictional nexus, but,
7 again, it left untouched the question of what
8 "taken in violation of international law" means.
9 In fact, it --

10 JUSTICE ALITO: Thank --

11 MR. KNEEDLER: -- specifically refers
12 to --

13 JUSTICE ALITO: -- thank you. Thank
14 you, Mr. Kneeder.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor.

17 JUSTICE SOTOMAYOR: Counsel, to what
18 extent have other nations created or done away
19 with sovereign immunity for takings either from
20 nationals or non-nationals? Meaning the U.S.
21 has done it, you claim, for takings involving
22 non-nationals, but how many other countries have
23 done the same thing, waived sovereign immunity
24 in those situations automatically?

25 MR. KNEEDLER: Virtually none. And --

1 and -- and, certainly, none have waived with
2 respect to claims or -- or abrogated or created
3 an exception for claims based on takings from
4 domestic takings.

5 JUSTICE SOTOMAYOR: Well, I guess -- I
6 guess, if it were up to me -- I'm sorry for
7 interrupting you, but we are on limited time --
8 if we're already an exception to the rule, I
9 don't see then why we have to read the exception
10 to the rule -- what the principles that would
11 guide us with respect to the U.S.'s
12 self-interest, why we shouldn't just read the
13 plain text of the law and import into it the
14 limitations of customary international law when
15 customary international law, frankly, doesn't
16 waive sovereign immunity at all?

17 MR. KNEEDLER: Well, this was a very
18 modest exception when it was adopted. It was
19 intended to be and it was -- it -- it was an
20 outgrowth or of a piece with Congress's efforts
21 to respond to the uncompensated garden variety
22 or whatever you want to call them, the reg- --
23 the regular sorts of takings that are governed
24 by our Just Compensation Clause and that are
25 governed by the Customary International Law of

1 Takings or expropriation.

2 It -- it was regarded as not much of a
3 deviation from the -- from the restrictive
4 theory of sovereign immunity. What's being
5 urged here would be a radical departure from
6 that because it would open U.S. courts to
7 adjudicating whether foreign governments had
8 engaged in serious human rights abuses.

9 Here, it may be everybody agrees that
10 there was a genocide and a human rights
11 violation occurred. And, in response to that,
12 in fact, that's what the United States has urged
13 the countries involved to be responsible for.

14 But, in other situations, there would
15 -- the Court might be asked in the first time,
16 in the first instance to decide whether there
17 was an Armenian genocide, for example, or
18 whether --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Kagan.

22 JUSTICE KAGAN: Mr. Kneedler, I take
23 your point that Congress probably wasn't
24 thinking about this case when it passed (a)(3),
25 but -- but that's not always what we consider

1 most relevant.

2 I mean, what is your best evidence
3 that this language that is used in (a)(3) is a
4 term of art with a specialized meaning, as
5 opposed to ordinary language that should be read
6 in an ordinary way to comprehend these claims,
7 whether or not Congress thought about the
8 question at the time?

9 MR. KNEEDLER: Well, I mean, I think
10 there are a number of things that reinforce
11 that.

12 First of all, the -- the entire phrase
13 is "taken in violation of international law,"
14 which requires reference to international law as
15 it was understood at the time.

16 And the Restatement at the time,
17 Section 185, and this Court has looked to the
18 Restatement in the past to inform its
19 understanding of the FSIA.

20 JUSTICE KAGAN: Well, international
21 law at the time recognized the international
22 crime of genocide, correct?

23 MR. KNEEDLER: At -- at -- yes, I'm
24 sorry, in '76, yes, but -- but I -- I think
25 what's important to look at is the -- the

1 phrasing is "property taken," which we think
2 connotes or calls up the concepts just like in
3 our own Fifth Amendment referring to private --
4 to property taken that --

5 JUSTICE KAGAN: I mean, it's true that
6 you have the word "taken," but, in -- in -- in
7 fact, you don't even have the word "taking" or
8 -- or "confiscation" in the way that you have in
9 the Hickenlooper Act.

10 And the Restatement, which some people
11 have pointed to, you know, also uses the word
12 "taking" and makes it very clear that it -- the
13 word "alien" is all over the Restatement.

14 So, if I'm just looking at this
15 language, "taken" itself, I say, well, this
16 language covers these claims.

17 MR. KNEEDLER: Well, again, the
18 reference -- the -- Section 185 of the
19 Restatement posits the question when taking is
20 wrongful under international law, which is
21 virtually the language of the exception. And
22 then it says the taking by a state of property
23 of an alien is wrongful under international law
24 in the specified circumstances.

25 And this -- this -- this is a position

1 that goes back to Secretary Hull in 1938 to --
2 to Belmont, to Sabbatino. The controversy --

3 JUSTICE KAGAN: Thank you, Mr.
4 Kneedler. Thank you.

5 MR. KNEEDLER: -- in Sabbatino was
6 whether --

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch.

9 JUSTICE GORSUCH: Good morning, Mr.
10 Kneedler. I -- I understand your argument that
11 the Clarification Act only works to address
12 limits on the commercial activity requirement.

13 But (h)(2) does exempt Nazi-era
14 claims, and -- where the action is "based on a
15 claim that such work was taken in connection
16 with the acts of a foreign government as part of
17 a systematic campaign of coercive confiscation
18 or misappropriation of works from members of a
19 targeted and vulnerable group."

20 Doesn't that seem to anticipate that
21 there will be such claims that can be brought
22 under (a)(3)?

23 MR. KNEEDLER: I -- I think what it --
24 what it does is recognize that some such claims
25 have been brought, but it doesn't pass on the

1 question of whether they are valid claims.

2 It serves the purpose of not granting
3 those claims an additional immunity in a sense
4 by saying that if the property is brought into
5 the U.S., it doesn't count as commercial
6 activity. But it otherwise refers to a taking
7 within the meaning of (b)(3), and that refers
8 back then to what (b)(3) -- or, excuse me,
9 (a)(3) means.

10 And we think it -- it was clear then
11 and it's clear now that it is limited to -- to
12 the international law of expropriations, which
13 has to do with whether there was adequate
14 compensation and a public purpose.

15 JUSTICE GORSUCH: If Congress, though,
16 isn't disadvantaging Holocaust-era claims the
17 way it wishes to disadvantage other claims, what
18 should that tell us?

19 MR. KNEEDLER: That there was a, I
20 suppose, special solicitude in having -- in
21 allowing -- in not cutting off those claims.
22 Again, it only applies when the property is
23 brought into the United States.

