

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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MIRIAM FULD, ET AL., )  
 )  
 Petitioners, )  
 )  
 v. ) No. 24-20  
 )  
 PALESTINE LIBERATION ORGANIZATION, )  
 )  
 ET AL., )  
 )  
 Respondents. )  
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UNITED STATES, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 24-151  
 )  
 PALESTINE LIBERATION ORGANIZATION, )  
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 ET AL., )  
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 Respondents. )  
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Pages: 1 through 121

Place: Washington, D.C.

Date: April 1, 2025

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15    Respondents.                 )  
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18    Washington, D.C.  
19    Tuesday, April 1, 2025  
20  
21           The above-entitled matter came on for  
22       oral argument before the Supreme Court of the  
23       United States at 10:04 a.m.

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7 MITCHELL R. BERGER, ESQUIRE, Washington, D.C.; on  
8 behalf of the Respondents.  
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 24-20, Fuld versus Palestine Liberation Organization, and the consolidated case.

Mr. Yalowitz.

ORAL ARGUMENT OF KENT A. YALOWITZ  
ON BEHALF OF THE PETITIONERS IN CASE 24-20

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

The United States can take many actions in response to terror activity abroad by the PLO and the PA that kills American citizens. The government could, for example, prosecute them under our criminal laws, and they admit doing so would not violate any due process rights.

They contend, however, that bringing a civil action crosses a red line and is unconstitutional under the Due Process Clause. That is incorrect. The federal government's sphere of sovereignty is sufficiently broad that it follows American citizens wherever in the world they might travel.

1           The government could, for example,  
2 simply ban terror pay -- pay -- payments to  
3 terrorists who have killed Americans and,  
4 concomitantly, could establish federal  
5 jurisdiction when that ban is violated.

6           Here, the government took a smaller  
7 step of providing that if the PLO and the PA  
8 make post-enactment payments to terrorists or  
9 engage in post-enactment U.S. activities, that  
10 will be deemed a submission to the jurisdiction  
11 of federal courts in a narrow class of cases  
12 closely related to terrorism.

13           The statute gave the defendants fair  
14 warning. Their conduct was knowing and  
15 voluntary. The statute reasonably advances  
16 legitimate government interests in the context  
17 of our federal system. The judgment of the  
18 court should be reversed.

19           I welcome the Court's questions.

20           JUSTICE THOMAS: If we analyze this  
21 under the Fifth Amendment, what limitations  
22 would the Fifth Amendment provide --

23           MR. YALOWITZ: So --

24           JUSTICE THOMAS: -- for personal  
25 jurisdiction?

1           MR. YALOWITZ: So, first of all, the  
2 Fifth Amendment requires fair notice and  
3 opportunity to be heard, which the defendants  
4 had.

5           In addition, it protects persons  
6 against arbitrary government action. Here, the  
7 statute reasonably advances a legitimate  
8 government interest and within the context of  
9 the federal government's power.

10           JUSTICE THOMAS: How would that -- how  
11 would that differ from analyzing it under the  
12 Fourteenth Amendment?

13           MR. YALOWITZ: Under -- under the  
14 Fourteenth Amendment, there is a territorial  
15 limitation on each state. The states, because  
16 they're bounded by each other within the context  
17 of our federal system, at least the Court has  
18 seeded horizontal federalism in -- in the  
19 Fourteenth Amendment, and so that limitation  
20 would exist.

21           JUSTICE THOMAS: Would -- when you say  
22 "horizontal limitation," what do you mean? And  
23 exactly how would the Fourteenth Amendment apply  
24 and how would that differ from the application  
25 of the Fifth Amendment?

1           MR. YALOWITZ: So -- so we don't think  
2           that the Fourteenth Amendment would apply at all  
3           here. However, if -- if the test were the same  
4           under the Fourteenth and the Fifth Amendments,  
5           the Court would have to look at the interests of  
6           the -- of the federal government in the same way  
7           that it looks at the interests of the state  
8           governments because the state governments are  
9           bounded by limitations that the other faces --  
10          that California can't -- can't infringe the  
11          sovereignty of Ohio, for example.

12                 The federal government doesn't suffer  
13          from that limitation. The federal government's  
14          powers are more expansive.

15                 JUSTICE KAGAN: Well, there have been  
16          many courts that think that just, as in the  
17          Fourteenth Amendment, we look to see whether a  
18          defendant has minimum contacts with a particular  
19          state, these courts say so too we should look to  
20          see whether a defendant has minimum contacts  
21          with the United States when it comes to the  
22          Fifth Amendment.

23                 MR. YALOWITZ: Certainly, if Congress  
24          has not spoken, that would still be the rule  
25          under our proposed test. So, for example, in



1 the Daimler case, there was no statute providing  
2 for federal jurisdiction. Minimum contacts  
3 would apply because the plaintiffs would have to  
4 travel under the Fourteenth Amendment and the --  
5 and the alien tort statute.

6 But, where Congress has indicated the  
7 jurisdictional contacts that are relevant, due  
8 respect for Congress's judgment would provide  
9 for a more expansive view.

10 JUSTICE KAGAN: Well, why is that? If  
11 the minimum contacts test is a constitutional  
12 test, why does what Congress says in a  
13 particular statute modify that?

14 MR. YALOWITZ: Be -- because the  
15 minimum context -- minimum contacts test grows  
16 out of Fourteenth Amendment cases that -- that  
17 provided for limitations on state governments.  
18 Those limitations do not apply to the federal  
19 government. The Court has said that.

20 Even in the Lochner era, when the  
21 Court was imposing those kinds of limitations,  
22 the Court said that -- that those limitations  
23 don't apply when the federal government's powers  
24 are at issue. And I'm thinking of Burnet  
25 against United States -- Bennett against United

1 States, Burnet against Brooks, Cook against  
2 Tait.

3 JUSTICE BARRETT: Well, why --

4 JUSTICE SOTOMAYOR: Could I --

5 JUSTICE BARRETT: -- would it be  
6 relevant even if Congress hadn't spoken? I  
7 mean, if -- if they're really a feature of the  
8 interstate fed -- of interstate federalism and  
9 that's their role under the Fourteenth  
10 Amendment, why would we care about the minimum  
11 contacts analysis even in the absence of a  
12 statute where Congress tried to override it?

13 MR. YALOWITZ: So the -- the Court has  
14 said in the Omni case that there has to be a  
15 statutory basis for jurisdiction, and if -- if  
16 there's no statutory basis for jurisdiction,  
17 then plaintiffs obtain jurisdiction by service  
18 under state law.

19 JUSTICE BARRETT: So it would be that  
20 the Fourteenth Amendment -- you're -- so it's  
21 not -- I guess maybe I misunderstood you.  
22 You're not saying that Congress would be  
23 overcoming some background principle that would  
24 otherwise be applicable to the jurisdiction of  
25 the United States. You're simply saying that

1       there would be no statute authorizing service of  
2       process --

3                 MR. YALOWITZ:   Correct.

4                 JUSTICE BARRETT:  -- in that  
5       hypothetical?

6                 MR. YALOWITZ:   Correct.

7                 JUSTICE SOTOMAYOR:  But, if I'm -- can  
8       I unpackage your argument?  You're basically  
9       saying there is no due process protection  
10      whatsoever under the Fifth Amendment, even for  
11      U.S. citizens, because I don't know why it makes  
12      a difference that this is a foreigner or a U.S.  
13      citizen.

14                If there is, as you're advocating, no  
15      Fifth Amendment due process constraint on  
16      government, then Congress could, at its own  
17      whim, say you committed an act in New York, it  
18      violated a federal statute, get tried in  
19      California --

20                MR. YALOWITZ:   So --

21                JUSTICE SOTOMAYOR:  -- get tried in  
22      Alaska, get tried in Hawaii.  You might say  
23      political factors could constrain that.

24                But haven't we said when we've  
25      analyzed the Fourteenth Amendment that there are

1 two components? One is the interstate interests  
2 of constraining the states from expanding their  
3 jurisdiction. But we've also said there's a  
4 second component, which is fairness, and it  
5 doesn't seem -- and we've not limited that to  
6 the interstate concerns.

7 Why would we take it out of the Fifth  
8 Amendment altogether?

9 MR. YALOWITZ: I -- I don't think you  
10 would. So I -- the rule that we're recommending  
11 would -- would -- would include a fairness or a  
12 reasonableness component that protects citizens  
13 and non-citizens alike from -- from arbitrary  
14 federal action.

15 So, for example, if Congress passed a  
16 law that said, if you enter Paris, France,  
17 you're subject to the jurisdiction of the  
18 district court in Paris, Texas, that would be a  
19 arbitrary government action that would violate  
20 the due process rights of anybody being tried  
21 under that statute.

22 However, when it comes to U.S.  
23 citizens, Congress and the courts are nationwide  
24 actors anyway, and so, for example --

25 JUSTICE SOTOMAYOR: Yeah, but if I

1 live in New York and I have never left New York,  
2 which is highly unlikely, but -- or I'm in  
3 Idaho -- in Idaho or somewhere else on a farm  
4 and never left it, and all I did was something  
5 there that happened to violate a federal law, I  
6 might have a problem with being haled to Hawaii  
7 or Alaska.

8 MR. YALOWITZ: So -- so Congress has  
9 in some cases provided for nationwide  
10 jurisdiction. For example, the -- the U.S.  
11 Court of Federal Claims has -- is a nationwide  
12 court.

13 And -- and what the courts have done  
14 as a practical matter and sensitive to the --  
15 the problems that individuals might have is  
16 the -- the courts will go to them or their --  
17 or, by rule, the courts have said, you know, you  
18 can't be -- you can't -- your trial subpoena  
19 will only be a hundred miles from where you --  
20 where you live.

21 I -- I -- I -- we're not advocating a  
22 rule that would eliminate a reasonableness --

23 JUSTICE SOTOMAYOR: Some sort of  
24 fairness requirement?

25 MR. YALOWITZ: -- or fairness --

1 right.

2 JUSTICE SOTOMAYOR: You're just saying  
3 that, here, it's met?

4 MR. YALOWITZ: Correct.

5 JUSTICE JACKSON: And, by "fairness,"  
6 are you talking about principles of individual  
7 liberty? I mean, I'm sort of focusing on the  
8 Insurance Corp. of Ireland case and the idea  
9 that due process not only in the Fourteenth  
10 Amendment context has this notion of principles  
11 of federalism and interstate sovereignty but  
12 also the concern that Justice Sotomayor was  
13 picking up on about sort of a liberty interest  
14 in not being haled into a court far away.

15 And I would think that would apply  
16 even in the international context.

17 MR. YALOWITZ: Right. I -- I think  
18 that it -- I agree with that. I think that  
19 there's not a -- there's not a liberty --  
20 there's not a reasonableness problem in this  
21 case.

22 JUSTICE JACKSON: Right.

23 MR. YALOWITZ: No -- nobody said, oh,  
24 it's -- it's too difficult for us to go from  
25 65th Street down to --

1                   JUSTICE JACKSON: No, I understand on  
2 the facts of this case. But -- but, to the  
3 extent that we are trying to assess what the  
4 Fifth Amendment requires in terms of personal  
5 jurisdiction, isn't there some idea, in addition  
6 to what the Fourteenth Amendment says about  
7 federalism, which you say doesn't apply in the  
8 Fifth Amendment context, is there still some  
9 notion of a personal jurisdiction limitation in  
10 the Fifth Amendment that is rooted in these  
11 principles of liberty?

12                   MR. YALOWITZ: I think so, yes. We --  
13 we're not advocating for a -- for a complete  
14 removal of -- of any protections that an  
15 individual might have because it's traveling  
16 under the Fifth Amendment. What we're saying is  
17 the -- these territorial -- these very tight  
18 territorial limits that we've seen in the  
19 Fourteenth Amendment cases have no place in a --  
20 in an analysis dealing with a federal statute.

21                   JUSTICE ALITO: So what, again, do you  
22 think is the Fifth Amendment test?

23                   MR. YALOWITZ: Sure. So we would say  
24 that the statute has to provide fair warning and  
25 that it has to reasonably advance a legitimate

1 government interest in the context of our  
2 federal system.

3 JUSTICE GORSUCH: What is that --

4 JUSTICE ALITO: What -- what's an --  
5 an example of an illegitimate government  
6 interest that is unreasonably advanced?

7 MR. YALOWITZ: Well, I think that my  
8 Paris, Texas, example --

9 JUSTICE ALITO: Wait. What is it  
10 again? What is your Paris, Texas, example  
11 again?

12 MR. YALOWITZ: Sure. If you -- if you  
13 drive a car in Paris, France, then -- then  
14 you're subject to jurisdiction in district court  
15 in Paris, Texas. You know, they're both called  
16 "Paris," so, you know --

17 JUSTICE ALITO: I mean, do you  
18 think -- could -- could Congress say that if one  
19 American driving a car in France causes injury  
20 to another American causing -- driving a car in  
21 France, a suit may be brought in the United  
22 States?

23 MR. YALOWITZ: Hmm. Well, it would  
24 be -- that -- that would be a more difficult  
25 case than ours because it's hard to see what the



1 federal reference is.

2 JUSTICE ALITO: No, I understand it's  
3 more difficult than yours.

4 MR. YALOWITZ: Right.

5 JUSTICE ALITO: But I'm -- and maybe  
6 we don't have to say what the Fifth Amendment  
7 test is, but you've offered a Fifth Amendment  
8 test, so I'm trying to understand what it means.

9 MR. YALOWITZ: It -- it would be  
10 difficult to see what the federal interest is  
11 in -- in regulating traffic laws or auto  
12 accidents abroad.

13 JUSTICE ALITO: Providing compensation  
14 for Americans who are tortiously injured, no  
15 matter where the tort occurs.

16 MR. YALOWITZ: Sure. That --  
17 that's -- and I think that -- I think that  
18 Congress has very broad foreign commerce powers,  
19 and, obviously, if Congress legislated to the  
20 limit, then that would be a -- that would be a  
21 interesting and difficult case.

22 JUSTICE GORSUCH: Mr. Yalowitz, I'm --  
23 I'm struggling to see any of this in your brief.  
24 I had understood your argument in your brief to  
25 say that under the Fifth Amendment, due process

1 just requires service, a judge, and -- and an  
2 opportunity to be heard.

