

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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22 for the United States, as amicus curiae,
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 and
3 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.

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 Fischer and
21 Abelesz cases in the Seventh Circuit and then
22 the two cases you're hearing today.

23 Until then, as Your Honor noted in the
24 Altman 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. First of all, the
13 entity from which the property was allegedly
14 taken was -- was a company, a consortium, which
15 was itself owned by three firms underneath that
16 which were also companies. So this is a case of
17 claimed takings from German national companies.

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

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

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

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

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

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

24 JUSTICE ALITO: Well, if it occurred,
25 would it be more than a trivial number of cases

1 and, if so, why would Congress have gone out of
2 its way to define the covered period as
3 beginning in 1933?

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

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor.

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

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

1 case.

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

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

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

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

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

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

25 So why don't we follow the plain

1 meaning of the statute, and why should we look
2 to customary international law as opposed to
3 simply the plain meaning of the words?

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

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

21 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

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

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

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

21 I -- I think it's also --

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

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

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

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

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

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

25 And this provision of the FSIA is

1 creating a narrow exception for violations of
2 the law of takings. There are other parts of
3 the F --

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

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch.

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

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

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

21 MR. FREIMAN: Let me respond in -- in
22 -- in three parts, Your Honor. First of all,
23 the question of statelessness is not a question
24 that was raised by the plaintiffs in this case
25 in the district court, court of appeals, or

1 here. So this is entirely a forfeited question,
2 one that the Court need not address, and, in
3 fact, hasn't been developed in any way.

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

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

15 MR. FREIMAN: Well --

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

19 MR. FREIMAN: That would require this
20 Court to go down the path of determining the
21 international law of nationality. I will say
22 that there's no bad treatment exception under
23 the international law of nationality, and if it
24 were read -- it's not a -- the international law
25 of takings is not a human rights principle.

1 It's a principle of nation-to-nation rights and
2 of the transfer of wealth.

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

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

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

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

24 What do we -- you say it wasn't -- it
25 was forfeited, but, of course, the plaintiffs

1 won their subject matter jurisdiction on other
2 grounds. If we were to -- if we were to find in
3 your favor here, shouldn't they be given a shot
4 to -- to make this argument on remand?

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

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh.

15 JUSTICE KAVANAUGH: Thank you.

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

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

24 MR. FREIMAN: This Court held in
25 Samantar that the mere fact that something is

1 literally possible does not mean it's what --
2 it's what the text meant. And in Dolan, this
3 Court has noted that reading a statute to the
4 outer limits of its definitional possibilities
5 is sometimes in error.

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

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

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett.

22 JUSTICE BARRETT: So, counsel, you
23 said earlier that the expropriation exception,
24 there would be jurisdiction for a U.S. court to
25 hear a claim by a foreign national against, say,

1 Germany for the -- for a claim that Germany took
2 that foreign national's property as part of the
3 genocide of the Holocaust under the
4 international law of takings.

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

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

25 MR. FREIMAN: It gives the court the

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

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

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

20 JUSTICE BARRETT: Thank you.

21 CHIEF JUSTICE ROBERTS: A minute to
22 wrap up, Mr. Freiman.

23 MR. FREIMAN: Thank you.

24 I'd like to, I guess, raise three
25 reasons for skepticism about the broad reading

1 of (a)(3) that plaintiffs provide, and the first
2 two track what you heard earlier, of Simon.

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

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

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

22 In their view, it's unbounded: any
23 international law that anyone can think of in
24 the human rights or law of war context.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Kneedler.

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

6 MR. KNEEDLER: Mr. Chief Justice, and
7 may it please the Court:

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

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

21 That interpretation is confirmed by
22 the parallel provision of the Restatement in
23 effect when the FSIA was enacted, and the
24 exception's statutory history is part of
25 Congress's response to the uncompensated

1 expropriation of Americans' property by Cuba and
2 others.

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

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

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

21 MR. KNEEDLER: No, I -- I -- I don't
22 think so. The -- the -- it -- it -- it seems
23 pretty clear at the time that the only -- the
24 only international law addressing takings was
25 the law of expropriation, which had to do with

1 -- with whether compensation was awarded to a
2 foreign national.