24 And if -- if -- if Congress was acting
25 on the assumption or even the belief that some

1 claims were valid, that -- that still is the
2 view of the later Congress. It didn't change
3 the language, and -- and -- and this Court has
4 often said that the view of the later Congress
5 is of very limited force when it comes to
6 interpreting something that was enacted here
7 almost 40 years -- almost 40 years earlier.

8 JUSTICE GORSUCH: Thank you.

9 MR. KNEEDLER: And, again --

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh.

12 JUSTICE KAVANAUGH: Thank you, Chief
13 Justice.

14 And good morning, Mr. Kneedler.
15 You've explained what you think the statutory
16 phrase means, but I just want to explore the
17 rationale behind the distinction.

18 So what, in your view, is the
19 justification for denying compensation to
20 citizens of the country in question or, maybe
21 stated the other way, what harms would result
22 from recognizing claims that outweigh the
23 benefits of recognizing the claims?

24 MR. KNEEDLER: Well, several things.
25 It's -- it's an aspect of the rule of state

1 responsibility to other states. And so, when --
2 when the expropriating state takes the property
3 of another state's nationals, that is offending
4 the rights of that state, and that individual,
5 Congress concluded, should be able to sue.

6 But corresponding to that, this Court
7 has often said, in Sabbatino and elsewhere, that
8 the -- that that principle is limited to the
9 taking of property of aliens because, as a
10 general principle, the treatment of a country of
11 -- of its own nationals is not a matter of
12 international concern.

13 So what was -- and -- and if a -- if a
14 state -- and this was true in Communist states.
15 This was the controversy at the time. Many
16 states believed that they could take their
17 citizens' property without compensation. And --
18 and the act of state doctrine in Sabbatino did
19 not interfere with that at all.

20 All of those cases and -- and
21 discussions took as a given that there would be
22 no compensation -- or U.S. could not enforce a
23 rule of compensation for an expropriation by
24 another country of its own nationals' property.
25 That was a given.

1 The controversial point was the one
2 the United States was urging about whether
3 international law even spoke to the question of
4 expropriating the property of nationals. And
5 the Restatement and the -- and the expropriation
6 exception are an expression of Congress's view
7 of U.S. policy -- yes, that that does violate
8 international law -- but that's as far as it
9 goes.

10 And that is what Congress was driving
11 at in enacting the FSIA, not opening U.S. courts
12 to broader human rights violation claims.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Barrett.

16 JUSTICE BARRETT: Mr. Kneedler, I have
17 a question about what the Clarification Act
18 should tell us about the expropriation
19 exception.

20 So, in showing special solicitude for
21 Nazi-era claims, the Clarification Act clearly
22 assumes that some such claims against Nazi-era
23 confiscations of property would be going forward
24 and that the Foreign Sovereign Immunities Act
25 would not bar them.

1 So, if your interpretation of the
2 expropriation exception is correct to say that
3 it applies only when there's a foreign national
4 suing a government for the taking of property,
5 what kind of class of claims are those?

6 I guess I would open up some of the
7 difficult questions of nationality and
8 citizenship that Justice Alito was asking you,
9 but could we expect there would have been or was
10 there a large subset of claims brought against
11 Nazi governments -- Nazi-controlled governments
12 by foreign nationals? What -- what is Congress
13 referring to there?

14 MR. KNEEDLER: Well, several things.
15 I mean, like Altmann was a case by a foreign
16 national against -- against Austria, but I think
17 the bigger point is that Congress knew there
18 were such claims, but I don't think that is the
19 same thing as Congress determining that those --
20 that those could -- that they -- that they fell
21 within the Expropriation Act, and, in fact,
22 again, the Clarification Act simply refers to
23 the taking of property within the meaning of
24 (a)(3), which refers one back to what (a)(3)
25 means.

1 So, really, what Congress was doing
2 was not taking away the opportunity of someone
3 who had such a claim to rely on the loan of
4 property to a U.S. museum as establishing the
5 commercial nexus, but it didn't do more than
6 that.

7 And I think the Court should -- should
8 insist upon a much more explicit and -- and
9 conscious determination by Congress to open up
10 U.S. courts to these sorts of claims, which are
11 far beyond what Congress had in mind when it
12 enacted the FSIA.

13 JUSTICE BARRETT: Thank you, counsel.

14 CHIEF JUSTICE ROBERTS: A minute to
15 wrap up, Mr. Kneedler.

16 MR. KNEEDLER: Thank you, Mr. Chief
17 Justice.

18 An important thing to remember here is
19 that the Foreign Sovereign Immunities Act was
20 the codification of the restrictive theory of
21 sovereign immunity, and it adopted a general
22 rule of immunity subject to exceptions. This
23 Court has referred to that as a presumption of
24 immunity. And this Court should enforce that by
25 insisting upon a clear statement by Congress to

1 depart from the -- from the restrictive theory.

2 The problem here, beyond the statutory
3 text and context and background and structure,
4 is the fact that this would put courts of the
5 United States in the business of making
6 sensitive judgments about the conduct of foreign
7 governments, including perhaps some of our
8 closest allies, and invite other countries to
9 open their courts to claims based on situations
10 in the -- in this country's unfortunate past,
11 where it has committed acts that everyone would
12 now regard as violations of the law of nations.

13 So this Court should adhere to
14 Congress's understanding and intention of
15 limiting the expropriation exception to
16 circumstances involving the taking of property
17 by foreign nationals in the traditional sense of
18 requiring the compensation and not tie it to the
19 violation of international law.

20 CHIEF JUSTICE ROBERTS: Thank you, Mr.
21 Kneedler.

22 Mr. O'Donnell.

23 ORAL ARGUMENT OF NICHOLAS M. O'DONNELL
24 ON BEHALF OF THE RESPONDENTS

25 MR. O'DONNELL: Mr. Chief Justice, and

1 may it please the Court:

2 The Foreign Sovereign Immunities Act
3 provides jurisdiction over cases in which rights
4 and property taken in violation of international
5 law are at issue. The ordinary and natural
6 meaning of that phrase, chosen by Congress,
7 applies to Petitioners' property takings during
8 the Holocaust. The Nazis deemed German Jews to
9 be non-German, aliens outside of the rule of
10 law, at the moment the regime began on January
11 30, 1933, and took their property because of who
12 they were.

13 I was puzzled here, the suggestion
14 earlier that we have not raised that issue,
15 because we have framed the case in those terms
16 since the complaint and at every stage since.