3 And -- and now you're saying that  
4 there's some sort of balancing test or  
5 reasonableness requirement, and -- and -- and  
6 I -- I just didn't see that in your brief. I  
7 saw hints of that in the government's but not  
8 yours.

9 MR. YALOWITZ: So you --

10 JUSTICE GORSUCH: And -- and I'm -- I  
11 guess I'm asking this: Where does this come  
12 from then? If it -- if -- if -- if it's -- if  
13 I'm right that it's not in your brief, where --  
14 where do these requirements come from?

15 MR. YALOWITZ: So we see three threads  
16 of due process jurisprudence from the founding:  
17 service, as -- as you say; a court, as you say;  
18 and then there's a debate among scholars about  
19 whether due process included a substantive  
20 component.

21 JUSTICE GORSUCH: Yeah. You say  
22 substantive due process precedents require no  
23 more than what I've just described. That's --  
24 that's page 22 of your brief.

25 MR. YALOWITZ: Right. Right. So

1 it --

2 JUSTICE GORSUCH: Now I'm hearing a  
3 slightly different version of your argument.

4 MR. YALOWITZ: I -- I -- I would say  
5 that for those members of the Court who believe  
6 that there is a -- there is a --

7 JUSTICE GORSUCH: I -- I'm -- I'm  
8 really not interested in your -- your -- your  
9 attempt to assemble five votes. I'm interested  
10 in your views on what the law is.

11 MR. YALOWITZ: Well, look, I think  
12 that the -- that -- that a form of substantive  
13 due process has been a long tradition in the  
14 Court and in this country. And we're not  
15 arguing in this case that -- that arbitrary --  
16 that an arbitrary statute would be  
17 constitutional.

18 We think that -- we think that --

19 JUSTICE GORSUCH: Well, one man's  
20 arbitrariness is another man's brilliance, I  
21 mean, and no -- no member of Congress who votes  
22 for something and the president signs thinks  
23 that what they're doing is arbitrary.

24 MR. YALOWITZ: I don't disagree with  
25 that. I -- I understand -- I understand the

1 point you're making and I don't disagree with  
2 it.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Justice Thomas, anything further?

6 Justice Alito?

7 JUSTICE SOTOMAYOR: But all of our --  
8 all of our cases have spoken about -- under the  
9 Fourteenth Amendment, have put in a substantive  
10 due process component that's independent from  
11 the interstate question?

12 MR. YALOWITZ: That is -- that is the  
13 Court's jurisprudence to date, correct.

14 JUSTICE SOTOMAYOR: So all of our  
15 cases have spoken about some form -- some  
16 version of fairness?

17 MR. YALOWITZ: I -- right. And -- and  
18 particularly given the -- given the foreign  
19 policy and national security issues in this  
20 case, I would think that the --

21 JUSTICE SOTOMAYOR: No, I know you  
22 want to win, but that's -- but --

23 MR. YALOWITZ: No, but I would  
24 think --

25 JUSTICE SOTOMAYOR: -- but Justice

1 Gorsuch was limiting -- saying that there is  
2 no -- that there is no substantive due process  
3 component to due process.

4 MR. YALOWITZ: There are those who  
5 have that view. We don't need that to win the  
6 case, particularly given the -- the deference  
7 that the Court -- the deferential standard of  
8 review that the Court engages in in a -- in a  
9 case involving national security and foreign  
10 policy.

11 JUSTICE SOTOMAYOR: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: And -- and just so I  
14 understand your test, it's a non-arbitrariness  
15 test or it's a fundamental fairness test? What  
16 is it?

17 MR. YALOWITZ: Non-arbitrary.

18 JUSTICE KAGAN: Would that -- is that  
19 different from a fundamental fairness test?

20 MR. YALOWITZ: I -- I -- I -- I  
21 understand it better. I -- I find fundamental  
22 fairness to be squishier.

23 JUSTICE KAGAN: Squishier?

24 MR. YALOWITZ: Yeah.

25 JUSTICE KAGAN: But we -- we -- we

1 have used that squishy concept when it comes to  
2 the Fourteenth Amendment. Yes?

3 MR. YALOWITZ: Indeed.

4 JUSTICE KAGAN: And -- and, when it  
5 comes to the Fourteenth Amendment, we've said  
6 that that, along with federalism concerns that  
7 don't really play here, but that also fairness  
8 concerns lead to a minimum contacts test.

9 So why wouldn't we say the same thing  
10 here?

11 MR. YALOWITZ: There's no reason not  
12 to say the same thing here. In this case, I  
13 think the -- the -- the concerns that Justice  
14 Sotomayor were talking about about, you know,  
15 having somebody without resources required to  
16 travel far and defend a case, those -- those  
17 don't exist in -- in this case.

18 So, to the extent fundamental fairness  
19 is worried about unfairly burdening -- deeply  
20 unfairly burdening a defendant with the -- with  
21 the act of defending a case in a faraway locale,  
22 that is not a problem in this case.

23 JUSTICE KAGAN: Okay. I mean, I guess  
24 I am a little bit -- maybe I'm just not  
25 understanding the test, but I do -- do want to

1 understand it, so let me press you a little bit  
2 more.

3 MR. YALOWITZ: Sure.

4 JUSTICE KAGAN: It's not a problem in  
5 this case because you think that there are  
6 minimum contacts here, so even if there were a  
7 minimum contacts test, it would be satisfied  
8 here? Is that what you're saying?

9 MR. YALOWITZ: No, that's -- that's  
10 not what we're saying. Well, let me back off of  
11 that a little bit.

12 I -- I think that there -- that one  
13 way to consider the minimum contacts test is to  
14 ask: Did the defendant direct its activities at  
15 a person within the protection of the sovereign?

16 And, here, that test is certainly met.  
17 These defendants directed their activity at U.S.  
18 citizens who are within the protection of the  
19 United States.

20 JUSTICE KAGAN: I don't think that  
21 that would be usually the way that we would  
22 explain what minimum contacts was looking for.  
23 We would usually talk in terms of, like,  
24 something like purposeful availment of the  
25 sovereign. So, here, that would be the entire

1 United States, something like that.

2 MR. YALOWITZ: Well, that -- that's  
3 true in a -- in a commercial case. But, here,  
4 we're talking about intentional torts, so the --  
5 the analysis is a little bit different with an  
6 intentional tort because you're not really  
7 availing yourself of anything by -- by blowing  
8 up a -- a bomb.

9 JUSTICE KAGAN: But you're not taking  
10 issue of, like, with -- and, I guess, like  
11 Justice Gorsuch, I thought maybe something  
12 different from your brief, but, as I understand  
13 it, you're not taking issue with some sort of  
14 substantive component -- call it  
15 non-arbitrariness, call it fairness -- and  
16 you're not really taking issue with a minimum  
17 contacts test as long as it's kind of your  
18 version of minimum contacts?

19 MR. YALOWITZ: That's fair. I -- I  
20 mean, you say "our version" --

21 JUSTICE KAGAN: Well, which is like if  
22 you direct yourself to individuals with --  
23 direct yourself to the sovereign entity, to  
24 individuals within the protection of the  
25 sovereign entity.



1                   MR. YALOWITZ: Right. Right. So  
2 the -- the -- the sovereign sphere of the State  
3 of Nevada ends at the border. So, when -- when  
4 the -- the plaintiffs in Walden against Fiore  
5 traveled to Georgia, they were not within the  
6 protection of Nevada anymore.

7                   It's different for federal -- for U.S.  
8 citizens. Wherever in the world you travel, the  
9 protection of the United States travels with  
10 you. And so the sovereign interests are  
11 different.

12                   So, when -- when you think of -- and  
13 some of the -- like the lower court in this case  
14 talked about they -- they didn't conduct any  
15 activities within the territory of the United  
16 States. That's the wrong way to think about the  
17 sovereignty of the United States. It's a  
18 sovereign-by-sovereign analysis.

19                   Sovereignty of the United States is  
20 much broader than the sovereignty of the State  
21 of Nevada.

22                   JUSTICE KAGAN: Thank you.

23                   CHIEF JUSTICE ROBERTS: Justice  
24 Gorsuch?

25                   JUSTICE GORSUCH: So, if I've got it

1 right, you want us to adopt the fundamental  
2 fairness language from our Fourteenth Amendment  
3 jurisprudence but give it different content in  
4 the Fifth Amendment. Is that fair?

5 MR. YALOWITZ: I don't think you have  
6 to adopt the fundamental fairness --

7 JUSTICE GORSUCH: No. But, to get  
8 your five votes, that's -- you're willing to do  
9 that?

10 MR. YALOWITZ: I would be willing --

11 JUSTICE GORSUCH: Yeah.

12 MR. YALOWITZ: -- to do that.

13 JUSTICE GORSUCH: Okay. And if we did  
14 that --

15 MR. YALOWITZ: I'm not going to lie.

16 JUSTICE GORSUCH: Yeah. No, I --

17 (Laughter.)

18 JUSTICE GORSUCH: -- I appreciate  
19 that. I'm -- I'm just trying to understand  
20 where the ball has bounced because it's bounced  
21 considerably from your brief.

22 And -- and this fundamental fairness  
23 test, do you have any historical pedigree for it  
24 and -- because it's not what we do in the  
25 Fourteenth Amendment. You've conceded that. So

1 where did it come from --

2 MR. YALOWITZ: So --

3 JUSTICE GORSUCH: -- if I'm not just  
4 making it up?

5 MR. YALOWITZ: -- the -- the  
6 fundamental fairness test comes from  
7 International Shoe.

8 JUSTICE GORSUCH: Okay. But that's  
9 the minimum contacts test that you were  
10 discussing with Justice Kagan, and you're saying  
11 no, it's going to apply very differently because  
12 it's -- it's -- it's -- it's -- it's the United  
13 States rather than a state.

14 But you get into the -- you get into  
15 the same -- if it's fundamental fairness, you  
16 get into the same notice and opportunity to be  
17 heard, and you get into whether it's reasonable  
18 to be haled into Paris, Texas, and all those  
19 kinds of questions, don't you?

20 MR. YALOWITZ: I -- I -- I think that  
21 if you adopt a -- a substantive due process  
22 overlay, then that's where the law takes you.  
23 That's where the Court's precedents take you.  
24 If --

25 JUSTICE GORSUCH: Do you have any

1 basis in history for that?

2 MR. YALOWITZ: No. I think that if  
3 you go back to what -- what the founders were  
4 doing, what this Court was doing in the early  
5 years, you don't have any --

6 JUSTICE GORSUCH: I mean, back then,  
7 it was, yes, there's international law of  
8 nations.

9 MR. YALOWITZ: Correct.

10 JUSTICE GORSUCH: But Congress can  
11 defease that when it chooses. That was the law.

12 MR. YALOWITZ: Correct. Very clearly,  
13 there was -- there were jurisdictional  
14 limitations that the courts applied. They came  
15 from the general law of nations. They did not  
16 come from the Constitution.

17 JUSTICE GORSUCH: But, you know,  
18 Justice Story said, if Congress says otherwise,  
19 we have to follow that.

20 MR. YALOWITZ: Correct.

21 JUSTICE GORSUCH: And then it becomes  
22 a political question between international  
23 sovereigns.

24 MR. YALOWITZ: And not just Justice  
25 Story. That's -- that is -- that --

1 JUSTICE GORSUCH: Oh, sure.

2 MR. YALOWITZ: I mean, I -- that's  
3 all --

4 JUSTICE GORSUCH: He famously said it.

5 MR. YALOWITZ: Right. It's all over  
6 the cases.

7 JUSTICE GORSUCH: Yeah. Okay.

8 Now let's say we have to apply our  
9 minimum contacts test because you've kind of  
10 taken us there a bit or at least close to it.  
11 I'm wondering -- I -- I understand, you know,  
12 there's (A) and (B) in the statute here.

13 MR. YALOWITZ: Right.

14 JUSTICE GORSUCH: Right? And (A) had  
15 to do with the payments abroad.

16 MR. YALOWITZ: Right.

17 JUSTICE GORSUCH: (B) had to do with  
18 maintaining an office here. I -- I -- I get the  
19 analogy that (B) is sort of like, a little bit  
20 like, what we would do in the Fourteenth  
21 Amendment context. You -- you maintain an  
22 office in a particular jurisdiction. You're  
23 kind of opening yourself up to all manner of  
24 suits. But (A) is purely extraterritorial  
25 behavior.

1                   And I'm wondering: Is (B) enough for  
2 you in this case? Do you need anything more  
3 than (B) to bring this suit?

4                   MR. YALOWITZ: We -- we don't need  
5 more than (B).

6                   JUSTICE GORSUCH: So --

7                   MR. YALOWITZ: But Congress gave us  
8 both.

9                   JUSTICE GORSUCH: I understand that.  
10 But, if -- if -- if the Court were to say -- and  
11 follow your lead today and say, well, you know,  
12 something like fundamental fairness and minimum  
13 contacts -- let's just say we did a straight-up  
14 Fourteenth Amendment analysis under our existing  
15 precedent and said (B) is a lot like having an  
16 office in a particular jurisdiction.

17                   Is that enough for you? Is that  
18 enough of a victory for you to pursue this suit?

19                   MR. YALOWITZ: We -- that would be a  
20 suboptimal solution --

21                   JUSTICE GORSUCH: Why?

22                   MR. YALOWITZ: -- for us because -- in  
23 candor, because the defendants have contested  
24 whether they have come within (B). They don't  
25 contest that they've come within (A).

1 JUSTICE GORSUCH: Yeah.

2 MR. YALOWITZ: And the -- the case is  
3 old enough to go to law school.

4 JUSTICE GORSUCH: Well, they -- they  
5 say -- I appreciate that. They -- as I  
6 understand it, they say with respect to (B) that  
7 they're doing -- that they're maintaining their  
8 offices extra-legally and that, therefore,  
9 should make a difference.

10 If this Court were to say that doesn't  
11 make a difference, that they're maintaining  
12 offices here through the grace of executive  
13 non-enforcement, that's enough to open them to  
14 jurisdiction, does that -- is that enough for  
15 this suit to proceed?

16 MR. YALOWITZ: If the Court were to  
17 apply the statute --

18 JUSTICE GORSUCH: Yes.

19 MR. YALOWITZ: -- and say the --  
20 the -- the record is sufficient, if -- if this  
21 Court were to say the record is sufficient to  
22 conclude that the activities set out in the  
23 record are within the text of the statute, which  
24 is unambiguous, then that's enough for us.