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

6 CHIEF JUSTICE ROBERTS: Well, but
7 that's the --

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

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

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

21 The -- the domestic takings law was
22 really the converse of -- of the rule that
23 international law does prohibit the
24 uncompensated taking of the property of
25 nationals of another country because that

1 violates the rights of that other country.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas.

5 JUSTICE THOMAS: Thank you, Mr. Chief
6 Justice.

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

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

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

21 But there -- there are, you know,
22 perhaps sensitive questions about that, and I
23 think the question would have to take into
24 account the formulation of the -- of the rule,
25 which is that international law prohibited the

1 uncompensated taking of a foreign -- of an
2 alien's property or the national of another
3 nation.

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

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

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

1 for an expropriation.

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

7 CHIEF JUSTICE ROBERTS: Justice
8 Breyer.

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

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

23 Stuart Eizenstat said these things
24 should be worked out through informal mediation
25 and other kinds of negotiations. I'm not sure

1 if they've been done.

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

7 MR. KNEEDLER: The United States for
8 20 years has been urging countries to adopt --
9 first of all, right after the war, there were a
10 number of reparations and compensation programs
11 for victims.

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

18 Different countries have responded,
19 some more fully; others less so. The United
20 States continues to urge and work with those
21 countries, particularly Germany.

22 There was a joint statement issued in
23 2018 in which the United States recognized that
24 more needed to be done with respect to the
25 Advisory Commission that Germany has set up.

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

8 CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

23 So there are -- you know, there could
24 be questions like that that -- that would
25 involve questions, you know, not directly

1 involved -- involved here.

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

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

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

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

25 Therefore, it -- it's necessary to go

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

8 JUSTICE ALITO: Thank --

9 MR. KNEEDLER: -- specifically refers
10 to --

11 JUSTICE ALITO: -- thank you. Thank
12 you, Mr. Kneedler.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor.

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

23 MR. KNEEDLER: Virtually none. And --
24 and -- and, certainly, none have waived with
25 respect to claims or -- or abrogated or created

1 an exception for claims based on takings from
2 domestic takings.

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

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

25 It -- it was regarded as not much of a

1 deviation from the -- from the restrictive
2 theory of sovereign immunity. What's being
3 urged here would be a radical departure from
4 that because it would open U.S. courts to
5 adjudicating whether foreign governments had
6 engaged in serious human rights abuses.

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

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

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Kagan.

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

25 I mean, what is your best evidence

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

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

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

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

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

21 MR. KNEEDLER: At -- at -- yes, I'm
22 sorry, in '76, yes, but -- but I -- I think
23 what's important to look at is the -- the
24 phrasing is "property taken," which we think
25 connotes or calls up the concepts just like in

1 our own Fifth Amendment referring to private --
2 to property taken that --

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

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

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

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

23 And this -- this -- this is a position
24 that goes back to Secretary Hull in 1938 to --
25 to Belmont, to Sabbatino. The controversy --

1 JUSTICE KAGAN: Thank you, Mr.
2 Kneedler. Thank you.

3 MR. KNEEDLER: -- in Sabbatino was
4 whether --

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch.

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

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

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

21 MR. KNEEDLER: I -- I think what it --
22 what it does is recognize that some such claims
23 have been brought, but it doesn't pass on the
24 question of whether they are valid claims.

25 It serves the purpose of not granting

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

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

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

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

22 And if -- if -- if Congress was acting
23 on the assumption or even the belief that some
24 claims were valid, that -- that still is the
25 view of the later Congress. It didn't change

1 the language, and -- and -- and this Court has
2 often said that the view of the later Congress
3 is of very limited force when it comes to
4 interpreting something that was enacted here
5 almost 40 years -- almost 40 years earlier.

6 JUSTICE GORSUCH: Thank you.

7 MR. KNEEDLER: And, again --

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh.