17 This Court in Helmerich noted the
18 potential that a sovereign -- sovereign's
19 takings of its own nationals' property may
20 amount to a violation of international law. If
21 that logic did not apply to Nazi-forced sales
22 from Jews, when would it apply?

23 Petitioner Germany also committed
24 genocide, which is itself a violation of
25 international law. The Nazi government set out

1 explicitly to destroy the German Jewish people
2 by taking their property. And Congress has
3 specifically identified the Nazi's looting of
4 art from the Jewish people as genocidal. This
5 is not a new kind of human rights case. It's a
6 property rights case.

7 Briefly, with respect to comity,
8 sovereign immunity is the broadest expression of
9 what Justice Breyer this morning called a
10 motivating principle. And Congress in 1976
11 created a comprehensive non-discretionary
12 framework for that motivating principle.

13 Petitioners' newfound status-based
14 comity abstention argument would trample the
15 FSIA out of existence. As Ms. Harrington said,
16 what sovereign defendant would not claim a
17 paramount interest in property within its own
18 territory. Every one of the takings of property
19 of aliens that Petitioners say are covered by
20 the law would immediately face this assertion.

21 Congress has set the rules, and the
22 Court need not rewrite them.

23 CHIEF JUSTICE ROBERTS: Counsel, what
24 do you do with the International Court of
25 Justice determination that it would, in fact, be

1 a violation of international law to refuse to
2 grant immunity to a state for expropriation of
3 its own nationals' property?

4 MR. O'DONNELL: Mr. Chief Justice, I
5 think the answer is one that Ms. Harrington
6 provided and that Mr. Kneedler, in part,
7 conceded, and that is that there is no other
8 nation that provides jurisdiction for
9 expropriations in this way.

10 So, if the expropriation exception
11 would violate international law, it already had
12 and it already has for almost 45 years.

13 CHIEF JUSTICE ROBERTS: But what is
14 your -- your best evidence that there is a
15 genocide exception to the general rule that the
16 expropriation exception is limited to the taking
17 of foreign nationals' property?

18 MR. O'DONNELL: Mr. Chief Justice, I
19 think there are two answers to that. One is
20 that, as was alluded to in an earlier comment,
21 genocide was already recognized as a violation
22 of international law in 1976.

23 And much more squarely --

24 CHIEF JUSTICE ROBERTS: Well, but, at
25 that time -- but, at that time, the

1 expropriation of a nation by its own nationals'
2 property was not recognized as a violation of
3 international law.

4 MR. O'DONNELL: I think, respectfully,
5 Your Honor, that the state of that understanding
6 is -- is a little less solid than Petitioners
7 suggest. I think one of the things you see in
8 the Congressional Record, you see in the amicus
9 brief by Mr. Feldman in the Hungary case, for
10 example, is that it was a bit of a jungle as to
11 -- as to how to treat expropriations from
12 citizens.

13 And the Restatement addresses when a
14 taking of property from an alien violates
15 international law, but it's a section about
16 takings from aliens. And it's not as clearly
17 laid out as the genocide convention, which had
18 been codified all the way back in 1948 and was
19 well within the -- the view of Congress.

20 And the second is this specific
21 historic episode had received considerable
22 treatment by U.S. policymakers and the
23 executive, in particular, the letter from Mr.
24 Kate in 1949 that it was the policy of the
25 executive, never rescinded since, to remove any

1 constraint upon the exercise of jurisdiction
2 over the acts of Nazi officials.

3 CHIEF JUSTICE ROBERTS: Well,
4 obviously, there's no issue in this case, but
5 how do you decide in -- in other instances
6 whether or not the taking is in the context of
7 more general violations of human rights so that
8 you call -- fall within this -- in other words,
9 how broadly would you articulate the -- if you
10 want to call it the genocide exception to the
11 normal rule?

12 Now, of course, the first answer is,
13 you know, whatever it is, it covers this case,
14 but do you have a more general rule that would
15 be applied in other situations?

16 MR. O'DONNELL: Your Honor, I have
17 two. The first is when the claim -- that the
18 claim has to sound -- as you said in -- in OBB,
19 the gravamen has to be about the taking of
20 property.

21 And if you look at the other human
22 rights norms in Judge Katsas's dissent, for
23 example, they do not implicate the taking of
24 property. Torture is not caused by the taking
25 of property. In fact, the Torture Victim

1 Protections Act specifically eschews torture by
2 deprivation, anything -- or caused by anything
3 other than physical anguish.

4 So the first is the claim that the
5 international human rights norm has to sound in
6 the taking of property in the first instance and
7 that those other norms do not. And the second
8 position I would say, Your Honor, as the final
9 sort of foundry against all of this is, well,
10 then look to what Congress has said. Has
11 Congress recognized this episode of property
12 taking as a violation of international law or a
13 genocide?

14 The list -- that list is vanishingly
15 small. And -- and even though in instances that
16 Congress has recognized as genocide after
17 considerable debate, fewer of those still --
18 again, the genocide convention has multiple
19 avenues, if you will, to the commission of
20 genocide. And --

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas.

24 JUSTICE THOMAS: Thank you, Mr. Chief
25 Justice.

1 Counsel, can you give me any -- any
2 example of genocide where property has not been
3 involved? It seems like, as I think of whether
4 it's Armenia or the Ukraine or Germany or up in
5 the Baltic States, that whenever that's occurred
6 there's been a loss of property or a taking of
7 property. So wouldn't virtually every one of
8 those involved be covered by your argument?

9 MR. O'DONNELL: Not necessarily, Your
10 Honor, because even those genocides recognize or
11 are commonly understood to recognize as such,
12 again, there may be property takings that happen
13 alongside the genocide, but the genocide
14 convention, a genocide can be committed, as I've
15 said, in multiple ways.

16 And if you kill the members of the
17 group and then you take their property, the --
18 the taking didn't cause the genocide. It was
19 alongside of it. But, if you take the property,
20 as Germany did, explicitly to destroy the group
21 of people and remove it from the face of the
22 earth, then you've committed -- committed
23 genocide through the taking of property, which
24 is the focus of the expropriation exception.

25 JUSTICE THOMAS: Well, I don't

1 understand how it would make a difference to
2 have one sequence versus the other, that you
3 commit the genocide before you take the property
4 or the property before you take the -- the --
5 before you commit the genocide.

6 But, with that aside, we've said, I
7 think, in other cases that the expropriation
8 exception was not a radical departure. Wouldn't
9 your reading it as you do be just that, a
10 radical departure?