25 JUSTICE GORSUCH: And so there would

1 be no need to opine on what -- what limits  
2 are -- may or may not exist under the Fifth  
3 Amendment. We could simply say under our  
4 Fourteenth Amendment jurisprudence analogy it  
5 would -- it's enough?

6 MR. YALOWITZ: Correct.

7 JUSTICE GORSUCH: And that would  
8 satisfy you?

9 MR. YALOWITZ: If -- if the Court --  
10 I -- I want to be very clear.

11 JUSTICE GORSUCH: If we applied (B).

12 MR. YALOWITZ: Right. I want to be  
13 very clear because --

14 JUSTICE GORSUCH: I want to be clear  
15 too.

16 MR. YALOWITZ: Yeah. We -- we've  
17 had -- we've had a very long journey.

18 JUSTICE GORSUCH: I do appreciate  
19 that.

20 MR. YALOWITZ: And -- and -- and a --  
21 a -- a remand back to the panel for further  
22 application of --

23 JUSTICE GORSUCH: That's not what  
24 I'm --

25 MR. YALOWITZ: Right.



1 JUSTICE GORSUCH: That's not what I'm  
2 asking about.

3 MR. YALOWITZ: -- would not be good  
4 for us.

5 JUSTICE GORSUCH: But -- but, if we  
6 were to say (B) applies, you're good to go?

7 MR. YALOWITZ: The Congress has made  
8 it an either/or.

9 JUSTICE GORSUCH: Yeah.

10 MR. YALOWITZ: Right.

11 JUSTICE GORSUCH: Okay. Thank you.

12 MR. YALOWITZ: All right.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Kavanaugh?

15 JUSTICE KAVANAUGH: I understood your  
16 argument in the brief to be arguing in the  
17 alternative --

18 MR. YALOWITZ: That's correct.

19 JUSTICE KAVANAUGH: -- and to have  
20 a -- what I would say, a broader argument  
21 that -- that Congress -- there are no limits on  
22 Congress, constitutional limits, other than  
23 service of process, et cetera, but there's no  
24 extra personal jurisdictional limits on Congress  
25 and then that you are arguing, even if that were

1 rejected or even if that's not correct, we have  
2 a second argument that even under the Fourteenth  
3 Amendment precedents, you still win.

4 MR. YALOWITZ: That's correct.

5 JUSTICE KAVANAUGH: Okay. And you're  
6 not giving up that first argument?

7 MR. YALOWITZ: Absolutely not.

8 JUSTICE KAVANAUGH: Okay. Just making  
9 sure.

10 Okay. And then what role does  
11 international law play? Any? Congress can  
12 override that, I --

13 MR. YALOWITZ: Right.

14 JUSTICE KAVANAUGH: -- assume to be  
15 your position, but I just want to make sure I  
16 have that nailed down.

17 MR. YALOWITZ: Right. So -- so, if  
18 Congress hasn't spoken or hasn't spoken clearly,  
19 then international law, would there be a  
20 presumption of compliance with international  
21 law? In -- in this case, there's no conflict  
22 between what Congress has done and international  
23 law. But Congress is free to override  
24 international law.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Barrett?

3 JUSTICE BARRETT: So I want to  
4 describe one way to understand your argument,  
5 and I'd like you to tell me if -- if this is one  
6 way to understand your argument.

7 So the Fifth Amendment obviously  
8 predates the Fourteenth Amendment by quite a  
9 bit, and we have a line of precedent -- Justice  
10 Story's cases being a prime example; we have  
11 others -- that understand the Fifth Amendment in  
12 the way that you propose for your broader  
13 argument.

14 Then we have a distinct line of cases  
15 that pick up with International Shoe that  
16 interpret the Fourteenth Amendment differently.  
17 So we have competing lines of precedent.

18 Is one way to understand your  
19 argument, like, let them just keep going  
20 separately and parallel, maybe International  
21 Shoe is wrong, maybe the Fourteenth Amendment  
22 precedent is wrong, but don't disturb it, just  
23 stay the course with the Fifth Amendment  
24 precedent, and, if they're in tension, so be it?

25 MR. YALOWITZ: Right. This is not the

1 case to resolve how the Court should deal with  
2 Fourteenth Amendment cases.

3 JUSTICE BARRETT: Well, do we ever  
4 have to resolve that question on your view?  
5 Could we just let the Fifth Amendment and the  
6 Fourteenth Amendment precedent -- because, I  
7 mean, as in your view, would we be overruling  
8 some of these other cases, these Fifth -- not --  
9 not the four -- don't -- don't shake your head  
10 too soon.

11 If we treated the Fifth Amendment as  
12 having the minimum-contacts-type requirement,  
13 would we have to be -- if we treated the Fifth  
14 Amendment that way, would we be essentially  
15 overruling some of the 19th Century cases that  
16 take the Justice Story view?

17 MR. YALOWITZ: Hmm. That's an  
18 interesting question. So I -- I think that -- I  
19 think it wouldn't be overruling those cases to  
20 say that the -- the sovereign power of the  
21 government is sufficient to protect Americans  
22 abroad. And the reason I think that is --

23 JUSTICE BARRETT: Well, that's not  
24 quite the question.

25 I mean, I'm asking: If we say -- you

1 know, Justice Kagan's questions were pointing  
2 out that we have treated the Fourteenth  
3 Amendment as containing a fairness component.  
4 And -- and I don't understand your argument to  
5 be in a full-throated way -- your broader  
6 argument in a full-throated way to say, yes,  
7 there's a fairness component that would lead us  
8 to embrace the minimum contacts analysis for  
9 purposes of the Fifth Amendment.

10 Is that correct?

11 MR. YALOWITZ: Correct.

12 JUSTICE BARRETT: Okay. So, if that  
13 is your argument, you are arguing for the Fifth  
14 Amendment to be interpreted differently from the  
15 Fourteenth, correct?

16 MR. YALOWITZ: Correct.

17 JUSTICE BARRETT: If we say, no, no,  
18 no, no, no, the Fourteenth Amendment analysis,  
19 not the interstate federalism prong but the  
20 minimum contacts prong, the fairness prong,  
21 applies in the Fifth Amendment context, is it  
22 your view that we would be overruling cases from  
23 the 19th Century in, say, the Justice Story line  
24 or at least rendering a decision that would be  
25 in some tension with those cases which took a

1 different view of the Fifth Amendment?

2 MR. YALOWITZ: I think that -- I think  
3 that a decision to that effect would be in  
4 tension with those cases, yes.

5 The -- the -- at the time that -- at  
6 the time that the Due Process Clause was  
7 ratified, there was no --

8 JUSTICE BARRETT: Which Due Process  
9 Clause? The Fifth Amendment?

10 MR. YALOWITZ: The 1791.

11 JUSTICE BARRETT: Okay.

12 MR. YALOWITZ: The one we're here  
13 about.

14 There was no territorial limitation at  
15 all embedded in it in any way. And so -- and --  
16 and, in fact, the founders quite frequently  
17 litigated cases arising outside of the United  
18 States. Famously, the Philadelphia Convention  
19 was packed with lawyers who had litigated those  
20 cases as judges.

21 JUSTICE BARRETT: So was Pennoyer  
22 wrong to house a territorial understanding of --  
23 you know, of personal jurisdiction within the  
24 Due Process Clause of the Fourteenth Amendment?

25 MR. YALOWITZ: I -- I don't -- I -- I

1 think that what Pennoyer -- the way I read  
2 Pennoyer and the way Professor Sachs reads  
3 Pennoyer is that Pennoyer was -- was  
4 constitutionalizing kind of a narrower view of  
5 due process, which is there has to be a judge  
6 with -- with jurisdiction, there has to be  
7 opportunity to be heard, the Murray's Lessee  
8 view of -- of due process.

9 I -- I think the territorial  
10 restriction, the idea that there was a  
11 territorial horizontal federalism basis, I think  
12 that came into the Court's jurisprudence in the  
13 Lochner era.

14 JUSTICE BARRETT: Do you agree with  
15 Professor Sachs's amicus brief?

16 MR. YALOWITZ: Oh, yeah.

17 JUSTICE BARRETT: Okay. Thank you  
18 very much.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Jackson?

21 JUSTICE JACKSON: Yeah, I just want to  
22 know: Is that amicus brief and Professor  
23 Sachs's opinion the basis for your certainty  
24 about what happened at the founding? I mean, is  
25 there other evidence?

1                   MR. YALOWITZ: It -- it's confirmatory  
2 of our views. Judge Sofaer also put in an  
3 amicus brief that talked about Founding Era  
4 evidence.

5                   JUSTICE JACKSON: But -- but did  
6 you -- did you go to the original sources or are  
7 you relying on them for your view as to what the  
8 ratification state of affairs was?

9                   MR. YALOWITZ: As a matter of fact, I  
10 spent a lot of time with the original sources.

11                   JUSTICE JACKSON: And did you -- you  
12 found no evidence? How -- how many sources?  
13 What -- what is the scope here of our  
14 understanding of what actually happened then?

15                   MR. YALOWITZ: I -- I -- I think --  
16 I -- it's -- it's very clear that at the  
17 convention and at the rat -- the Philadelphia  
18 Convention and at the ratifying conventions,  
19 the -- the members of the convention and the --  
20 the founders urging ratification viewed the  
21 power of the judiciary and the power of the  
22 legislature to be coextensive.

23                   That's in the ratifying conventions.  
24 That's in Hamilton's Federalist Number 80.

25                   The -- the -- it's also clear from --



1 now this is secondary sources, but they're cited  
2 in my brief, Bourguignon, for example, and  
3 Deirdre Mask's article -- that -- that the  
4 founders litigated those cases, those  
5 extraterritorial cases.

6 And then the only question is: Well,  
7 did the Fifth Amendment change that? Did the  
8 Due Process Clause erase that baseline  
9 understanding?

10 And, when you go to what Randolph said  
11 in his report on the Judiciary Act, when you  
12 look at the Judiciary Act, which was Senate  
13 Bill 1 in the first session of the 1st Congress,  
14 written by -- in the hands of Ellsworth and  
15 Patterson, you see people who were in the room  
16 who thought that it was perfectly okay to -- to  
17 allow for extraterritorial --

18 JUSTICE JACKSON: But you concede, as  
19 Justice Barrett pointed out, that we do have a  
20 Fourteenth Amendment due process set of cases  
21 and interpretations that have a different view  
22 about the extent to which there are limitations  
23 that relate to contacts?

24 MR. YALOWITZ: Right. So two -- I  
25 agree with that, and I -- I -- I would say two

1 things about it.

2 First of all, seeded within that  
3 jurisprudence is the idea of this horizontal  
4 federalism, which, even if you want to say it's  
5 the same standard, it's going to be a  
6 sovereign-by-sovereign analysis. That's what  
7 Justice Kennedy's plurality said in the --

8 JUSTICE JACKSON: How -- how do you  
9 explain Insurance Corporation of Ireland then?

10 MR. YALOWITZ: Insurance Corporation  
11 of Ireland --

12 JUSTICE JACKSON: Where it was very  
13 clear -- or the fact that we have waiver in --  
14 in these kinds of situations? Meaning isn't  
15 there some concept of individual liberty? If  
16 not, you couldn't --

17 MR. YALOWITZ: Right.

18 JUSTICE JACKSON: -- waive this if it  
19 was all about territorial sovereignty.

20 MR. YALOWITZ: Right. And, as -- as  
21 Your Honor pointed out in -- in Mallory, it's  
22 a -- it's a -- it's a waivable right. There is  
23 a right and it's waivable. Of course.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Kneedler.

3 ORAL ARGUMENT OF EDWIN S. KNEEDLER

4 ON BEHALF OF THE PETITIONER IN CASE 24-151

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

7 The act of Congress at issue here is  
8 an integral component of the foreign policy and  
9 national security policy of the political  
10 branches, including the securing of compensation  
11 for victims of terrorism.

12 Congress determined that it is fair to  
13 deem the PLO and PA to have consented to  
14 personal jurisdiction in suits under the  
15 Anti-Terrorism Act if they made payments to or  
16 on behalf of persons who injured or killed  
17 Americans in acts of terrorism or engaged in  
18 certain activities in the United States.

19 Both of those forms of conduct that  
20 are jurisdiction-triggering are knowing and  
21 voluntary. They have a clear nexus to United  
22 States territory and to United States nationals  
23 and to the compelling U.S. interests in  
24 deterring terrorism.

25 And the sculp -- the scope -- excuse

1 me -- of the resulting submission to United  
2 States jurisdiction is very limited. It is not  
3 a general jurisdiction. It is narrowly limited  
4 to terrorism cases.

5 Congress has the constitutional  
6 authority and institutional capacity to weigh  
7 the very interests, including the distinct  
8 status and international engagements of the PLO  
9 and PA, the United States' unique and long-term  
10 relationship with those entities, the  
11 imperatives of national security and foreign  
12 policy, and fairness to the claimants and to the  
13 foreign defendants.

14 Congress's judgment on these issues,  
15 as in all issues of national security and  
16 foreign policy, are entitled to great deference.

17 The Act providing for jurisdiction  
18 here is eminently fair and does not deprive  
19 Respondents of due process. This Court should  
20 sustain the statute.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Mr. Kneedler, just to  
23 take a step back, do the PLO and the Palestinian  
24 Authority have constitutional rights?

25 MR. KNEEDLER: We have not taken a

1 position on that question. We have assumed that  
2 they do. That question is itself of some  
3 sensitivity to have the Court determine or a  
4 court determine in a judicial proceeding whether  
5 a particular entity is like a sovereign, is a  
6 sovereign, to what extent is it like a  
7 sovereign. We urge the Court not to delve into  
8 that. We have not taken a position on that  
9 because of the sensitivities in this particular  
10 arena.

11           But we -- we do think that the status  
12 of the PLO, assuming arguendo that it has  
13 some -- and PA -- that they have some  
14 constitutional rights, that status is still  
15 relevant to the application of due process  
16 because -- for the reasons that I gave. The  
17 United States has a long-term relationship  
18 concerning them. It's complicated. It's  
19 nuanced. But the deterrence of terrorism has  
20 been at the center of that policy for the last  
21 four decades. And the United States has taken  
22 consistent efforts -- efforts to dissuade the  
23 PLO and the PA from supporting terrorism.

24           JUSTICE THOMAS: Didn't the Justice  
25 Department take a different position in the

1 1980s, that the PLO did not have constitutional  
2 rights?