10 JUSTICE KAVANAUGH: Thank you, Chief
11 Justice.

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

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

22 MR. KNEEDLER: Well, several things.
23 It's -- it's an aspect of the rule of state
24 responsibility to other states. And so, when --
25 when the expropriating state takes the property

1 of another state's nationals, that is offending
2 the rights of that state, and that individual,
3 Congress concluded, should be able to sue.

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

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

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

24 The controversial point was the one
25 the United States was urging about whether

1 international law even spoke to the question of
2 expropriating the property of nationals. And
3 the Restatement and the -- and the expropriation
4 exception are an expression of Congress's view
5 of U.S. policy -- yes, that that does violate
6 international law -- but that's as far as it
7 goes.

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

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Barrett.

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

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

24 So, if your interpretation of the
25 expropriation exception is correct to say that

1 it applies only when there's a foreign national
2 suing a government for the taking of property,
3 what kind of class of claims are those?

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

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

24 So, really, what Congress was doing
25 was not taking away the opportunity of someone

1 who had such a claim to rely on the loan of
2 property to a U.S. museum as establishing the
3 commercial nexus, but it didn't do more than
4 that.

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

11 JUSTICE BARRETT: Thank you, counsel.

12 CHIEF JUSTICE ROBERTS: A minute to
13 wrap up, Mr. Kneedler.

14 MR. KNEEDLER: Thank you, Mr. Chief
15 Justice.

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

25 The problem here, beyond the statutory

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

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

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

20 Mr. O'Donnell.

21 ORAL ARGUMENT OF NICHOLAS M. O'DONNELL
22 ON BEHALF OF THE RESPONDENTS

23 MR. O'DONNELL: Mr. Chief Justice, and
24 may it please the Court:

25 The Foreign Sovereign Immunities Act

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

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

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

21 Petitioner Germany also committed
22 genocide, which is itself a violation of
23 international law. The Nazi government set out
24 explicitly to destroy the German Jewish people
25 by taking their property. And Congress has

1 specifically identified the Nazi's looting of
2 art from the Jewish people as genocidal. This
3 is not a new kind of human rights case. It's a
4 property rights case.

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

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

19 Congress has set the rules, and the
20 Court need not rewrite them.

21 CHIEF JUSTICE ROBERTS: Counsel, what
22 do you do with the International Court of
23 Justice determination that it would, in fact, be
24 a violation of international law to refuse to
25 grant immunity to a state for expropriation of

1 its own nationals' property?

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

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

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

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

21 And much more squarely --

22 CHIEF JUSTICE ROBERTS: Well, but, at
23 that time -- but, at that time, the
24 expropriation of a nation by its own nationals'
25 property was not recognized as a violation of

1 international law.

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

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

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

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

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

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

19 And if you look at the other human
20 rights norms in Judge Katsas's dissent, for
21 example, they do not implicate the taking of
22 property. Torture is not caused by the taking
23 of property. In fact, the Torture Victim
24 Protections Act specifically eschews torture by
25 deprivation, anything -- or caused by anything

1 other than physical anguish.

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

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

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas.

22 JUSTICE THOMAS: Thank you, Mr. Chief
23 Justice.

24 Counsel, can you give me any -- any
25 example of genocide where property has not been

1 involved? It seems like, as I think of whether
2 it's Armenia or the Ukraine or Germany or up in
3 the Baltic States, that whenever that's occurred
4 there's been a loss of property or a taking of
5 property. So wouldn't virtually every one of
6 those involved be covered by your argument?

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

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

23 JUSTICE THOMAS: Well, I don't
24 understand how it would make a difference to
25 have one sequence versus the other, that you

1 commit the genocide before you take the property
2 or the property before you take the -- the --
3 before you commit the genocide.

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

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

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

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

21 MR. O'DONNELL: I -- I don't think it
22 would, Your Honor. It -- it would be a
23 departure from the restricted theory, no
24 question, or from the restrictive theory as it
25 appeared, but that -- that view changed over

1 time.