11 MR. O'DONNELL: With respect, Your
12 Honor, no, because I would submit that if there
13 was any taking of property recognized in 1976 as
14 in violation of the law of nations, it was what
15 this Petitioner did between 1933 and 1945.

16 It is not hard to imagine at all. In
17 fact, I -- I think it's the opposite --

18 JUSTICE THOMAS: No, I -- I understand
19 that, but I'm talking about your -- really, your
20 reading of FSIA, that wouldn't that be a -- a --
21 a radical departure from more -- a more
22 restrictive theory?

23 MR. O'DONNELL: I -- I don't think it
24 would, Your Honor. It -- it would be a
25 departure from the restricted theory, no

1 question, or from the restrictive theory as it
2 appeared, but that -- that view changed over
3 time.

4 And, again, I -- I come back to the
5 author of the letter that announced the
6 restrictive theory in 1940 -- 1952 and that's
7 Mr. Kate. And genocide in this way, we -- we
8 can be thankful there are not other examples
9 like it. It -- it -- it cannot be repeated
10 enough, there is no paradigm like the Holocaust.

11 And there is no second case that fits
12 into the allegations of the Holocaust.
13 Mezerhane, the Eleventh Circuit case relied upon
14 by Petitioners, points this out. The Venezuelan
15 victims in that case tried to say, well, we --
16 we are sort of being treated unfairly and like
17 foreign nationals, like the Nazis treated
18 people, and the Eleventh Circuit said that's
19 absurd, that's absurd, there's only one
20 Holocaust.

21 JUSTICE THOMAS: If -- if we have some
22 doubts about whether or not you've preserved
23 your alternative standing argument, should we
24 just remand that to the district court to
25 consider in the first instance?

1 MR. O'DONNELL: Alternative standing
2 in what respect, Your Honor?

3 JUSTICE THOMAS: Well, I mean, if you
4 -- your argument, you're arguing, obviously, an
5 interpretation of FSIA. But you also have an
6 argument that -- that you just made, for
7 example, that genocide -- that the taking is
8 genocidal. Was that preserved?

9 MR. O'DONNELL: Yes, Your Honor. We
10 -- we -- we allege in the complaints and have
11 said at every stage since that Nazi Germany's
12 treatment of the consortium as non-Germans is --
13 is a violation of international law.

14 The Petitioners raised the domestic
15 takings rule in their motion to dismiss the
16 first amended complaint, and we have been
17 arguing about it ever since. I really don't
18 understand Petitioners' argument that this has
19 not come up before.

20 JUSTICE THOMAS: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Breyer.

23 JUSTICE BREYER: It seems to me that
24 you could read this language to refer to what
25 was expropriations, that was the Communists,

1 that was Nasser, that was sometimes in South
2 America, Venezuela, et cetera. And they're
3 talking about expropriation.

4 And the other way would be to read it,
5 as you read it, they're just talking about
6 property involved in a violation of
7 international law. And, as Justice Thomas also
8 has pointed out, seems to me there are loads of
9 violations of international law in violating --
10 in violating -- that involves property, not just
11 genocide.

12 And so an argument that's made against
13 your side is look what you're opening up. I
14 mean, you can have slavery involving property.
15 You can have systematic discrimination. You can
16 have cruel and unhuman degrading treatment.

17 I mean, the list goes on and on of
18 what violates international law. And many of
19 them involve property. And if we can bring
20 these kinds of actions here, well, so can these
21 other countries do the same and accuse us.

22 I mean, what about Japanese
23 internment, which involved 30,000 people in
24 World War II who were not American citizens but
25 were of Japanese origin? And the first time

1 we'd sue China for the Rohingyas or whatever,
2 you know, what do you think they're going to say
3 about the -- the -- the railroad workers who
4 came in in the 19th century?

5 I mean, that seems in no way to limit
6 it according to a principle that would say we
7 should have the actions here that are
8 universalizable and won't hurt, through chaos,
9 if they're brought everywhere. That's a fairly
10 strong argument. And so I think that that's why
11 I want to hear you answer it.

12 MR. O'DONNELL: Your Honor, I think
13 the first response to that is that it could
14 easily be limited to instances where Congress
15 has identified the episode or the taking in
16 those terms. And, again, that's a very short
17 list. I don't know that it extends any further
18 than the Holocaust and World War II. And --

19 JUSTICE BREYER: Well, why isn't it?
20 Why isn't it a taking of property in violation
21 of international law where, in country X, they
22 have child slavery involving children from other
23 countries, and they take the property in deed,
24 whether or not you call it labor as a property.
25 They take other property too. And so they come

1 to court, and 700 judges in this country pass
2 judgment on that.

3 Why doesn't that fall within the
4 language?

5 MR. O'DONNELL: Because the violation
6 of the international norm, Your Honor, doesn't
7 cause the deprivation.

8 JUSTICE BREYER: Why -- it doesn't?
9 Suing them into slavery, bringing them into
10 slavery doesn't cause the deprivation of the
11 house they own in the adjacent country? It
12 doesn't involve the deprivation of sometimes
13 their clothing and sometimes their gold teeth,
14 as Justice Thomas said?

15 I mean, terrible things happen in this
16 world. And that's why I was somewhat moved by
17 Eizenstat's statement that the way to go after
18 them practically is through all kinds of
19 mediation, arbitration, and other kinds of
20 special agreements, and not necessarily 700
21 judges.

22 MR. O'DONNELL: Well, Your Honor, I'll
23 take that second point first because, as
24 Ms. Harrington alluded to, I think it's actually
25 the reverse.

1 The existence of those claims is what
2 led to the Berlin Accords and the resolution at
3 a broad level of banking claims that were
4 substantial and sweeping, and it was the
5 prospect of facing those litigations that
6 brought the parties to the table.

7 In this case, Congress has recognized,
8 sure, it's better that we can work it out. But
9 it's clearly not possible. That's what the HEAR
10 Act said. Congress stated a strong unanimous
11 policy in 2016 that these claims survive.

12 Again, to go back to the Clarification
13 Act, if Congress has recognized it, there really
14 isn't a need, I think, for further inquiry.

15 CHIEF JUSTICE ROBERTS: Justice Alito.

16 JUSTICE ALITO: I want to make sure I
17 understand the scope of your argument. At times
18 in your brief, particularly when you refer to
19 the absence from the provision in question of
20 any reference to aliens, you seem to be making
21 an argument that would apply to any domestic
22 taking. But that's not your argument, am I
23 right?