3 MR. KNEEDLER: Well, you say a  
4 different position. We're not taking a position  
5 here. But, in those -- those cases were --

6 JUSTICE THOMAS: Well, it's different  
7 from the non-position.

8 (Laughter.)

9 MR. KNEEDLER: Those -- those cases --  
10 those cases were not about due process with  
11 respect to adjudicate -- being haled into U.S.  
12 courts. They were First Amendment cases by and  
13 large that had to do with the permissibility of  
14 the United States closing the Palestine  
15 Information Office or limiting the -- the  
16 expressive conduct of those entities in the  
17 United States.

18 And we think, in those situations, the  
19 United States surely has the authority to expel  
20 the PLO, to close an information office, to  
21 close any office for that matter, and to limit  
22 what they may engage in in the United States.

23 I think that the due process question  
24 of being deemed to be -- have submitted to the  
25 courts of the United States may present a

1 different question.

2 CHIEF JUSTICE ROBERTS: Counsel, you  
3 articulated your -- your jurisdictional approach  
4 in the terms of the particular facts of this  
5 case. I mean, could you articulate it more  
6 generally how it would apply? In other words,  
7 you focus on the facts, and that's perfectly  
8 appropriate. But, if we were to articulate the  
9 general test and how it would apply, how would  
10 you -- how would you articulate that?

11 MR. KNEEDLER: Well, I -- I -- I think  
12 there are maybe different circumstances. This  
13 case is word -- the statute here is worded in  
14 terms of consent to jurisdiction, where the --  
15 the PA and PLO are deemed to have consented to  
16 or to submit -- to submit themselves to the  
17 jurisdiction of the United -- United States  
18 courts.

19 In that circumstance, we have proposed  
20 a test that depends on whether the conduct that  
21 is jurisdiction-triggering is knowing and  
22 voluntary and whether the resulting submission  
23 to jurisdiction is fair and not exorbitant.  
24 The -- the dissenting opinion from rehearing en  
25 banc in the court of appeals also said that

1 there should be a nexus between the United  
2 States and -- and the -- and the conduct  
3 involved.

4 I think the nexus -- I'm sorry. But,  
5 if -- if you're -- if you're not relying on  
6 consent, then you have perhaps a different  
7 analysis.

8 CHIEF JUSTICE ROBERTS: Well, it  
9 sounds like it's a grab bag. I mean, you -- as  
10 far as I can tell, it's -- it's got to be fair.  
11 It can't be exorbitant. There has to be a  
12 nexus. I mean, that's a bunch of words.

13 I mean, could you be a little more  
14 precise about what exactly we should be looking  
15 for or --

16 MR. KNEEDLER: Well, the -- what I was  
17 describing is linked to the question of consent,  
18 and we were building on the consent theory that  
19 came from this Court's decision in Mallory and  
20 other cases under the Fourteenth Amendment,  
21 where the conduct has to be voluntary and -- and  
22 I think some element of -- of fairness or nexus  
23 to the -- to the jurisdiction.

24 So, in that part of what I was saying,  
25 in that part of our argument, we were saying



1 that the circumstances here can be analyzed  
2 under the Fourteenth Amendment standards. It's  
3 obviously not the Fourteenth Amendment itself,  
4 and the United States is different from states.

5 But, with respect to consent, the  
6 factors that I have identified -- and this  
7 statute is written in terms of consent -- are --  
8 would be relevant to consent.

9 If you're -- if you're not talking  
10 about a situation of consent, then you get into  
11 something that's more parallel to International  
12 Shoe with the -- with -- I do want to make an  
13 important point here --

14 JUSTICE GORSUCH: Well --

15 MR. KNEEDLER: -- though, in response  
16 to just --

17 JUSTICE GORSUCH: -- Mr. Kneedler --

18 MR. KNEEDLER: I'm sorry.

19 JUSTICE GORSUCH: -- are you asking us  
20 to apply the Fourteenth Amendment standards, or  
21 are you saying the Fifth Amendment is different?

22 MR. KNEEDLER: We do believe the Fifth  
23 Amendment is different, but even if in this --

24 JUSTICE GORSUCH: And -- and the Fifth  
25 Amendment, as Justice Barrett was pointing out,

1 was historically understood to assume the law of  
2 nations, general law applies, but Congress  
3 can -- can reject that.

4 MR. KNEEDLER: Yes.

5 JUSTICE GORSUCH: And when it does,  
6 this Court has to follow it. That -- that  
7 was -- that was the historical rule in the Fifth  
8 Amendment as I understand it, unless I'm  
9 mistaken.

10 MR. KNEEDLER: Well, that was the  
11 understanding certainly.

12 JUSTICE GORSUCH: Okay.

13 MR. KNEEDLER: Justice Story expressed  
14 that. I don't think any of those cases were  
15 actual --

16 JUSTICE GORSUCH: And The Charming  
17 Betsy and -- and a whole bunch of others, right?

18 MR. KNEEDLER: Right. With respect to  
19 sovereign immunity or other aspects of -- of  
20 jurisdiction, yes. But those cases -- those  
21 decisions, particularly the Justice Story ones,  
22 were not presented with a case in which Congress  
23 actually had disagreed with -- with  
24 international law.

25 JUSTICE GORSUCH: And, here, we do --

1                   MR. KNEEDLER: And we think that  
2                   that --

3                   JUSTICE GORSUCH: And, here, we do  
4                   have that, and -- and Congress has adopted (A)  
5                   and (B). And is there any -- and you talk about  
6                   the importance of -- of the sensitivity of  
7                   foreign relations and that this Court is not  
8                   well-positioned to do that and the -- and the  
9                   political branches are.

10                   And if all that's true, then -- then  
11                   how do we have this fundamental fairness overlay  
12                   that you're now discussing in your brief in the  
13                   Fifth Amendment context?

14                   MR. KNEEDLER: Well, again, I was --  
15                   those -- that -- the articulation of that test  
16                   was looking at it under -- under the rubric of  
17                   consent, which --

18                   JUSTICE GORSUCH: Under the Fourteenth  
19                   Amendment rubric? I -- I just want to be clear.  
20                   We're talking about --

21                   MR. KNEEDLER: Yes. But -- but --  
22                   but --

23                   JUSTICE GORSUCH: Okay. I'm talking  
24                   about the Fifth Amendment.

25                   MR. KNEEDLER: No, I understand that.

1 All I meant is that if -- because the statute is  
2 written in terms of consent, if the Court chose  
3 to analyze it under consent --

4 JUSTICE GORSUCH: I'm -- I'm -- and  
5 I'm asking you to put aside the Fourteenth  
6 Amendment concepts for now.

7 MR. KNEEDLER: Okay.

8 JUSTICE GORSUCH: And under the Fifth  
9 Amendment, does this Court have any role in  
10 saying that what Congress has done is improper?

11 MR. KNEEDLER: I don't think it has a  
12 role here. I'm reluctant to say that there is  
13 no role because one could imagine any sort of  
14 act of Congress -- I -- I think -- I think --

15 JUSTICE GORSUCH: Yes. And that's  
16 what -- that's the tension I see in your  
17 argument. On the one hand, you say,  
18 historically, the Fifth Amendment was understood  
19 to mean we respect what Congress does in this  
20 area. And you -- you started off -- your  
21 introduction was all about how we owe deference  
22 to the political branches in this area.

23 But it seems at the same time you want  
24 a safety valve for this Court to overrule some  
25 instances in which Congress does speak --

1 MR. KNEEDLER: Well, I --

2 JUSTICE GORSUCH: -- and defease  
3 international law.

4 MR. KNEEDLER: No, all I'm saying is  
5 that the Court -- the Court doesn't have to go  
6 there, and -- and we think it would be prudent  
7 for the Court to wait for an act of Congress  
8 to -- because it takes an act of Congress to  
9 provide for personal jurisdiction other than  
10 following the rules of the state.

11 I think it would be prudent for the  
12 Court to look at the particular act of Congress  
13 involved, what the rationale for that statute  
14 was, and see whether it -- whether it would  
15 comport with due process.

16 JUSTICE GORSUCH: My -- my -- my --

17 JUSTICE KAGAN: Mr. --

18 JUSTICE GORSUCH: -- last question.

19 I'm sorry. I'm almost done.

20 If we were just to analyze this under  
21 the Fourteenth Amendment precedents, same  
22 question I asked your -- your friend earlier.  
23 (B) I kind of understand. You have an office,  
24 okay?

25 MR. KNEEDLER: Right.

1 JUSTICE GORSUCH: And I get the  
2 Mallory analogy. I do. I understand that. Now  
3 whether it works is another thing.

4 But (A) is a little bit different.  
5 It -- it's purely extraterritorial behavior.  
6 And that -- that's a little harder to square in  
7 my mind with our Fourteenth Amendment  
8 jurisprudence.

9 Do we need to decide (A)? Is it  
10 enough to say this case survives under (B) even  
11 applying our Fourteenth Amendment?

12 MR. KNEEDLER: Well, we agree with the  
13 plaintiffs that it would be prudent for the  
14 Court to address both. And -- and I --

15 JUSTICE GORSUCH: But do we need to?  
16 I mean, if -- if -- if there's jurisdiction  
17 under (B), do we need to say there's also  
18 jurisdiction under (A)?

19 MR. KNEEDLER: Well, with respect to  
20 the activities, the lower courts have not  
21 decided whether the -- whether the activities  
22 that -- that are alleged would -- would be  
23 protected or not protected, so there would be  
24 yet a further remand.

25 And we think the payments -- and I do

1 want to address, I think, a premise of your  
2 question. Because the payments occur outside of  
3 the United States, there can't be minimum  
4 contacts with the United States.

5 But this is a place where we think the  
6 Fifth Amendment would differ from the  
7 Fourteenth.

8 JUSTICE GORSUCH: Okay. That -- that  
9 answers my question if you say it's different  
10 than the Fourteenth, so we'd need to do  
11 something different.

12 I'm sorry, Justice Kagan.

13 JUSTICE KAGAN: No, no, no, that was  
14 helpful.

15 I hear you, Mr. Kneidler, as being  
16 reluctant to go to a place where you say that  
17 anything Congress says goes. I mean, obviously,  
18 you're saying here Congress -- what Congress  
19 said goes, but you're reluctant to say  
20 anything -- may I continue?

21 CHIEF JUSTICE ROBERTS: Sure.

22 JUSTICE KAGAN: -- you know, anything  
23 Congress says goes, there are constitutional  
24 constraints.

25 And is that because there would be

1 foreign policy implications that would result  
2 from an extremely broad congressional assertion  
3 of jurisdiction over foreign nationals?

4 MR. KNEEDLER: There could well be. I  
5 mean, I think that would be one of the -- one of  
6 the reasons. And Congress proceeded cautiously  
7 here. It tried a number of -- of ways to  
8 provide for these suits.

9 It could, but -- but one can imagine,  
10 especially in -- in these days, if you subjected  
11 someone around the globe to general jurisdiction  
12 in U.S. courts, the Court might be troubled by  
13 that. And this is far from that.

14 JUSTICE KAGAN: Well, the -- the Court  
15 might be troubled. I'm -- I'm really asking  
16 whether the Solicitor General representing the  
17 United States is troubled by that.

18 I could understand an argument which  
19 would say that if Congress does something that  
20 really stretches very far and wide, it could  
21 have foreign policy consequences, it could  
22 encourage other nations to retaliate and treat  
23 U.S. citizens in the same way, that sort of  
24 thing, where the United States might be -- you  
25 tell me if you are -- but might be reluctant to



1 have a court rule that says anything Congress  
2 says goes in this area.

3 MR. KNEEDLER: Yeah, there would --  
4 there could well be problems with other  
5 countries' reactions to that and -- and  
6 retaliation perhaps.

7 I do want to complete the thought, if  
8 I -- if I could, about why the Fifth Amendment  
9 would be different with --

10 JUSTICE KAGAN: So you want a narrower  
11 rule than sort of anything Congress says goes?

12 MR. KNEEDLER: We would be pleased  
13 with a rule that -- that is broader than --  
14 broader than what we've urged here, but we think  
15 it -- it -- it would also be useful to proceed  
16 incrementally. The Court wouldn't have to  
17 confine it to these precise circumstances, which  
18 are -- are compelling.

19 But the -- but the point I wanted to  
20 make, which -- which I think could be part of  
21 the test if you're not looking at -- at consent,  
22 is that I don't think minimum contacts would be  
23 the right way to look at it.

24 It would be, I think, at most, a nexus  
25 of some sort to the United States, which is what

1 Judge Menashi in the -- in -- in his dissenting  
2 opinion in the court of appeals said.

3 And, here, you have a nexus. It -- it  
4 doesn't have to be territorial contacts because,  
5 as plaintiffs' counsel pointed out, the United  
6 States has sovereign authority to extend laws  
7 and judicial jurisdiction beyond the borders of  
8 the United States.

9 Here, the conduct abroad plainly has a  
10 nexus to the United States. The payments prong  
11 concerns acts of terrorism that injure United  
12 States persons --

13 JUSTICE KAGAN: Thank you.

14 MR. KNEEDLER: -- abroad.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 Mr. Kneedler.

17 It might help me get a handle on the  
18 positions of the respective parties if you could  
19 tell me in what significant respects the  
20 position of the United States differs from that  
21 of Petitioner.

22 MR. KNEEDLER: I -- I don't think  
23 the -- I don't think the position really --

24 CHIEF JUSTICE ROBERTS: Not  
25 necessarily the judgment. The analytic

1 approach.

2 MR. KNEEDLER: I -- I think the  
3 analytical approach that I've described is -- is  
4 consistent -- entirely consistent with what  
5 plaintiffs have argued. They are making a  
6 broader argument sort of categorically and  
7 affirmatively at this time.

8 We have not, which is not to say that  
9 we may not embrace that at a later time, but we  
10 think that that's an issue that should -- that  
11 this Court should decide on the basis of -- of a  
12 full briefing and -- and analysis in a situation  
13 where it might really matter.

14 But -- but, here, we don't -- we -- we  
15 think this fits comfortably into even Fourth  
16 Amend -- Fourteenth Amendment principles but,  
17 certainly, the Fifth Amendment principles with  
18 respect to Congress's ability in this area to --  
19 to provide for jurisdiction.