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

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

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

24 MR. O'DONNELL: Alternative standing
25 in what respect, Your Honor?

1 JUSTICE BREYER: It seems to me that
2 you could read this language to refer to what
3 was expropriations, that was the communists,
4 that was Nasser, that was sometimes in South
5 America, Venezuela, et cetera. And they're
6 talking about expropriation.

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

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

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

25 I mean, what about Japanese

1 internment, which involved 30,000 people in
2 World War II who were not American citizens but
3 were of Japanese origin? And the first time
4 we'd sue China for the Rohingyas or whatever,
5 you know, what do you think they're going to say
6 about the -- the railroad workers who came in
7 the 19th century?

8 I mean, that seems no way to limit it
9 according to a principle that would say we
10 should have the actions here that are
11 universalizable and won't hurt, through chaos,
12 if they're brought everywhere. That's a fairly
13 strong argument.

14 And so I think that that's why I want
15 to hear you answer it.

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

23 JUSTICE BREYER: Well, why isn't it?
24 Why isn't it a taking of property in violation
25 of international law where in country X, they

1 have child slavery involving children from other
2 countries, and they take the property in deed,
3 whether or not you call it labor as a property.
4 They take other property too. And so they come
5 to court, and 700 judges in this country pass
6 judgment on that.

7 Why doesn't that fall within the
8 language?

9 MR. O'DONNELL: Because the violation
10 of the international norm, Your Honor, doesn't
11 cause the deprivation.

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

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

1 MR. O'DONNELL: Well, Your Honor, I'll
2 take that second point first, because as
3 Ms. Harrington alluded to, I think it's actually
4 the reverse.

5 The existence of those claims is what
6 led to the Berlin Accords and the resolution at
7 a broad level of banking claims that were
8 substantial and sweeping. And it was the
9 prospect of facing those litigations that
10 brought the parties to the table.

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

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

19 CHIEF JUSTICE ROBERTS: Justice Alito.

20 JUSTICE ALITO: I want to make sure I
21 understand the scope of your argument. At times
22 in your brief, particularly when you refer to
23 the absence from the provision in question of
24 any reference to aliens, you seem to be making
25 an argument that would apply to any domestic

1 taking. But that's not your argument, am I
2 right?

3 MR. O'DONNELL: No, it would still
4 need to violate an identifiable norm of
5 international law.

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

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

20 JUSTICE ALITO: Well, since World War
21 II, customary international law has expanded
22 greatly. Prior to World War II, it was largely,
23 if not entirely, limited to relations between
24 nations, but, in reaction to the Holocaust, to
25 those horrors, customary international law has

1 reached out and now protects many human rights.

2 So would your argument apply to any
3 taking that violates any principle of human
4 rights recognized by customary international law
5 or by treaties since the Second World War?

6 MR. O'DONNELL: No, Your Honor, it
7 couldn't extend any past -- any further past
8 1976 because the Court has -- has said on a
9 number of occasions that the understanding for
10 this law --

11 JUSTICE ALITO: Okay. Well, most of
12 -- most of that work was done -- a lot of it was
13 done before 1976. Would it be -- would it
14 include everything recognized up to 1976?

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

20 JUSTICE ALITO: Even if it's limited
21 to genocide -- there have been many incidents in
22 the past that some people claim are genocidal.
23 Sometimes these are hotly disputed. I won't go
24 through the list. I hope there won't be more in
25 the future, but, given human nature, that's a

1 possibility. Wouldn't your argument require
2 courts to decide whether a particular event that
3 indisputably involved atrocities amounted to
4 genocide?

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

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

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

21 Now, in this case, the FSIA itself has
22 been amended to include the episode at the heart
23 of this very case --

24 JUSTICE ALITO: So we would --

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

1 JUSTICE ALITO: -- so did the -- the
2 meaning of the FSIA change?

3 MR. O'DONNELL: No.

4 JUSTICE ALITO: Based on later
5 congressional legislation?

6 MR. O'DONNELL: No.

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

9 MR. O'DONNELL: Well, then I suppose,
10 Your Honor, you have to look at the genocide
11 that Congress had recognized as of 1976.