24 MR. O'DONNELL: No, it would still
25 need to violate an identifiable norm of

1 international law.

2 JUSTICE ALITO: Okay. So is -- is it
3 your argument that any taking that violates any
4 principle of international law would be covered,
5 or is your argument limited to those acts that
6 constitute genocide or those that are part of a
7 campaign of genocide, or is it a
8 Holocaust-specific argument?

9 MR. O'DONNELL: My argument, Your
10 Honor, is it -- it -- it extends certainly to
11 genocide, it extends certainly to the Holocaust,
12 and it would extend to other norms of which I
13 can't think of any, where, as I said to Justice
14 Breyer, it is a -- it is a violation of the norm
15 itself that causes the property taking.

16 JUSTICE ALITO: Well, since World War
17 II, customary international law has expanded
18 greatly. Prior to World War II, it was largely,
19 if not entirely, limited to relations between
20 nations, but, in reaction to the Holocaust, to
21 those horrors, customary international law has
22 reached out and now protects many human rights.

23 So would your argument apply to any
24 taking that violates any principle of human
25 rights recognized by customary international law

1 or by treaties since the Second World War?

2 MR. O'DONNELL: No, Your Honor, it
3 couldn't extend any past -- any further past
4 1976 because the Court has -- has said on a
5 number of occasions that the understanding for
6 this law --

7 JUSTICE ALITO: Okay. Well, most of
8 -- most of that work was done -- a lot of it was
9 done before 1976. Would it be -- would it
10 include everything recognized up to 1976?

11 MR. O'DONNELL: Your Honor, I -- I'm
12 not sure I have the same view of how much of
13 that work had been done by 1976, but, if the --
14 if the norm violation caused the property
15 taking, yes.

16 JUSTICE ALITO: Even if it's limited
17 to genocide -- there have been many incidents in
18 the past that some people claim are genocidal.
19 Sometimes these are hotly disputed. I won't go
20 through the list. I hope there won't be more in
21 the future, but, given human nature, that's a
22 possibility. Wouldn't your argument require
23 courts to decide whether a particular event that
24 indisputably involved atrocities amounted to
25 genocide?

1 MR. O'DONNELL: They might be faced
2 with that threshold question, Your Honor. And
3 in that instance, as we've said, I think the
4 easiest signal post, as in the rest of this law,
5 is to look what Congress has said about that
6 alleged episode.

7 JUSTICE ALITO: Well, on what ground
8 would we say this includes genocide but only
9 those that have been specifically recognized in
10 some other statute that does not govern this
11 particular case? What would be our
12 justification for drawing that distinction?

13 MR. O'DONNELL: It would be to
14 determine the scope that Congress intended
15 through the passage not only of this law but of
16 other laws on that topic as to that particular
17 case.

18 Now, in this case, the FSIA itself has
19 been amended to include the episode at the heart
20 of this very case --

21 JUSTICE ALITO: So we would --

22 MR. O'DONNELL: -- though not in --

23 JUSTICE ALITO: -- so did the -- the
24 meaning of the FSIA change?

25 MR. O'DONNELL: No.

1 JUSTICE ALITO: Based on later
2 congressional legislation?

3 MR. O'DONNELL: No.

4 JUSTICE ALITO: Then how would we read
5 that back into our interpretation of the FSIA?

6 MR. O'DONNELL: Well, then I suppose,
7 Your Honor, you'd have to look at the genocide
8 that Congress had recognized as of 1976.

9 JUSTICE ALITO: So this would -- this
10 would apply only to past genocides? It wouldn't
11 apply to any that occurred in the future?

12 MR. O'DONNELL: No, I think I -- I
13 think I would walk that back actually, Your
14 Honor. I -- I think -- I think, if Congress
15 expressed itself squarely in those terms, it
16 would apply.

17 JUSTICE ALITO: All right. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor.

20 JUSTICE SOTOMAYOR: Counsel, let's
21 assume we accept your adversary's position that
22 the FSIA has to be read to apply -- that the
23 only international -- customary international
24 law was the customary international law that
25 limited its application to -- to non-nationals.

1 What -- just articulate for me what
2 you see as left in the case. Do we reverse and
3 -- and direct dismissal? Do we reverse and
4 remand and for what?

5 MR. O'DONNELL: Your Honor, I think
6 you affirm, because the complaint alleges --

7 JUSTICE SOTOMAYOR: I know that's what
8 you want, counsel.

9 MR. O'DONNELL: Right.

10 JUSTICE SOTOMAYOR: I just said we
11 don't -- if we assume your opposition's
12 position, what would you ask us to do then?

13 MR. O'DONNELL: As applied to the
14 allegations of German residents specifically in
15 our case? That then you hold that individual --

16 JUSTICE SOTOMAYOR: No, as to your --
17 as to your case, he wins. He presented a
18 question, we say he's right that customary
19 international law does not apply to the takings
20 of nationals. That's the rule we set. What's
21 left of your case?

22 MR. O'DONNELL: I suppose, Your Honor,
23 that what's left is a remand to determine if,
24 under a relatively unaddressed part of the case
25 in terms of the scope of nationality, a remand

1 to answer that question, whether in this case,
2 as amici have ably demonstrated, that German
3 governmental treatment of German Jews in the
4 1930s would transgress that nationality line.

5 I think the answer is clear, but the
6 Court may determine that it hasn't been
7 addressed below and needed to be.

8 JUSTICE SOTOMAYOR: All right. Is --
9 one of the things that I'm dealing with in my
10 own head is how would we determine -- I know the
11 amici make their argument -- but given that
12 there hasn't been a recognition of causes of
13 actions against sovereigns in other -- in other
14 countries for expropriation of property within
15 the borders of a nation, how will we ever
16 determine that question?

17 How can we ask the courts below to
18 determine that question outside of an academic
19 discussion?

20 MR. O'DONNELL: Well, I think that's a
21 question of fact in a particular case, I mean,
22 and -- and -- and it may require the submission
23 of historical expertise.

24 JUSTICE SOTOMAYOR: Thank you,
25 counsel.

1 CHIEF JUSTICE ROBERTS: Justice Kagan.

2 JUSTICE KAGAN: Mr. O'Donnell, Judge
3 Katsas in one of his dissents made the point
4 that your position would create a kind of
5 strange dichotomy whereby victims of the
6 Holocaust could bring suit for property
7 deprivations, but their relatives or -- or --
8 you know, could not bring suit for their deaths.