20 CHIEF JUSTICE ROBERTS: Thank you.

21 Justice Thomas?

22 JUSTICE THOMAS: Mr. Kneedler, the  
23 Chamber of Commerce amicus brief indicates that  
24 the Justice Department has had a consistent view  
25 that these organizations did not have

1 constitutional rights.

2 Do you think the brief is accurate?  
3 And, if it is accurate, is this now a change of  
4 positions?

5 MR. KNEEDLER: Again, I -- the -- the  
6 cases that -- from -- from back in that era  
7 concerned, I think -- I think all of them  
8 concerned the First Amendment and Congress's  
9 ability to deal with the PIO and -- or  
10 information office and the -- and the PLO with  
11 respect to their domestic activities.

12 In the prior round of the Sokolow  
13 case, where the Second Circuit held that the --  
14 that the Respondents here do have due process  
15 rights, we did not take a position on that  
16 question at the time and we urged the court to  
17 deny certiorari in the case.

18 So that -- that has been -- once we  
19 have now looked at the due process question --  
20 and this goes back, I think, at least 10  
21 years -- I -- I forget when the -- when the  
22 prior was. So we -- we have not advanced a  
23 position with respect to due process in those  
24 intervening years.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1                   JUSTICE ALITO: Mr. Kneedler, I  
2 understand that you're trying to wend your way  
3 through some sensitive territory, but I could  
4 use some help about the problems that I see  
5 along the course that you are recommending.

6                   You start with the argument that we  
7 could say that this -- that there is  
8 jurisdiction -- there would be jurisdiction  
9 under the Fourteenth Amendment's case law  
10 because of consent.

11                   What -- what are -- what limit do you  
12 see on the ability of a state to impose a -- a  
13 regime of constructive intent?

14                   I mean, suppose that a state said that  
15 anyone who commits a tort against one of our  
16 citizens is deemed to have consented to our  
17 jurisdiction, regardless of where the tort  
18 occurs. Would that be consistent with our  
19 Fourteenth Amendment case law?

20                   MR. KNEEDLER: No, it would not. And  
21 I -- and I think maybe I misspoke or -- or  
22 wasn't clear about the Fourteenth Amendment.

23                   I didn't mean literally the Fourteenth  
24 Amendment standards as if the United States was  
25 a state. I -- I meant that the Fourteenth

1 Amendment principles as applied to the United  
2 States rather than a state.

3 And so, with -- with respect to a -- a  
4 state, there may be issues, as -- as you  
5 suggested in -- in Mallory, with respect to the  
6 ability of a state to condition subjection to  
7 jurisdiction on the basis of doing business in  
8 the state.

9 But Congress has a much broader  
10 authority with respect to -- under the Commerce  
11 Clause, for -- for example, to condition  
12 someone's participation in our economy than a --  
13 than a -- an individual state does.

14 JUSTICE ALITO: So -- so then it -- it  
15 does seem that you are not -- you are not really  
16 saying we can find that there's personal  
17 jurisdiction here simply by applying the  
18 Fourteenth Amendment? We have to look to a  
19 different standard?

20 MR. KNEEDLER: No. What our -- what  
21 our -- our brief said or tried to say is you can  
22 look at Fourteenth Amendment principles, not the  
23 literal application of them, Fourteenth  
24 Amendment principles with respect to consent,  
25 apply those to the somewhat distinct situation

1 of the United States under -- under the Fifth  
2 Amendment, where the -- where Congress is not  
3 limited in the way a state is in conditioning  
4 access to the economy or to other aspects of  
5 United States interests in the way that a state  
6 is.

7 JUSTICE ALITO: And then, on the  
8 question whether it would be enough -- whether  
9 there could be -- there -- there would be  
10 personal jurisdiction because the PLO has an  
11 office in the United States, that's not --  
12 that -- that is a factual issue, isn't it, that  
13 has not been resolved --

14 MR. KNEEDLER: Yes.

15 JUSTICE ALITO: -- by the lower  
16 courts? So we would have to do that in the  
17 first instance?

18 MR. KNEEDLER: Or -- or remand to the  
19 court of appeals.

20 JUSTICE ALITO: Or remand.

21 MR. KNEEDLER: Yeah. It -- it -- it's  
22 really activities. There are no offices, aside  
23 from the U.N. office, although there are  
24 allegations that that office is being used or  
25 has been used for activities extending beyond

1 the role at the U.N.

2 JUSTICE ALITO: And so then, if we  
3 say -- if we look to the 19th Century cases, the  
4 statements that Judge -- that Justice Story  
5 made, you don't want us really to say -- you  
6 don't want us to adopt that fully, that --  
7 well -- well, we'll presume that Congress is --  
8 that Congress is respecting international law,  
9 but, if it says it's not, if it's authorizing  
10 jurisdiction where that would be contrary to  
11 principles of international law, that's fine.  
12 You really don't want us to say anything goes.

13 But, if we don't say anything goes,  
14 then we have to say what doesn't go or we have  
15 to explain why this would meet -- why the facts  
16 here would meet whatever standard is -- is  
17 required. How do we do that without -- you  
18 don't want us to say anything goes, but that  
19 means we have to say what the test is. And then  
20 what is the test?

21 MR. KNEEDLER: Well, you say we -- we  
22 don't want you to say -- I mean, it -- we -- we  
23 are -- we are not disagreeing with the basic  
24 proposition that Congress has broad authority in  
25 this area.



1 JUSTICE ALITO: Well, let me just  
2 rephrase it. At one point, you said you -- I  
3 thought you just said a few minutes ago you'd be  
4 pleased with a decision that says Congress can  
5 do whatever it wants. But I understood your  
6 argument to mean that you really --

7 MR. KNEEDLER: I -- I --

8 JUSTICE ALITO: -- you didn't -- you  
9 really don't want that because --

10 MR. KNEEDLER: -- I did not mean to  
11 say that.

12 JUSTICE ALITO: Okay.

13 MR. KNEEDLER: And -- and I think that  
14 the -- the question of how far Congress's powers  
15 go could -- as Justice Kagan pointed out, you  
16 know, the farther it goes may create other  
17 problems for us.

18 JUSTICE ALITO: No. No, I appreciate  
19 that. But how can we -- if we don't say Justice  
20 Story was right, you know, end of case, then we  
21 have to say that there is some standard that has  
22 to be met, and then we would have to explain why  
23 this case does or does not meet that standard,  
24 right? So then we have to say what the test is.

25 MR. KNEEDLER: Well --

1 JUSTICE ALITO: And that gets more  
2 difficult.

3 MR. KNEEDLER: Yeah. Well, again,  
4 there may not be one test. We laid out a test  
5 for consent. There may be a -- a different --  
6 probably would be a different test where consent  
7 is not the basis of the jurisdiction but  
8 something akin to minimum contacts, which I  
9 think would be a nexus to the United States  
10 because the United States has interests abroad.

11 If those interests are affected, like  
12 U.S. citizens or -- or terrorism or other  
13 actions of the United States in the Middle East,  
14 if whatever's being done has a -- has a nexus to  
15 that, that would be a sufficient basis for the  
16 exercise --

17 JUSTICE ALITO: Okay. Well --

18 MR. KNEEDLER: -- of jurisdiction.

19 JUSTICE ALITO: -- just to -- to  
20 wrap -- to wrap up, you -- you want -- on  
21 consent, you want us to say there's consent here  
22 even though there might not be consent or there  
23 would not be consent if a state tried to do  
24 something analogous and had to meet the  
25 Fourteenth Amendment?

1           MR. KNEEDLER:  There -- there may well  
2     not be because this is conduct -- the payments  
3     prong is -- is conduct occurring outside the  
4     United States, so, if minimum contacts is  
5     thought of in terms of a territorial connection,  
6     we don't think that that applies to the United  
7     States.

8           JUSTICE ALITO:  Thank you.

9           CHIEF JUSTICE ROBERTS:  Justice  
10    Sotomayor?

11          JUSTICE SOTOMAYOR:  Let's go back a  
12    moment to your response to Justice Gorsuch.

13          Justice Story did not -- did not have  
14    a case in front of him involve -- establishing  
15    personal jurisdiction over a person who had no  
16    connection to the United States whatsoever,  
17    correct?

18          MR. KNEEDLER:  Right.  Yes.

19          JUSTICE SOTOMAYOR:  That was not at  
20    issue there.

21          MR. KNEEDLER:  Those -- those --

22          JUSTICE SOTOMAYOR:  It's interesting  
23    that he and other commentators spent so much  
24    time making these broad statements when Congress  
25    consistently -- that's what Professor Sachs

1 pointed to -- for over a hundred years, pretty  
2 much stayed within International Shoe's  
3 limitations, no, in all the Acts that it  
4 created?

5 MR. KNEEDLER: Well, it -- it -- yeah,  
6 I mean, it created nationwide service of process  
7 or even worldwide service of process like under  
8 the --

9 JUSTICE SOTOMAYOR: Yes.

10 MR. KNEEDLER: -- antitrust laws.  
11 It -- it has proceeded, but it -- but it has  
12 regulated some things outside the United States  
13 that affect --

14 JUSTICE SOTOMAYOR: Absolutely.

15 MR. KNEEDLER: -- its interests.

16 JUSTICE SOTOMAYOR: But -- but the  
17 absolute statement, it never did?

18 MR. KNEEDLER: No, it's never -- it's  
19 never -- it's never gone to that extent.

20 JUSTICE SOTOMAYOR: It's always --  
21 okay. Now, going back to your concession, I  
22 think, to Justice Alito, I don't think that this  
23 fits within our minimum contacts theory of the  
24 Fourteenth Amendment, so go with me.

25 If I can't see this as consistent with

1 the Fourteenth Amendment, then those circuits  
2 who have said that the Fourteenth and the  
3 Fifteenth, like the Second, are identical are  
4 wrong? The Second Circuit was wrong in that --

5 MR. KNEEDLER: Yes. We --

6 JUSTICE SOTOMAYOR: -- assumption?

7 MR. KNEEDLER: -- we think it was  
8 clearly wrong, yes.

9 JUSTICE SOTOMAYOR: All right. So now  
10 we go to Justice Alito's point, which is, if the  
11 Fifth -- if the Fifth Amendment is different,  
12 your colleague, Petitioners' counsel, argued  
13 somewhat what you ended up with in your response  
14 to Justice Alito, which is that Congress can --  
15 the Fifth Amendment has some sort of limitation  
16 because there has to be some nexus to a federal  
17 interest, correct?

18 MR. KNEEDLER: Well, I think the Court  
19 can assume that. I -- you know, again, if  
20 Congress passes a statute --

21 JUSTICE SOTOMAYOR: We can't assume it  
22 if we're going to apply it to this case.

23 MR. KNEEDLER: Well, I --

24 JUSTICE SOTOMAYOR: Well, you know --

25 MR. KNEEDLER: No, I -- no, I think

1 the Court could assume that there's a nexus  
2 requirement. If Congress passes a statute where  
3 there isn't one, then there will be time enough  
4 to decide whether that -- whether that's --  
5 that's valid.

6 JUSTICE SOTOMAYOR: So I guess the  
7 opinion, the way we would write it is to say we  
8 don't have to reach the question whether  
9 Congress has the constitutional power to -- to  
10 submit to our jurisdiction something without a  
11 federal interest, but this federal interest is  
12 enough?

13 MR. KNEEDLER: I -- I think that would  
14 be sufficient. It may also -- another different  
15 context may be if it's a U.S. citizen, as  
16 opposed to somebody outside the United States or  
17 a foreign entity.

18 JUSTICE SOTOMAYOR: All right. Now  
19 let's go to another part of this question, which  
20 is the office or lack thereof. I understood  
21 that the -- the -- the provision at issue here,  
22 (B), as opposed to (A), which is the payment  
23 prong, but the (B) prong, do they have to have  
24 an office, or could they just be present here at  
25 all?

1 MR. KNEEDLER: Well --

2 JUSTICE SOTOMAYOR: Meaning I thought  
3 any activity, whether it was behalf -- I think  
4 Justice Gorsuch got to this at one point. (B)  
5 could be read whether they have U.N. immunity or  
6 not is irrelevant. The U.S. could choose if it  
7 wanted, couldn't it, to say we won't respect  
8 U.N. immunity with respect to this person,  
9 correct?

10 MR. KNEEDLER: And -- yeah. First of  
11 all, there's no personal immunity here.  
12 There -- the U.N. --

13 JUSTICE SOTOMAYOR: It --

14 MR. KNEEDLER: -- agreement provides  
15 for access to the U.N. --

16 JUSTICE SOTOMAYOR: Right.

17 MR. KNEEDLER: -- by observers like  
18 the -- like the PLO and PA. But --

19 JUSTICE SOTOMAYOR: But no -- nothing  
20 says that the U.S. has to give them -- that that  
21 activity of having access --

22 MR. KNEEDLER: The -- the headquarters  
23 agreement --

24 JUSTICE SOTOMAYOR: Right.

25 MR. KNEEDLER: -- does but not -- but

1 Congress -- I mean, that -- the United States  
2 acceded to that. So --

3 JUSTICE SOTOMAYOR: It acceded to  
4 that, but it didn't have to.

5 MR. KNEEDLER: Yes. Well -- and we  
6 don't want to suggest that the defendants --

7 JUSTICE SOTOMAYOR: No.

8 MR. KNEEDLER: -- might draw away from  
9 it.

10 JUSTICE SOTOMAYOR: So, if we said  
11 something like what Justice Gorsuch said, which  
12 is the fact that they're here for whatever  
13 reason is enough of a connection to the U.S.?

14 MR. KNEEDLER: I -- I -- I think  
15 the -- the Court could hold that. I mean,  
16 there -- and -- and process was served in the  
17 United States --

18 JUSTICE SOTOMAYOR: Well, exactly.

19 MR. KNEEDLER: -- as -- as well. But  
20 the only office is the office -- the  
21 U.N.-related office. The allegations are  
22 that --

23 JUSTICE SOTOMAYOR: But that's  
24 irrelevant to --

25 MR. KNEEDLER: -- that that office was



1 abused --

2 JUSTICE SOTOMAYOR: That's irrelevant  
3 to the point we're discussing, which is, if the  
4 statute is written so that any presence for any  
5 reason in the United States subjects them to  
6 jurisdiction here for purposes of service.

7 MR. KNEEDLER: If -- if there was such  
8 a -- a statute. Here, there's -- the statute  
9 itself providing for personal jurisdiction  
10 protects or doesn't include or doesn't count the  
11 U.N. office and activities that are ancillary to  
12 that or meeting with U.S. officials. Those are  
13 not activities that count for purposes of  
14 triggering personal jurisdiction.