12 JUSTICE ALITO: So this would -- this
13 would apply only to past genocides? It wouldn't
14 apply to any that occurred in the future?

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

20 JUSTICE ALITO: All right. Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor.

23 JUSTICE SOTOMAYOR: Counsel, let's
24 assume we accept your adversary's position that
25 the FSIA has to be read to apply -- that the

1 only international -- customary international
2 law was the customary international law that
3 limited its application to -- to non-nationals.

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

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

10 JUSTICE SOTOMAYOR: I know that's what
11 you want, counsel.

12 MR. O'DONNELL: Right.

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

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

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

24 JUSTICE THOMAS: Well, I mean, if you
25 -- your argument, you're arguing, obviously, an

1 interpretation of FSIA. But you also have an
2 argument that -- that you just made, for
3 example, that genocide -- that the taking is
4 genocidal. Was that preserved?

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

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

16 JUSTICE THOMAS: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Breyer.

19 MR. O'DONNELL: I suppose, Your Honor,
20 that what's left is a remand to determine if
21 under a relatively unaddressed part of the case
22 in terms of the scope of nationality, a remand
23 to answer that question, whether in this case,
24 as amici have ably demonstrated, that German
25 governmental treatment of German Jews in the

1 1930s would transgress that nationality line.

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

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

14 How can we ask the courts below to
15 determine that question outside of an academic
16 discussion?

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

21 JUSTICE SOTOMAYOR: Thank you,
22 counsel.

23 CHIEF JUSTICE ROBERTS: Justice Kagan.

24 JUSTICE KAGAN: Mr. O'Donnell, Judge
25 Katsas in one of his dissents made the point

1 that your position would create a sort of
2 strange dichotomy whereby victims of the
3 Holocaust could bring suit for property
4 deprivations, but their relatives or -- or, you
5 know, could not bring suit for their deaths.

6 So why would that make sense?

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

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

20 JUSTICE KAGAN: What about the text a
21 little bit here? What more do you think
22 Congress would have had to say to limit it to
23 sort of standard international law
24 expropriations?

25 MR. O'DONNELL: I think this goes

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

10 JUSTICE KAGAN: Is that slicing the
11 salami pretty thin, you know, "taking" versus
12 "taken," when we know what they were talking
13 about, really?

14 MR. O'DONNELL: I don't think so, Your
15 Honor, because it, again, to be a term of art,
16 it has to be specific, and it has to be used
17 similarly elsewhere. Even this phrase doesn't
18 appear in the -- in the second Hickenlooper
19 amendment.

20 The words "international law" do, but
21 the context, as Petitioners would put it, around
22 that phrase is slightly different. So if
23 Congress is using slightly different words, we
24 must assume that it had a slightly different
25 intention.

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

9 So why in that context shouldn't we be
10 thinking a little bit more than we typically do
11 about actually what Congress had in mind when it
12 -- when it drafted these exceptions?

13 MR. O'DONNELL: Well, I think Your
14 Honor certainly a plain textual interpretation
15 has the benefit of simplicity. In this case, if
16 you were interested in the context and you
17 looked to the legislative history, which I urge
18 the Court to do, first, in the 1973 hearing
19 Hitler's takings of art came up specifically, as
20 well as did other various contexts like the
21 taking of Lithuanian's property, that made clear
22 that there's no limitation in mind.

23 Again, this was a fairly expansive
24 discussion, both in terms of the hearing and the
25 -- and the back and forth. And as you said

1 earlier in this argument, "of aliens" is all
2 over the restatement. And it's not in this
3 case, the lodestars are taking without adequate
4 and fair compensation and not for public
5 purpose, but arbitrary and discriminatory.

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

11 JUSTICE KAGAN: Thank you, Mr.
12 O'Donnell.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch.

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

20 MR. O'DONNELL: I think we would have
21 a harder case, yes.

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

24 MR. O'DONNELL: I don't know that I
25 agree that "taking" is a term of art, Your

1 Honor, but I think it's a lot closer to one.
2 And it is the sort of term like those that
3 appear in the cases cited by Petitioner
4 prevailing party, costs, substantial evidence,
5 think things that are -- that are recurring
6 terms in the law.