9 So why would that make sense?

10 MR. O'DONNELL: Justice Kagan, that
11 dichotomy already exists, even in the classical
12 expropriations that Petitioners assert are the
13 limits of the law. And I'll give you an
14 example.

15 Let's assume that someone in Venezuela
16 had been tortured by the Hugo Chavez government.
17 That person could not sue under the FSIA if that
18 person was a foreign national. That person
19 could not sue under the FSIA, but they could sue
20 if the Venezuelan government took their
21 property. That's a -- that's a dichotomy that
22 Congress has factored into the exception itself.

23 JUSTICE KAGAN: Talk about the text a
24 little bit here. What more do you think
25 Congress would have had to say to limit it to

1 sort of standard international law
2 expropriations?

3 MR. O'DONNELL: I think this goes
4 back, Your Honor, to the term of art question.
5 And I think maybe if Congress had said concerns
6 rights in property or concerns takings in
7 violation of international law, I think this
8 goes to your questions earlier, and a question
9 you posed in the -- in the Helmerich oral
10 argument. They could have phrased this in a --
11 in a different way that more obviously
12 implicated a body of law. I think Petitioners'
13 suggest --

14 JUSTICE KAGAN: I mean, is that -- is
15 that slicing the salami pretty thin, you know,
16 "taking" versus "taken," when we know what they
17 were talking about really?

18 MR. O'DONNELL: I don't think so, Your
19 Honor, because it -- again, to be a term of art,
20 it has to be specific, it has to be used
21 similarly elsewhere. Even this phrase doesn't
22 appear in the -- in the second Hickenlooper
23 Amendment.

24 The words "international law" do, but
25 the context, as Petitioners would put it, around

1 that phrase is slightly different. And so, if
2 Congress is using slightly different words, we
3 must assume that it had a slightly different
4 intention.

5 JUSTICE KAGAN: Maybe we should
6 forswear the kind of ordinary meaning textualism
7 that you're asking us to adopt in this context.
8 Mr. Kneedler said, you know, we've long
9 understood that the FSIA codifies the
10 restrictive theory of sovereign immunity, which,
11 except for narrow exceptions, gives the foreign
12 sovereign immunity for public acts.

13 So why in that context shouldn't we be
14 thinking a little bit more than we typically do
15 about actually what Congress had in mind when it
16 -- when it drafted these exceptions?

17 MR. O'DONNELL: Well, I think, Your
18 Honor, certainly, a plain textual interpretation
19 has the benefit of simplicity. In this case, if
20 you were interested in the context and you
21 looked to the legislative history, which I urge
22 the Court to do, first, in the 1973 hearing,
23 Hitler's takings of art came up specifically, as
24 well as did other various contexts, like the
25 taking of Lithuanians' property, that made clear

1 that there's no limitation in mind.

2 Again, this was a fairly expansive
3 discussion both in terms of the hearing and the
4 -- and the back and forth. And as you said
5 earlier in this argument, "of aliens" is all
6 over the restatement. And it's not in this
7 case. The lodestars are taking without adequate
8 and fair compensation and not for public purpose
9 as arbitrary and discriminatory.

10 And it would have been very easy
11 somewhere in those hearings, let alone in the
12 law itself, for someone to say: But, of course,
13 we're only talking about the property of aliens.
14 They didn't.

15 JUSTICE KAGAN: Thank you, Mr.
16 O'Donnell.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch.

19 JUSTICE GORSUCH: So, Mr. O'Donnell, I
20 -- I -- if I understand it, if Congress had said
21 -- used the word "taking" rather than "taken,"
22 you -- you -- you'd admit you'd have a much
23 harder case?

24 MR. O'DONNELL: I think we'd have a
25 harder case, yes.

1 JUSTICE GORSUCH: And that's because
2 "taking" is a term of art and "taken" is not?

3 MR. O'DONNELL: I don't know that I
4 agree that "taking" is a term of art, Your
5 Honor, but I think it's a lot closer to one.
6 And it's the sort of term like those that appear
7 in the cases cited by Petitioner, prevailing
8 party, costs, substantial evidence, thing --
9 things that are -- that are recurring terms in
10 the law.

11 JUSTICE GORSUCH: What do we do about
12 the fact that the statute uses the word "taken,"
13 the then Restatement spoke of international law
14 takings, takings in violation of international
15 laws in the manner that your opponents suggest.

16 This remained true despite knowledge
17 of the genocide convention and the Hague
18 Convention, which would have contained language
19 more like what you're asking us to read into
20 this statute. Then you get the Hickenlooper
21 Amendments as well. And that's all before we
22 even get to some of the other statutory clues
23 that Judge Katsas pointed out.

24 Why doesn't that as a matter of
25 ordinary meaning at the time of the statute's

1 passage stand as pretty strong evidence against
2 you taking collectively?

3 MR. O'DONNELL: Because those elements
4 of international law, Your Honor, are -- are
5 restrictive and not defining. The Restatement
6 Second, Section 185, is in a chapter entitled
7 Taking of the Property of Aliens.

8 So the fact that taking of the
9 property a violation -- taking of the property
10 of aliens violates international law does not
11 mean at the extent of international law.

12 And the Sabbatino/Hickenlooper
13 Amendment bears this out because the second
14 Hickenlooper Amendment refers back to violations
15 of international law, including those in this
16 section. And those in this section are takings
17 from United States citizens. So it -- it is --
18 it is exemplary but not exhaustive.

19 JUSTICE GORSUCH: Okay. And then, if
20 -- if your -- if your contrary reading were
21 correct, I -- I think you've agreed that
22 property -- property takings or taken, if you
23 will, because of a genocide is not going to be
24 the limit of our jurisdiction. It's also going
25 to include any other human rights violation

1 norms that -- that -- that somehow are related
2 to property. I would have thought terrorism,
3 slavery were a couple of examples we batted
4 around. I'm sure there are going to be many
5 others.

6 But I'm not -- I'm not understanding
7 what your limiting principle is. It seemed to
8 be some sort of causation analysis. Can you
9 explain that to me a little bit further?

10 MR. O'DONNELL: Yes, Your Honor. And
11 I actually think that the Court's guidance in
12 OBB is instructive on this, right? The
13 commercial activity exception asks if the claim
14 arises out of commercial activity in the United
15 States, and the Court was very clear that that
16 doesn't mean but for. That doesn't mean
17 alongside of which, right? The plaintiff in
18 that case wouldn't have been injured in Austria
19 if he or she hadn't bought the ticket in the
20 United States, but that wasn't enough.