15 JUSTICE SOTOMAYOR: You -- you don't  
16 think it triggers (B) or it can't trigger (B)?  
17 Is that what you're telling me?

18 MR. KNEEDLER: Yeah, the -- the  
19 statute exempts from the triggering activities  
20 activities at the office that are -- that are --

21 JUSTICE SOTOMAYOR: I don't --

22 MR. KNEEDLER: -- connected to the  
23 U.N.

24 JUSTICE SOTOMAYOR: I don't think  
25 that's what they -- I'll let plaintiff -- I'll

1 let Petitioners' counsel address that.

2 All right. Thank you, counsel.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 Justice Gorsuch?

5 Justice Kavanaugh?

6 JUSTICE KAVANAUGH: I just want to  
7 make sure I understand. The -- this is a  
8 national security and foreign policy case, as  
9 you started with, right?

10 MR. KNEEDLER: Yes.

11 JUSTICE KAVANAUGH: And Congress and  
12 the president have agreed, acting pursuant to  
13 the national security and foreign policy  
14 principles set forth in the Constitution, on  
15 what the proper rule here is, correct?

16 MR. KNEEDLER: That is correct, yes.

17 JUSTICE KAVANAUGH: And there's no  
18 doubt that the -- in terms of regulating the  
19 conduct, that they acted per -- pursuant to  
20 those Article I powers -- the Article I and  
21 Article II powers, correct?

22 MR. KNEEDLER: Right. And Article  
23 III, Congress -- or I guess Article I, Congress  
24 establishing the lower courts.

25 JUSTICE KAVANAUGH: So it seems like,

1 you know, it's Youngstown category 1 situation,  
2 where the president and Congress have acted  
3 together. Now there is still a role for  
4 judicial review to -- to make sure they're not  
5 crossing some other constitutional line, but,  
6 usually, that's a very sensitive judgment for a  
7 federal court to make.

8 And, usually, we would require  
9 something in either the text of the Constitution  
10 or in the historical practice over the years  
11 that would suggest some principle that the  
12 courts could rely on that would disagree with  
13 the foreign policy and national security  
14 judgment of Congress and the president acting  
15 together.

16 MR. KNEEDLER: Right. That's --  
17 that's absolutely correct. And even to the  
18 extent there is a fairness element here,  
19 Congress is in a position to weigh what --

20 JUSTICE KAVANAUGH: But Congress and  
21 the president --

22 MR. KNEEDLER: Congress and the  
23 president --

24 JUSTICE KAVANAUGH: I mean, I think --  
25 I think you're going to agree with what I'm

1 about to say, but Congress and the president are  
2 the ones who make fairness judgments when we're  
3 talking about the national security and foreign  
4 policy --

5 MR. KNEEDLER: Yeah.

6 JUSTICE KAVANAUGH: -- of the United  
7 States. Unless it crosses some other textually  
8 or historically rooted constitutional principle,  
9 courts shouldn't be coming in, I don't think,  
10 without that and saying: Gee, what Congress and  
11 the president are doing here to advance the  
12 national security and foreign policy interests  
13 of the United States strikes us, you know, from  
14 our perch as unfair.

15 MR. KNEEDLER: Yeah, I completely  
16 agree with that and, as I said, Congress's  
17 assess -- Congress and the President's  
18 assessment of what's fair in these  
19 circumstances, what -- what could be problematic  
20 in these circumstances, the ongoing relationship  
21 in which terrorism has always been a major -- a  
22 central element of the foreign policy and  
23 national security.

24 JUSTICE KAVANAUGH: And that's why you  
25 see bipartisan amicus briefs from the House of

1 Representatives, bipartisan amicus briefs from  
2 the Senate.

3 MR. KNEEDLER: Yes.

4 JUSTICE KAVANAUGH: This is not --  
5 this is a considered judgment that is across the  
6 two branches.

7 So I -- I think you said -- you  
8 started with great deference as the principle,  
9 and I -- I agree with that, obviously, based on  
10 what I've said so far. I'm wondering when the  
11 great deference runs out.

12 MR. KNEEDLER: Well, it -- as I stand  
13 here, I can't think of a circumstance in which  
14 it would, particularly with respect to entities  
15 such as the PLO and Palestinian Authority, which  
16 are foreign non-sovereign entities.

17 Yes, they exercise some governmental  
18 power, but there's a unique relationship.  
19 They -- they have diplomatic relations around  
20 the -- around the world. So Congress should  
21 have particular latitude. And a court, I think,  
22 should be reluctant, if ever, to second-guess  
23 that judgment.

24 JUSTICE KAVANAUGH: And I think you'll  
25 probably agree with this too, but it also

1 doesn't strike me as the proper judicial role to  
2 seize on international law principles that might  
3 be lurking out there somewhere to tell the  
4 president and Congress together, acting  
5 together, that somehow they've crossed some  
6 line.

7 MR. KNEEDLER: No, Congress is  
8 perfectly -- and the president are perfectly  
9 capable to take into account whatever  
10 international law there may be.

11 And it -- it's my understanding,  
12 although I haven't looked deeply into this, that  
13 international law doesn't place so much emphasis  
14 on personal jurisdiction the way we do.

15 But it's up to Congress and the  
16 president to weigh whatever -- if -- even if  
17 it's not international law, what international  
18 practice would be or what -- what the reaction  
19 of other nations might be in a particular  
20 circumstance.

21 But this is narrowly focused on a  
22 particular recurring problem that Congress  
23 desperately wants to address. This is its third  
24 try in doing that.

25 JUSTICE KAVANAUGH: The recurring

1 problem of terrorism?

2 MR. KNEEDLER: Yes.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Barrett?

6 JUSTICE BARRETT: Mr. Kneedler, I just  
7 want to follow up on Justice Kavanaugh's  
8 questions.

9 Given your answers to Justice  
10 Kavanaugh, I just want to make sure. I might  
11 have misunderstood your colloquy with Justice  
12 Kagan earlier. But I had thought that you  
13 said -- and -- and I may well have  
14 misunderstood -- that one reason for us not to  
15 go the full-bore route as broadly as Petitioner  
16 has asked us to is because that might have  
17 foreign policy implications or that might have  
18 national security implications that would blow  
19 back.

20 But is that what you said?

21 MR. KNEEDLER: Well, I think there  
22 might -- I think there -- I'm -- I'm not in a  
23 position to -- to say that categorically, but  
24 I -- but I do think there's some reason for  
25 cautious there -- caution there.

1 JUSTICE BARRETT: Why? I mean, as you  
2 just told Justice Kavanaugh, these judgments  
3 about foreign policy considerations are for  
4 Congress and the president to make.

5 So, if at some point in the future  
6 Congress and the president passed a statute that  
7 went farther than this one on personal  
8 jurisdiction, why would what we do be a foreign  
9 policy -- I mean, wouldn't we defer to president  
10 and Congress then?

11 I guess I'm just struggling to see  
12 what the foreign policy concern is with our  
13 taking the broad theory.

14 MR. KNEEDLER: Well -- well, but --  
15 but, if -- if you announce a broad categorical  
16 view here in a situation in which it is not --  
17 when the Court wouldn't be required to do so,  
18 it's that -- it's that statement that might --

19 JUSTICE BARRETT: Like, even if it's  
20 true, like the government -- like you've said  
21 that you're okay with that rule, you think we  
22 should just not say it.

23 MR. KNEEDLER: Well, I didn't -- I --

24 JUSTICE BARRETT: So, even if it's  
25 true or even if it's the accurate interpretation



1 of the Fifth Amendment, you're saying, shhh?

2 MR. KNEEDLER: I -- I -- no, I don't  
3 think I -- I -- I didn't mean to say we're okay  
4 with that. I think we would want to examine  
5 questions of -- of -- of fairness to see whether  
6 that should be an element or not or whether  
7 Congress, in fact, has plenary power.

8 And it may well be that -- that the  
9 Court, if -- if a situation actually confronted  
10 it, that the Court would conclude that or that  
11 we might submit that. I can't say we wouldn't.  
12 But I think -- I think it's important,  
13 particularly given the -- the parallel  
14 development of the Fourteenth Amendment, not to  
15 dismiss that out of hand in a case that  
16 doesn't -- doesn't require that analysis.

17 Also, there could be other situations  
18 in which Congress would provide for personal  
19 jurisdiction, like in the person -- in the  
20 commercial sphere, which would not present as  
21 starkly the questions of national security and  
22 foreign policy, although there would obviously  
23 be some foreign policy concerns about extending  
24 jurisdiction, but the circumstances might be  
25 different.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Jackson?

3 JUSTICE JACKSON: So can I go back to  
4 your colloquy with Justice Gorsuch? I didn't  
5 read your brief as conceding that historically,  
6 the Fifth Amendment imposed no limits.

7 In fact, on page 47, you say that that  
8 theory is not easily confirmed as a historical  
9 matter. And there's nothing in your brief that  
10 seems to embrace the proposition that as a  
11 historical matter, there were no limits on  
12 Congress's ability to do this sort of thing.

13 So I just want to give you an  
14 opportunity to clarify what the position of the  
15 United States is related to Justice Gorsuch's  
16 point about whether the -- what the history  
17 shows.

18 MR. KNEEDLER: Yeah. We are not  
19 making that affirmative argument, and, if we  
20 were going to make that argument, we would want  
21 to present a full -- a full argument on it  
22 either way and -- and fully addressing the --

23 JUSTICE JACKSON: But, to the Chief  
24 Justice's point, this then creates some daylight  
25 between you and the other Petitioners because

1 they are in fully on this kind of originalist  
2 take on what the Fifth Amendment requires and  
3 are encouraging us to -- to adopt that broader  
4 theory.

5 MR. KNEEDLER: As one of two  
6 alternatives, they make --

7 JUSTICE JACKSON: Yes. That's one of  
8 the alternatives. I appreciate that, but --

9 MR. KNEEDLER: Yes. Yeah. Yes. No,  
10 yeah.

11 JUSTICE JACKSON: -- but -- but the  
12 government is not asking us to do that as one of  
13 the things?

14 MR. KNEEDLER: We are not asking you  
15 to do that. We are -- but we are also not  
16 saying -- we're just not addressing --

17 JUSTICE JACKSON: Yes. Understood.

18 MR. KNEEDLER: -- that question either  
19 way.

20 JUSTICE JACKSON: Understood.

21 But going to Justice Kagan's point in  
22 response to Justice Barrett, I mean, I -- I  
23 would take your point to be that there could be  
24 foreign policy implications either way and that  
25 to the extent that there are announcements that

1 the Constitution of the United States imposes no  
2 limit on Congress or the president with respect  
3 to their activities internationally or  
4 concerning international citizens, that -- that  
5 could -- you could conceive of a world in which  
6 that could be problematic?

7 MR. KNEEDLER: Yes, I -- I -- I can  
8 conceive of that world. And I -- and I think,  
9 again, before the Court -- I -- I doubt that the  
10 Court would want to announce that without the  
11 executive branch and Congress supporting it  
12 either in an act of Congress --

13 JUSTICE JACKSON: So that's one reason  
14 why the broader theory might be we -- we should  
15 be cautious in -- in going down that road.

16 I -- I wonder if another possible  
17 reason is that we, as far as I can tell, have  
18 never applied this sort of methodology to  
19 considerations of the Fifth Amendment, and there  
20 could be all kinds of unintended consequences to  
21 starting to do that, like how do we interpret  
22 the scope of the Due Process Clause, do we do it  
23 as an originalist kind of exercise, and we  
24 haven't done that in other areas.

25 And -- and the concern is that that

1 might open cans of worms that would imperil, for  
2 example, you know, what we said in *Bolling*  
3 versus *Sharpe*, the idea that the Fourteenth  
4 Amendment's Equal Protection Clause is  
5 reverse-incorporated through the Fifth  
6 Amendment's Due Process Clause.

7           We didn't reach that through an  
8 originalist methodology. And so, if we're  
9 starting down that road, it just seems like  
10 there's all kinds of problems that might arise  
11 that we should be worried about.

12           MR. KNEEDLER: Yeah, I -- I -- I can't  
13 say as I stand here that all those problems  
14 would be true, but I do think that there -- that  
15 there would benefit from an analysis by  
16 Congress --

17           JUSTICE JACKSON: We've had different  
18 methodologies, and we just have to be careful in  
19 where -- in thinking about how we go about  
20 interpreting the Constitution and the  
21 implications that might have on existing  
22 precedents in other areas that deal with these  
23 same constitutional provisions, correct?

24           MR. KNEEDLER: Right. Now, with  
25 specific reference to personal jurisdiction,

1 this issue should not come up unless Congress  
2 first passes a statute providing for personal  
3 jurisdiction, and then we would know what --  
4 what Congress found and what the rationales for  
5 it are.

6 JUSTICE JACKSON: Yes. And, in this  
7 case, we have the statute. And -- and -- and I  
8 appreciate your consent theory. I just -- I'm  
9 just trying to understand, though.

10 You say that consent -- you agree that  
11 consent has to be knowing and voluntary, and you  
12 said that both forms of the conduct in this  
13 statute are -- both forms of the conduct are  
14 knowing and voluntary.

15 But I thought the knowing and  
16 voluntary had to go to the assent to  
17 jurisdiction. I -- I -- it's not that they  
18 continue to do something that they've already  
19 done. It's that if they agree to do this, they  
20 are consenting to the jurisdiction --

21 MR. KNEEDLER: They -- they are deemed  
22 to consent.

23 JUSTICE JACKSON: No, I understand.  
24 But the question is how fair is the deeming --

25 MR. KNEEDLER: Yes. No, no. And

1 that --

2 JUSTICE JACKSON: -- in a situation  
3 like this.

4 MR. KNEEDLER: -- and that's where  
5 fairness, I think, comes in. It comes in maybe  
6 in a case like Mallory or a case here on --

7 JUSTICE JACKSON: Yeah.

8 MR. KNEEDLER: -- on consent. But --  
9 but, like in the Carnival Cruise Lines, the  
10 passengers probably did not -- did not  
11 consciously submit to the jurisdiction of the  
12 court that was designated in those contracts, so  
13 they don't -- there doesn't have to be a  
14 conscious awareness that the conduct --

15 JUSTICE JACKSON: All right. One  
16 final question.

17 MR. KNEEDLER: Yeah.

18 JUSTICE JACKSON: I'm sorry, I'm --  
19 I'm mindful of the time.

20 The Second Circuit in this case said,  
21 as Justice Sotomayor pointed out, that the  
22 statute does not suffice to establish personal  
23 jurisdiction because the Fourteenth Amendment  
24 standards apply in the Fifth Amendment context,  
25 and they read those as precluding personal

1 jurisdiction here.