7 JUSTICE GORSUCH: What do we did about
8 the fact that the statute uses the word "taken,"
9 the then restatement spoke of international law
10 takings, takings in violation of international
11 laws in the manner that your opponents suggest.

12 This remained true despite knowledge
13 of the Genocide Convention and the Hague
14 Convention, which would have contained language
15 more like what you're asking us to read into
16 this statute. Then you get the Hickenlooper
17 amendments as well.

18 And that's all before we even get to
19 some of the other statutory clues that Judge
20 Katsas pointed out. Why doesn't that as a
21 matter of ordinary meaning at the time of the
22 statute's passage stand as pretty strong
23 evidence against you taking collectively?

24 MR. O'DONNELL: Because those elements
25 of international law, Your Honor, are -- are

1 restrictive and not defining. The restatement
2 second, Section 185, is in a chapter entitled
3 Taking of the Property of Aliens.

4 So the fact that taking of the
5 property a violation -- taking of the property
6 of aliens violates international law does not
7 mean at the extent of international law.

8 In the Sabbatino/Hickenlooper
9 Amendment bears this out because the second
10 Hickenlooper amendment refers back to violations
11 of international law, including those in this
12 section. And those in this section are takings
13 from United States citizens.

14 So it -- it is -- it is exemplary, but
15 not exhaustive.

16 JUSTICE GORSUCH: Okay. And then if
17 -- if your -- if your contrary reading were
18 correct, I think you have agreed that property
19 -- property takings or taken, if you will,
20 because of a genocide is not going to be the
21 limit of our jurisdiction. It is also going to
22 include any other human rights violation norms
23 that -- that somehow are related to property.

24 I would have thought terrorism,
25 slavery were a couple of examples we have batted

1 around. I'm sure there are going to be many
2 others.

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

7 MR. O'DONNELL: Yes, Your Honor. And
8 I actually think that the Court's guidance in
9 OBB is instructive on this, right? The
10 commercial activity exception asks if the claim
11 arises out of commercial activity in the United
12 States.

13 And the Court was very clear that that
14 doesn't meet but for. That doesn't mean
15 alongside of which, right? The plaintiff in
16 that case wouldn't have been injured in Austria
17 if he or she hadn't bought the ticket in the
18 United States, but that wasn't enough.

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

24 You may take someone's property when
25 you impress them into involuntary servitude, but

1 the taking doesn't cause the servitude.

2 JUSTICE GORSUCH: And -- and so you
3 would say here that taking of property caused a
4 genocide --

5 MR. O'DONNELL: Yes.

6 JUSTICE GORSUCH: -- but a taking of
7 property doesn't cause terrorism or slavery; is
8 -- is that your argument?

9 MR. O'DONNELL: That's right, Your
10 Honor, yes, because the Genocide Convention
11 acknowledges deliberately inflicting on the
12 group conditions of life calculated to bring
13 about its physical destruction in whole or in
14 part. That's precisely what Nazi Germany did
15 in --

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

23 And I don't see why the same couldn't
24 be said of other human rights violations, like
25 slavery, like -- like the terrorism. I'm sorry

1 for going over, but I would appreciate your
2 response.

3 MR. O'DONNELL: Sure. If I may, it's
4 because, Justice Gorsuch, the FSIA and this
5 exception is concerned with property. And --
6 and as I said before, there is a discrepancy
7 between the treatment of property claims and
8 personal injury claims or other human rights
9 claims.

10 That's a discrepancy that exists even
11 in the Petitioner's reading of the statute.

12 JUSTICE GORSUCH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh.

15 JUSTICE KAVANAUGH: Thank you, Chief
16 Justice. Good afternoon, Mr. O'Donnell.

17 I'm interested in whether you could
18 have brought this suit in any country other than
19 Germany? In other words, does any other country
20 waive sovereign immunity for foreign nations'
21 domestic takings?