21 And those other human rights norms
22 that I mentioned and that Judge Katsas
23 mentioned, the violations are not caused by the
24 deprivation of property. You can't torture
25 someone by taking his or her property.

1 You may take someone's property when
2 you impress them into involuntary servitude, but
3 the taking doesn't cause the servitude.

4 JUSTICE GORSUCH: And -- and so you
5 would say here the taking of property caused a
6 genocide --

7 MR. O'DONNELL: Yes.

8 JUSTICE GORSUCH: -- but a taking of
9 property doesn't cause terrorism or slavery? Is
10 -- is that your argument?

11 MR. O'DONNELL: Yes, Your Honor, yes,
12 because the genocide convention acknowledges
13 deliberately inflicting on the group conditions
14 of life calculated to bring about its physical
15 destruction in whole or in part. That's
16 precisely what Nazi Germany did from the moment
17 it took --

18 JUSTICE GORSUCH: Well, in whole or in
19 part. No one doubts that this was part of -- of
20 -- of a horrific genocidal conduct by Nazi
21 Germany and the Third Reich, but I -- I don't
22 think anybody would contend that the taking of
23 property was the only or -- or maybe even the
24 most grotesque aspect of the genocide.

25 And I don't see why the same couldn't

1 be said of other human rights violations, like
2 slavery, like -- like -- like terrorism. I'm
3 sorry for going over, but I'd appreciate your
4 response.

5 MR. O'DONNELL: Sure. If I may, it's
6 because, Justice Gorsuch, the FSIA and this
7 exception is concerned with property. And --
8 and as I said before, there is a discrepancy
9 between the treatment of property claims and
10 personal injury claims or other human rights
11 claims. That's a discrepancy that exists even
12 in the Petitioners' reading of the statute.

13 JUSTICE GORSUCH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh.

16 JUSTICE KAVANAUGH: Thank you, Chief
17 Justice.

18 Good afternoon, Mr. O'Donnell. I'm
19 interested in whether you could have brought
20 this suit in any country other than Germany? In
21 other words, does any other country waive
22 sovereign immunity for foreign nations' domestic
23 takings?

24 MR. O'DONNELL: I am aware of none.

25 JUSTICE KAVANAUGH: And that would

1 suggest, I suppose, that there is a -- a
2 universal norm or close to universal norm of
3 international law to provide immunity for
4 foreign nations in those circumstances, at least
5 immunity in courts outside their own -- their
6 own countries?

7 MR. O'DONNELL: I think that's the
8 default rule, yes, Your Honor.

9 JUSTICE KAVANAUGH: Then, on the
10 question of the text, the argument is really the
11 term of art argument did this language have a
12 settled meaning at the time, and we've explored
13 that back and -- back and forth a little bit.

14 Justice Thomas, I think, asked you
15 whether your reading of the FSIA would be a
16 significant departure, and you said no -- a
17 significant departure from the understanding at
18 the time, you said no.

19 One thing I wanted to ask you about,
20 and give you an opportunity to respond, is the
21 current Restatement, the Restatement Fourth,
22 you're well aware the reporter's note,
23 Section 455, says that by eliminating the
24 domestic takings rule and permitting claims to
25 proceed on allegations of takings incurred --

1 occurred in the context of egregious violations
2 of international law, this line of decisions --
3 referring to the current cases we're talking
4 about -- this line of decisions appears to
5 expand the scope of 1605(a)(3) well beyond the
6 original intent of the Congress, potentially
7 opening courts of the United States to a wide
8 range of property-related claims arising out of
9 foreign internal conflicts characterized by
10 widespread human rights violations.

11 So what's your response to the
12 reporter's note in the current Restatement
13 saying that this line of decisions goes well
14 beyond what Congress would have understood?

15 MR. O'DONNELL: Well, Your Honor, my
16 response starts with where I began today, and
17 that's the Court's musing, if nothing else, in
18 Helmerich that -- that there may be a category
19 that -- that violates international law.

20 And I think -- I -- I think, again, as
21 to what would have been understood in 1976, I --
22 I know I keep talking about my case, but -- but
23 this episode, of course, was the -- was the
24 paradigmatic episode of taking and international
25 law violation in 1976.

1 And I think it would have been well
2 understood by that Congress -- I looked this up
3 in the congressional historians -- 40 percent of
4 whom had served in World War II, as had the
5 President.

6 I think, to pose the inverse of a
7 question the Court -- that I think Justice Alito
8 raised in his post-op dissent, I think the
9 Congress would be shocked in 1976 to hear the
10 suggestion that Nazi Germany's property taking
11 didn't violate international law for the whole
12 of the regime.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett.

16 JUSTICE BARRETT: Counsel, the
17 distinction that you're drawing between "taken"
18 and "taking" seems awfully thin to me because,
19 you know, if I'm looking at 1605(a)(3), the way
20 that it's drafted, I mean, one could say with --
21 with reference to our takings clause in which
22 "rights in property taken in violation of the
23 takings clause" or in violation of the Fifth
24 Amendment seems -- and moreover, when you go to
25 the Clarification Act, it does use the word

1 "taking" in -- in referring back. I'm looking
2 now in (h)(2)(D), if you look down into the
3 subsections, it talks about the takings having
4 occurred after 1900.

5 So the statute does use the word
6 "taking" and the way that (h) -- 1606(a)(3) is
7 drafted, it would be hard to say anything other
8 than "taken." So really does your argument
9 depend that much on the distinction between
10 "taking" and property "taken"?

11 MR. O'DONNELL: No, Your Honor. And
12 -- and -- and if I can clarify, no pun intended,
13 Justice Kagan asked me about what other word
14 might have led to a different result. I -- I'm
15 not arguing that -- that "taking" would -- would
16 dispense with the claims, but, certainly -- and
17 this goes to -- to a question that Justice Alito
18 raised earlier -- the Clarification Act,
19 "taking" or "taken" refers to the whole of the
20 regime.

21 And it -- and it would make no sense
22 -- this just comes back to the textual principle
23 that I talked about before -- it would make no
24 sense to encompass that whole era if it meant to
25 exclude a certain category of takings and a

1 certain date range that Congress didn't say.

2 JUSTICE BARRETT: But, Mr. O'Donnell,
3 a lot of the force of your argument depends on
4 the ordinary meaning of the terms and relying
5 just on, you know, "property taken in violation
6 of international law" rather than saying it in a
7 term of art way.