2           Would it be enough for this Court at  
3 this time to just say, if we agreed to this,  
4 that the Fourteenth and Fifth are not equivalent  
5 with respect to what is required, the minimum  
6 context -- contacts test, and send it back for  
7 an assessment of what the Fifth Amendment  
8 requires as it relates to the facts of this  
9 case?

10           MR. KNEEDLER: I suppose it could do  
11 that, but I would urge the Court to actually  
12 decide the question. I mean, it was held  
13 unconstitutional. We think the -- the  
14 circumstances for this statute are compelling,  
15 that it would be useful for the Court to decide  
16 that and enable this at least in the Sokolow  
17 case, a long-pending case, to be resolved  
18 finally.

19           JUSTICE JACKSON: Thank you.

20           CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22           Mr. Berger.

23           ORAL ARGUMENT OF MITCHELL R. BERGER

24           ON BEHALF OF THE RESPONDENTS

25           MR. BERGER: Mr. Chief Justice, and



1 may it please the Court:

2           The PSJVTA purports to be a  
3 constructive consent statute, but it fails the  
4 due process test for constructive consent to  
5 jurisdiction established in Bauxites. Bauxites  
6 requires that the defendants' actions support a  
7 presumption of legal submission to the  
8 jurisdiction of the court.

9           But, as alleged here, the defendants'  
10 actions do not support a presumption of  
11 submission to the court's jurisdiction. Among  
12 other things, the D.C. Circuit and the Second  
13 Circuit previously held that the same types of  
14 PA and PLO conduct are constitutionally  
15 insufficient to support jurisdiction over them.  
16 Continuing to engage in jurisdictionally  
17 insufficient conduct is the exact opposite of  
18 submitting to the court's jurisdiction.

19           And there is no limiting principle if  
20 Congress can change that equation and say  
21 conclusively what conduct shows submission under  
22 the Bauxites due process standard. That would  
23 entirely collapse the distinction between  
24 prescriptive and adjudicative jurisdiction in  
25 all federal question cases.

1           Bauxites also holds that jurisdiction  
2 cannot be imposed as mere punishment, as it is  
3 here, when the alleged actions of the defendants  
4 do not support submission.

5           The PSJVTA also fails due process  
6 under Mallory. Mallory, of course, upheld a  
7 reciprocal exchange by which Pennsylvania  
8 permitted access to its markets in return for  
9 submission to the state court's jurisdiction.  
10 Applied here, the Mallory question is: Does the  
11 United States permit the PA or PLO to do  
12 anything on condition that they submit to  
13 federal court jurisdiction? And the answer is  
14 no three ways.

15           First, the PSJVTA itself doesn't  
16 permit any conduct at all.

17           Second, the statute gives no notice  
18 that its deemed consent condition attaches to  
19 any permission granted elsewhere.

20           And, third, the United States has  
21 never identified any permission granted  
22 elsewhere to which the deemed consent condition  
23 attaches.

24           And also, to address the questions of  
25 several of Your Honors, Mallory and Bauxites

1 tell us that federalism plays no role in consent  
2 jurisdiction. As a result, Bauxites and Mallory  
3 apply equally here under the Fifth and the  
4 Fourteenth Amendments and support the court of  
5 appeals' decision.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Mr. Berger, I know  
8 this is not the center of your argument, but  
9 could you just explain how PLO and PA are  
10 persons within the meaning of the Fifth and  
11 Fourteenth Amendment?

12 MR. BERGER: Yes. Absolutely, Justice  
13 Thomas. And I would respectfully draw the  
14 Court's attention back to the February 2018  
15 amicus brief filed by the United States in an  
16 earlier round of this case, in which the  
17 government's non-position was considerably more  
18 of a position and basically said there's only  
19 one type of person that this Court's precedent  
20 has recognized is excluded from the Due Process  
21 Clause and that's sovereigns. And, because the  
22 PA and the PLO are not recognized as sovereign  
23 by the United States, they are, by default,  
24 persons entitled to due process protection.  
25 That's at pages 8 to 12 of their CVSG brief.

1 JUSTICE THOMAS: So an actual state  
2 would not be covered by the Fifth and Fourteenth  
3 Amendment, but an organization that is  
4 substituting for that is protected by the Fifth  
5 and Fourteenth Amendment?

6 MR. BERGER: Well, I -- I think the  
7 line, as it's correctly been drawn at least in  
8 the lower courts, is that if it walks and talks  
9 like a government, it's not a sovereign state  
10 until the United States recognizes it as  
11 sovereign. And there are plenty of entities out  
12 there that exercise so-called governmental  
13 functions.

14 But, ultimately, it's binary, right?  
15 If -- if -- you're either a person for purposes  
16 of the Due Process Clause and entitled to due  
17 process protections, or you're a sovereign state  
18 and you're entitled to the protections of the  
19 Foreign Sovereign Immunities Act. But there's  
20 no no-man's-land where you're neither a  
21 sovereign state nor a person.

22 JUSTICE THOMAS: What if other  
23 countries recognize Petitioner -- Respondents as  
24 a state --

25 MR. BERGER: I think --

1 JUSTICE THOMAS: -- or a sovereign?

2 MR. BERGER: Excuse me. I think this  
3 Court's decision in Zivotofsky makes it very  
4 clear that there's only one vote that matters on  
5 this issue, and it's not the 140-odd other  
6 countries that recognize Palestine as sovereign.  
7 It's the vote of the president of the United  
8 States, who has exclusive authority to recognize  
9 a sovereign state.

10 JUSTICE SOTOMAYOR: Counselor, can I  
11 ask you to step away from the Fourteenth  
12 Amendment? Assume you're absolutely correct  
13 that this statute fails every test we have  
14 applied under the Fourteenth Amendment. I'll  
15 even grant you that because I think it does,  
16 okay?

17 But, assuming that, the argument here  
18 has not centered on that. It's centered on the  
19 Fifth Amendment. And so would you address why,  
20 if we find that the Fourteenth Amendment  
21 jurisprudence is not informative of or equal to  
22 the Fifth Amendment, why do you win?

23 MR. BERGER: Well --

24 JUSTICE SOTOMAYOR: Meaning there's  
25 been a variety of tests proposed. The other

1 side and the government seem to say the Fifth  
2 Amendment would look to whether there is a  
3 federal interest that -- and -- and jurisdiction  
4 reasonably relates to the protection of that  
5 interest. I think that's their -- their test.

6 How do you fit that?

7 MR. BERGER: Well, I would say this is  
8 a situation where we don't need ad hoc new  
9 standards that clearly at least some members of  
10 the Court are struggling with here today. We  
11 have a very old standard that I think makes  
12 sense for the Fifth Amendment.

13 JUSTICE SOTOMAYOR: Yeah, but their  
14 struggle is why don't we say there's no  
15 limitation. Their struggle doesn't appear to be  
16 with creating a limitation. Their struggle  
17 seems to be: Well, there's no historical basis  
18 for a limitation on Fifth Amendment federal  
19 jurisdiction.

20 I don't know why it has to be limited,  
21 their theory has to be limited, to the  
22 international or foreign affairs. Their theory  
23 would say, if there's no limit, it applies to  
24 U.S. citizens, as well as to foreign citizens.  
25 So we can step past that, okay?

1           MR. BERGER: Well, so I -- I guess I'd  
2 build a Fifth Amendment test this way. And I'll  
3 start with Your Honor's observation, I think, in  
4 your concurrence in Daimler that fundamentally,  
5 jurisdiction requires reciprocal fairness. And  
6 that's going to be true under the Fifth  
7 Amendment and the Fourteenth Amendment equally  
8 because both protect liberty interests. And, if  
9 it protects a liberty interest, there's no  
10 suggestion in any of the previous case law that  
11 a liberty interest is worth less under the Fifth  
12 Amendment than it is under the Fourteenth  
13 Amendment.

14           And if both protect a liberty  
15 interest, then it remains true, as the Court  
16 said in Murray's Lessee, that Congress cannot  
17 simply say what due process is. It's not up to  
18 Congress entirely. And I think that goes to the  
19 government's concession that the earlier cases,  
20 where Justice Story riding circuit or otherwise,  
21 they were opining on cases that weren't decided.  
22 Murray's Lessee is this Court's precedent that  
23 says the legislative will is not enough to  
24 define due process.

25           So what is the test? And I would say

1 the test is -- as developed by the court of  
2 appeals, is the correct one, which is that you  
3 adjust the forum for which a forum connection is  
4 required to be the United States as a whole  
5 because of the distinct federal interests rather  
6 than state interests, but you still apply a  
7 minimum contact test because of the reciprocal  
8 fairness that underlies the minimum contacts  
9 test.

10 JUSTICE KAGAN: Do you think that that  
11 reciprocal fairness applies as well when one's  
12 speaking of foreigners as -- as it does to a  
13 domestic context? I mean, even our view of  
14 fairness here, as in large sense being about  
15 reciprocity, I would think doesn't quite  
16 translate as well into the international context  
17 and which we're not used to thinking that way.

18 MR. BERGER: If anything, I would say  
19 respectfully, Justice Kagan, that the fairness  
20 component is probably exponential when it comes  
21 to dealing with foreigners because of the kinds  
22 of concerns that the government has articulated  
23 here, the kinds of concerns that were  
24 articulated in Daimler about overly grasping  
25 jurisdiction, that if we purport to have



1     exorbitant jurisdiction for foreigners but not  
2     for domestic citizens or residents, then you are  
3     really inviting an international comity problem.  
4     But there's no reason doctrinally to read into  
5     either the Fifth Amendment or the Fourteenth  
6     Amendment a different definition of person that  
7     would exclude foreigners.

8             A lot of the earlier case law,  
9     including those that Justice Gorsuch alluded to,  
10    are dealing with foreigners, and there's no  
11    assumption that, well, we're dealing with  
12    foreigners because they deserve less. If I may  
13    give one example that I think helps exemplify  
14    this and gets us back to any concern about  
15    original public meaning.

16            Nobody likes pirates, right? Pirates  
17    have been bad from the founding. Nobody ever  
18    thought that even though piracy is a crime  
19    against humanity or it's a crime that fits in  
20    the Define and Punish Clause, that, certainly,  
21    the United States can define piracy as an  
22    offense, but the United States does not try  
23    pirates in absentia because there's a delta  
24    between what Congress can prescribe as laws and  
25    what courts can do in adjudicating individual

1 claims against someone who violates a law with  
2 extraterritorial effect.

3 Justice Sotomayor in her commentary, I  
4 think, in RJR Nabisco notes that why are we  
5 dealing with a concern about the  
6 extraterritorial reach of a statute when there  
7 is separately a jurisdictional defense that  
8 would have to be considered? And there's always  
9 been an understanding from the founding that  
10 personal jurisdiction in the custody of the  
11 judicial branch is something over and above what  
12 Congress can prescribe.

13 JUSTICE GORSUCH: Certainly, that's  
14 true in -- in the piracy. You can't try them in  
15 absentia. You've got to get personal  
16 jurisdiction service process on them and -- and,  
17 therefore, have a court of competent  
18 jurisdiction. But the Court's never gone  
19 further in the Fifth Amendment context than that  
20 to start using principles of substantive due  
21 process -- there's that oxymoron again -- from  
22 the Lochner era no less to say that more is  
23 required beyond the original understanding. And  
24 it seems both sides would ask us to kind of play  
25 with that toy a bit and you -- you perhaps a

1 little more aggressively than your friends on  
2 the other side.

3 MR. BERGER: I think it's a toy that  
4 should be left in the box because there's no  
5 reason, to sort of paraphrase something that  
6 Your Honor said in Mallory, this is a case where  
7 you don't need a new rule. This is a case where  
8 a very old rule really applies.

9 And the old rule that applies, albeit  
10 at the court of appeals level but uniformly, is  
11 that the fairness that always underlay the Fifth  
12 Amendment and due process, even in Picquet and  
13 Toland and all these ancient cases, where they  
14 talk about principles of fundamental fairness --

15 JUSTICE GORSUCH: Ancient cases being  
16 our precedent.

17 MR. BERGER: Well, I'm not sure  
18 Toland -- I'm not sure that Picquet is.

19 JUSTICE GORSUCH: Some of them are.  
20 Some of them are lower court opinions, but  
21 they're -- they're -- they're precedents on the  
22 books --

23 MR. BERGER: Right.

24 JUSTICE GORSUCH: -- and perhaps  
25 worthy of respect as well as our newer stuff --

1 MR. BERGER: Not only do I respect --

2 JUSTICE GORSUCH: -- with the Lochner  
3 era no less.

4 MR. BERGER: I -- I -- I think I share  
5 that -- Your Honor's fondness for Murray's  
6 Lessee because you alluded to it in Jarkesy.  
7 And Murray's Lessee is a 19th Century precedent  
8 of this Court, not some Justice riding circuit  
9 opining in dictum what he thinks may be/might be  
10 the rule in some case where the question wasn't  
11 presented.

12 JUSTICE GORSUCH: Charming Betsy, you  
13 know, as well, right?

14 MR. BERGER: Right. But Murray's  
15 Lessee says as plain as you like that the  
16 legislative will alone cannot define what Fifth  
17 Amendment due process is.

18 JUSTICE GORSUCH: No one disputes  
19 that.

20 MR. BERGER: Right.

21 JUSTICE GORSUCH: But the question is,  
22 if you're going to start adding things onto it  
23 beyond what was originally understood and exists  
24 in our precedent for a long time, that's quite a  
25 toy.

1           That's -- and, as Justice Kavanaugh  
2           pointed out, you know, it's -- you're going to  
3           be second-guessing the Executive Branch and the  
4           Congress and the political judgments they've  
5           made about what does and doesn't interfere with  
6           international affairs.

7           MR. BERGER: I -- I -- I don't think  
8           that's true for at least two reasons if I may.  
9           And -- and one is that there's a huge open  
10          question in this case, right, about what  
11          activity, you're focusing only on the activity  
12          prong, as Your Honor had alluded in some earlier  
13          questions.