22 MR. O'DONNELL: I'm aware of none.

23 JUSTICE KAVANAUGH: And that would
24 suggest, I suppose, that there is a -- a
25 universal norm or close to universal norm of

1 international law to provide immunity for
2 foreign nations in those circumstances, at least
3 immunity in courts outside their own -- their
4 own countries?

5 MR. O'DONNELL: I think that's the
6 default rule; yes, Your Honor.

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

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

18 One thing I wanted to ask you about,
19 and give you an opportunity to respond, is the
20 current restatement, the restatement fourth,
21 you're well aware the reporters note
22 Section 455, says that by eliminating the
23 domestic takings rule and permitting claims to
24 proceed on allegations of takings incurred,
25 occurred in the context of egregious violations

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

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

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

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

25 And I think it would have been well

1 understood by that Congress -- I looked this up
2 in the congressional historians -- 40 percent of
3 whom had served in World War II as had the
4 President.

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

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett.

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

1 page 2-D, if you look down into the subsections,
2 it talks about the takings having occurred after
3 1900s.

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

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

19 And it -- and it would make no sense,
20 this just comes back to the textual principle
21 that I talked about before, it would make no
22 sense to encompass that whole era if it meant to
23 exclude a certain category of takings and a
24 certain date range that Congress didn't say.

25 JUSTICE BARRETT: But, Mr. O'Donnell,

1 a lot of the force of your argument depends on
2 the ordinary meaning of the terms, and relying
3 just on, you know, property taken in violation
4 of international law, rather than saying it in a
5 term of art way.

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

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

17 MR. O'DONNELL: Your Honor, I think
18 the -- the plain meaning of the phrase is -- is
19 the starting point. Is the episode in the
20 hypothetical case, Number 2, does it raise --
21 does it put rights and property taken in
22 violation of international law in issue, right,
23 are those things in play?

24 And if you read that and look to the
25 episode in question you -- you don't have to

1 limit yourself, I'm not saying you have to limit
2 yourself to the text and learn nothing else from
3 other words or context, I'm not saying that,
4 because, of course, I think the context supplies
5 the answer as well.

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

9 And, it's just --

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

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

21 MR. O'DONNELL: Well, but I think the
22 limiting principle, Justice Barrett, remains the
23 taking itself, what -- what -- was the property
24 taken in violation of international law? And
25 that assumes that the norm you're talking about

1 was breached through the deprivation of the
2 property itself.

3 JUSTICE BARRETT: Thank you, counsel,
4 I am out of time.

5 CHIEF JUSTICE ROBERTS: Counsel, you
6 can take a couple of minutes to wrap up, if you
7 would like.

8 MR. O'DONNELL: Thank you, Mr. Chief
9 Justice.

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

22 With regard to comity, which I know we
23 did not spend much time on, I would say the FSIA
24 says to district court judges the defendant is
25 immune unless the exception applies. And I

1 think in this circumstance of the game of
2 baseball.

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

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Three minutes for rebuttal, Mr.
18 Freiman.

19 REBUTTAL ARGUMENT OF JONATHAN M. FREIMAN

20 ON BEHALF OF THE PETITIONERS

21 MR. FREIMAN: Thank you, Mr. Chief
22 Justice. A couple of small points and then I
23 will wrap up. First of all, the Clarification
24 Act.

25 I think it's important to remember

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

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

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

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

24 Given that the plain text doesn't
25 decide, you should look to the canons and all of

1 them cut in our favor. I would like to
2 highlight three of them. First of all, clarity.
3 In Helmerich this Court held that clarity and
4 jurisdiction statutes especially regarding
5 foreign sovereigns is particularly important.
6 It's a doctrine with enormous diplomatic
7 consequences and Congress knew that clarity was
8 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. Under the
16 plaintiffs' interpretation, Congress didn't know
17 the boundaries. It was any principle of
18 international law. That's a big set, one that
19 can keep changing. Congress didn't want to lose
20 control of a sensitive diplomatic area like
21 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 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 have 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.

2 The case is submitted.

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

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