8 But, at the same time, you've pointed
9 to all kinds of limitations that might exist
10 outside of that ordinary meaning of the text;
11 for example, this is just genocide or just if
12 Congress calls it genocide.

13 Can you identify some of the limiting
14 principles, say, that maybe this is just the
15 Holocaust, the Nazi Holocaust, or maybe this is
16 just genocide, maybe it's just a genocide if
17 Congress identifies it as such? Are those the
18 only limitations you might find in that text?

19 MR. O'DONNELL: Your Honor, I think
20 the -- the plain meaning of the phrase is -- is
21 the starting point. Is the episode in the
22 hypothetical case number two, does it raise --
23 does it put "rights in property taken in
24 violation of international law" in issue, right?
25 Are those things in play?

1 And if you read that and look to the
2 episode in question, you -- you don't have to
3 limit yourself -- I'm not saying you have to
4 limit yourself to the text and learn nothing
5 else from other words or contexts. I'm not
6 saying that, because, of course, I think the
7 context supplies the answer as well.

8 And in that hypothetical case, you
9 would say, what is it about this episode that
10 did or did not violate international law?

11 And it's just --

12 JUSTICE BARRETT: Well, but, counsel,
13 it's very difficult to see, in the examples that
14 Justice Gorsuch was giving you, for example, how
15 property taken in the course of enslaving people
16 wouldn't fall into this very same logic that
17 you're articulating here.

18 And I think you're struggling to
19 identify limits because you know that it's
20 problematic to interpret it so broadly that it
21 would have the 700 district judges in the
22 country adjudicating all these kinds of claims.

23 MR. O'DONNELL: Well, but I think the
24 limiting principle, Justice Barrett, remains the
25 taking itself, what -- what -- was the property

1 taken in violation of international law? And
2 that assumes that the norm you're talking about
3 was breached through the deprivation of the
4 property itself.

5 JUSTICE BARRETT: Thank you, counsel.
6 I'm out of time.

7 CHIEF JUSTICE ROBERTS: Counsel, you
8 can take a couple of minutes to wrap up if you'd
9 like.

10 MR. O'DONNELL: Thank you, Mr. Chief
11 Justice.

12 Petitioners' argument boils down to
13 this, that despite the absence of language in
14 the FSIA as originally passed that would limit
15 claims based on the nationality of victims of
16 government property takings and despite the
17 presence in the Clarification Act of language
18 specifically recognizing the full extent of the
19 Nazi regime's art looting and forced sales as
20 properly within the expropriation exception,
21 that unique among Nazi victims, Congress
22 intended to disadvantage the Nazi's first
23 victims, German Jews. This makes no sense.

24 With regard to comity, which I know we
25 did not spend much time on, I would say the FSIA

1 says to district court judges the defendant is
2 immune unless the exception applies, and I think
3 in this circumstance of the game of baseball.

4 The judge in that scenario can be
5 thought of like the umpire in the baseball game,
6 whose rules say the batter gets four balls or
7 three strikes. Reading a status-based new
8 comity abstention doctrine to avoid the FSIA
9 would be like telling that umpire that, even
10 when the batter strikes out, the umpire can
11 still award first base if the batter is
12 important enough or really wants to get to first
13 base.

14 But to do so would be to legislate
15 where Congress has not. Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Three minutes for rebuttal, Mr.
19 Freiman.

20 REBUTTAL ARGUMENT OF JONATHAN M. FREIMAN
21 ON BEHALF OF THE PETITIONERS

22 MR. FREIMAN: Thank you, Mr. Chief
23 Justice. A couple of small points and then I'll
24 wrap up.

25 First of all, the Clarification Act.

1 I think it's important to remember that it only
2 involves art that is physically present in the
3 United States. That's a consequential
4 distinction when we're talking about foreign
5 sovereign immunity.

6 Second of all, with regard to what to
7 do if you find that the expropriation exception
8 applies only to violations of the international
9 law of takings, this is not a situation where
10 remand is appropriate.

11 The plaintiffs have never claimed that
12 the consortium or the firms or their ancestors
13 were not German nationals. You won't find a
14 paragraph in any of the briefs at any stage of
15 this litigation. This is something that should
16 be resolved finally here.

17 In sum, the Court's been given two
18 literally possible meanings. Ours is consistent
19 with the background that Congress was
20 legislating against and with the understanding
21 of the term "taken in violation of international
22 law" as it was understood in the Restatement,
23 which this Court has used to understand FSIA
24 exceptions in the past.

25 Even if the plain text doesn't decide,

1 you should look to the canons, and all of them
2 cut in our favor. I'd like to highlight three
3 of them. First of all, clarity. In Helmerich,
4 this Court held that clarity in jurisdictional
5 statutes especially regarding foreign sovereigns
6 is particularly important. It's a doctrine with
7 enormous diplomatic consequences, and Congress
8 knew that clarity was important.

9 It didn't create an exception letting
10 foreign sovereigns be sued for sovereign acts
11 without knowing the boundaries that it was
12 legislating. Under our interpretation, Congress
13 knew them. International law of takings, a
14 doctrine that the U.S. had long advocated for
15 with a specific content and coverage.

16 Under the plaintiffs' interpretation,
17 Congress didn't know the boundaries. It was any
18 principle of international law. That's a big
19 set, one that can keep changing. Congress
20 didn't want to lose control of a sensitive
21 diplomatic area like this.

22 Second, their reading would ignore
23 judicial interpretations of the very similar
24 language of the second Hickenlooper Amendment,
25 and there's no doubt that Congress knew of that.

1 The statute was cited in the committee
2 report here, as was a case by this Court, Alfred
3 Dunhill, repeatedly citing the prior judicial
4 interpretation of the second Hickenlooper
5 Amendment just a few months before the FSIA was
6 passed.

7 Third, their reading would violate the
8 international law of state immunity and rip a
9 large hole in the restrictive theory that
10 Congress was codifying. My friend tries to
11 limit the consequences to genocide, but the
12 genocide -- genocide convention doesn't use the
13 word "takings" or "taken." And as several
14 members of the Court have noted today, slavery,
15 systematic racial discrimination, and other
16 norms, like crimes against humanity or the laws
17 of war, can all involve takings.

18 Almost 700 judges, as several of you
19 have noted, would sit as new world courts,
20 judging the nations of the world for alleged
21 violations of international human rights and the
22 law of war.

23 Much more should be required from the
24 text to reach this result. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 12:52 p.m., the case
3 was submitted.)

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