14          Then the question is not what does due  
15          process allow. You don't have to reach that  
16          question because, as the government conceded,  
17          the statute contains a large number of  
18          exclusions where, essentially, whatever  
19          sovereign power Congress had and the president  
20          signed off on, they've -- they've laid down  
21          arms. They said, okay, we're not going to count  
22          for jurisdiction U.N. activity, meetings with  
23          the U.S. Government, and ancillary activities.

24          Well, "ancillary" is a huge, undefined  
25          term, and we don't know what that means. And

1 the reason we know that it means that there's  
2 not at the moment unanimity between the  
3 legislature and the executive is the  
4 government's opening brief cites two Office of  
5 Legal Counsel opinions dealing precisely with  
6 the Palestinian government, one in 2018, one in  
7 '22. They are a rich font of guidance, I think,  
8 in this area of what is the interest of the  
9 United States.

10 JUSTICE BARRETT: Counsel, can I --  
11 can I interrupt and ask a question? So, even  
12 under the Fourteenth Amendment, we do look back  
13 at historical practice. And I'm thinking of tag  
14 jurisdiction, for example.

15 So, for purposes of the Fifth  
16 Amendment, would tag jurisdiction be okay in the  
17 context of a foreign defendant?

18 MR. BERGER: I -- I think that if tag  
19 jurisdiction is limited to individuals, as Your  
20 Honor pointed out in your opinion in Mallory, it  
21 wouldn't apply to entities like the PA and the  
22 PLO, but there's no reason if his -- if history  
23 tells us, right, and that's the whole purpose of  
24 Burnham, is that there's a historical tradition  
25 behind tag jurisdiction, then, for individuals,

1 there's really no reason to treat that  
2 differently under the --

3 JUSTICE BARRETT: Okay. So, if -- if  
4 history matters for things like tag jurisdiction  
5 even under the Fourteenth Amendment, could we  
6 say that under the Fifth Amendment, we similarly  
7 look at history and we see a tradition of  
8 treating foreign individuals, foreign  
9 defendants, differently from domestic or from --  
10 from American citizens?

11 MR. BERGER: I think, analytically,  
12 you could say that we could ask the question,  
13 but I don't think if that -- if your question  
14 implied that that's the answer that history  
15 gives, I don't believe --

16 JUSTICE BARRETT: I -- I -- I  
17 understand. I'm just asking if we could ask the  
18 question because you -- you agree that history  
19 informs the content of due process even in the  
20 Fourteenth Amendment context.

21 And so it might not be one to one,  
22 right, between the Fifth Amendment and the  
23 Fourteenth Amendment because history might bear  
24 differently on the United States than on any  
25 individual state.

1           MR. BERGER: Well, I -- I guess a  
2 couple of points on that if I may. One is I --  
3 I do think that history matters, if you're  
4 writing on a blank slate, that there's a reason  
5 why foreigners have not been treated differently  
6 under the Fourteenth Amendment.

7           And then just to bring in one concern  
8 Justice Jackson raised, as exemplified by Judge  
9 Ho's concurring opinion in the Douglass case.  
10 He said, if we're going to start treating the  
11 Fifth and Fourteenth Amendment differently, then  
12 we are going to have to throw out the window the  
13 doctrine of incorporation because are we now  
14 diluting all of the rights that apply to the  
15 states?

16           JUSTICE BARRETT: Well, I mean, I  
17 think that's stretching it a bit far. I don't  
18 think we're throwing incorporation out. I mean,  
19 I think you can still recognize that the Fifth  
20 Amendment incorporates fundamental fairness for  
21 a substantive due process right. And I think  
22 this can be about personal jurisdiction.

23           So I think that's kind of a -- a way  
24 of -- of trying to -- to -- well, I just don't  
25 think it's necessary to go that far. I think



1 they're distinct issues.

2 MR. BERGER: If -- if -- if the Court  
3 doesn't need to, doesn't want to, and for  
4 whatever reason doesn't go that far, I think  
5 that what the historical case law tells us,  
6 whether it is Justice Story riding circuit,  
7 whether it's the Court in Toland, whether it's  
8 The Charming Betsy, you name it, all of the  
9 frigate cases, almost all of which involve  
10 reaching out to either a ship of a foreign  
11 nation or a foreign merchant, that there is,  
12 indeed, equal solicitude for foreigners.

13 JUSTICE BARRETT: Okay. And so I'll  
14 just say one other thing about incorporation. I  
15 think one distinction between your situation and  
16 that -- and it was kind of what I was struggling  
17 with some of the questions I was asking your  
18 friends on the other side -- is that, you know,  
19 we have doctrine in the context of incorporation  
20 already. There's already precedent on point.  
21 And, as you point out, then we're not writing on  
22 a blank slate, you know.

23 So, in the Fourteenth Amendment  
24 context, whatever one thinks of International  
25 Shoe, we're not writing on a blank slate. We

1 have quite a long line of precedent after that.

2 We don't have squarely on point  
3 precedent in the Fifth Amendment context in  
4 personal jurisdiction as we do in substantive  
5 due process, and so that's why I think it --  
6 it's not -- that's why we're here. It -- it's  
7 still an open question.

8 MR. BERGER: And I do understand it's  
9 an open question. And -- and to the extent the  
10 Court is approaching it with a blank slate, I  
11 would say the factors that matter are not just  
12 what is the original meaning and what does  
13 history tell us. It's certainly important.  
14 But, if jurisdiction is supposed to mean  
15 anything, it is supposed to provide predictable,  
16 reliable rules known in advance.

17 And I believe it was Justice Thomas  
18 who alluded to the Chamber of Commerce amicus  
19 brief here, which, once it gets past the point  
20 of debating whether or not we're persons  
21 entitled to due process, lays out all the  
22 reliability concerns that says you're going to  
23 have to throw out four decades of Fourteenth  
24 Amendment due process jurisprudence as  
25 understood to apply in federal question cases if

1 you decide the Fifth Amendment provides  
2 differential protection from the Fourteenth.

3           And that is given that a core function  
4 of jurisdiction is to provide predictable rules  
5 in advance, exemplified here by the fact that  
6 the PA and the PLO genuinely don't know when you  
7 read the statute when you're under the  
8 activities prong, what is it that implicates the  
9 activities prong, it has to be predictable and  
10 reliable. So, if you do write on a blank slate,  
11 then you're going to already have opened a  
12 Pandora's box of the problem of people saying:  
13 All right, I've got to reorder all my affairs.

14           I would like if I have time -- and I  
15 don't see the red light is on -- to just address  
16 some of the other questions that I heard from  
17 the Court. I do believe Mr. Kneedler made an  
18 extremely important comment, and I -- to some  
19 extent, I believe the plaintiffs have conceded  
20 this as well, that there's a large open question  
21 if you focus exclusively on the activity prong  
22 of what is covered, what is the meaning of  
23 ancillary, what is the meaning of official U.N.  
24 business.

25           And, earlier, I alluded to but perhaps

1 didn't finish the thought about the Office of  
2 Legal Counsel opinions which say two important  
3 things. One, it offers a view from the  
4 executive's point of view in the context of the  
5 Palestinians as to what activity is allowed, and  
6 it basically said no matter what Congress says,  
7 we, the executive, believe the Palestinians are  
8 allowed to engage in incidents of diplomacy,  
9 like speaking to the Palestinian diaspora, like  
10 speaking to American citizens about Palestinian  
11 rights.

12           And the only reason that matters is if  
13 we're litigating on remand, should it come to  
14 that, what is the meaning of ancillary  
15 activities, the OLC opinions are directly  
16 germane.

17           Point two about the OLC opinions, it  
18 says, look, we, the executive -- and this really  
19 goes to the government's point -- have exclusive  
20 control of how this country interacts with the  
21 Palestinian government. To the extent any  
22 statute out there, whether it's the 1987  
23 Anti-Terrorism Act or anything else, says we  
24 can't do something or what they want us to do  
25 imposes a condition contrary to a condition we

1 would impose, we view that as unconstitutional.

2           So I would respectfully say that as  
3 far as the statute goes in its uninterpreted  
4 form, it reflects, Justice Kavanaugh, executive  
5 and legislative unanimity. But the minute you  
6 get down into the details of what's ancillary  
7 activity, does the executive branch take a  
8 contrary position on a case-by-case basis, that  
9 unanimity unravels.

10           I think perhaps it was Justice --

11           JUSTICE JACKSON: Can I just ask you  
12 about -- just taking you back to the potential  
13 equivalence or not of the Fourteenth and the  
14 Fifth Amendment. I guess I -- do -- do you  
15 concede that there are principles of interstate  
16 federalism and sovereignty that are at play in  
17 the Fourteenth Amendment context that are not  
18 apposite in the Fifth Amendment context?

19           MR. BERGER: The -- the answer is yes  
20 but only in the imposed jurisdiction context,  
21 not here in the consent jurisdiction context.  
22 The -- the plurality opinion authored by Justice  
23 Gorsuch and the concurring opinion authored by  
24 Justice Alito in Mallory, which counts to five,  
25 a number I've heard earlier today, said

1 federalism does not matter for consent  
2 jurisdiction.

3 So, yes, federalism matters for  
4 imposed jurisdiction but not for consent  
5 jurisdiction. And why? Footnote 10 in Bauxites  
6 gives you the answer. It says someone may  
7 subject himself to powers from which you would  
8 otherwise be free, which is why federalism  
9 doesn't care if you consent to jurisdiction.

10 JUSTICE JACKSON: So you would have us  
11 have a Fifth Amendment doctrine that is parallel  
12 to the Fourteenth Amendment in the consent realm  
13 with respect to consent? That's the only  
14 parallelism that you --

15 MR. BERGER: I -- I think they're  
16 identical, Justice Jackson, in the consent  
17 realm. I think that is what five members of the  
18 this Court said in Mallory, that -- that due  
19 process federalism concerns do not arise in  
20 consent jurisdiction, however the --

21 JUSTICE JACKSON: And so then you win  
22 why? If -- if -- if we agree with you on that,  
23 that consent is the same in the two areas, then  
24 you say, to the extent that this statute was one  
25 that imposed or deemed consent, then we're in

1 that realm and you win because?

2 MR. BERGER: Because of the test --  
3 and I don't think the Court needs a new test for  
4 consent jurisdiction, which is that Bauxites  
5 tells us the defendants' actions must support a  
6 presumption of legal submission to the  
7 jurisdiction of the court. And our argument  
8 below was neither prong of the PSJVTA as applied  
9 in this case reflects submission.

10 Payments made overseas, outside of the  
11 antecedent sovereign authority of the United  
12 States, right? The United States can't say to  
13 Palestine do or don't make that payment. That  
14 is not submission to a U.S. forum. And, indeed,  
15 that's what the court of appeals said.

16 And, as applied in this case, where  
17 our contention, unresolved in the courts of  
18 appeals has been, is that all of our conduct  
19 has -- is U.N.-related conduct and has  
20 previously been held to be insufficient to  
21 support jurisdiction. And the United States  
22 acquiesced in the Southern District of New York  
23 decision in the 1980s in U.S. versus PLO that  
24 U.N. activity can't support jurisdiction.

25 All of those mean that when we

1 continue to be engaged in U.N. and ancillary  
2 activities, we haven't submitted to  
3 jurisdiction. No new standard is required.  
4 And, for more than 40 years, the Bauxites  
5 submission standard, it hasn't turned the -- the  
6 lower courts upside down. The courts know how  
7 to apply it. It's a facts-and-circumstances  
8 test.

9           And the lower courts have been  
10 perfectly comfortable with Bauxites. And not  
11 only that, all four opinions of Mallory in this  
12 Court cited the Bauxites submission standard.  
13 It's good law. It remains good law. It shows  
14 why we win.

15           I will try to burn quickly through a  
16 couple of other points. I think Justice Gorsuch  
17 asked if we were operating an office  
18 extra-legally. I think Mr. Kneedler very  
19 helpfully gave the answer, which is there's no  
20 question of extra-legal. We could debate all  
21 day long whether what we're doing is legal or  
22 not, but the fact of the matter is the statute  
23 simply excludes it. So, from a constitutional  
24 avoidance basis, you don't need to reach the due  
25 process question. If the statute says this



1 conduct does not support jurisdiction, that's  
2 the end of the story.

3           The fact that the U.S. activities  
4 prong remains unadjudicated, as I think both  
5 sets of Petitioners' counsel acknowledge, you  
6 know, our position is that this was an  
7 as-applied case that looked at various activity,  
8 but, if there's an open question as to what the  
9 ancillary activities exclusion means, then  
10 that's a matter for remand because, as I've  
11 heard from time to time, this is a court of  
12 review and not first view, and so that's grist  
13 for the mill for the court of appeals.

14           I mentioned the OLC opinions. And I  
15 guess I would just close with this thought,  
16 which is, whether we're searching for historical  
17 meaning, whether we're searching for what did  
18 the 1st Congress think about jurisdiction, I  
19 would -- and I would respectfully say the one  
20 analogy that drives all the answers is pirates,  
21 right?

22           Piracy has been illegal from the  
23 founding. The alien tort statute incorporated  
24 it. Nobody from the founding has thought that  
25 Congress could say not only do we prohibit

1 piracy, but tell you what, since we've  
2 prohibited piracy and because prescriptive  
3 jurisdiction and adjudicative jurisdiction is  
4 the same, we don't need to go -- to bother --  
5 all that trouble of finding, extraditing, or  
6 renditioning the pirate. We'll just try him in  
7 absentia. That's never been the law and that's  
8 because due process requires something more than  
9 what Congress prescribes.

10 JUSTICE KAGAN: You -- you might  
11 think, though, that what that suggests is that  
12 there's an obligation to provide notice and an  
13 opportunity to be heard without going as far as  
14 requiring minimum contacts in the way we've done  
15 under the Fourteenth Amendment.

16 MR. BERGER: Yeah, and I -- I would --  
17 I would respectfully say that -- that it's not  
18 just an alien tort statute issue, but, in all of  
19 this Court's extraterritorial application  
20 issues, there's been an observation, including  
21 by Justice Sotomayor, that -- that we're dealing  
22 with a whole different problem, which is  
23 everybody obviously had notice in -- saw a case  
24 like RJR Nabisco about what the statute  
25 purported to do, but Justice Sotomayor's opinion

1 noted that, okay, but we still have a whole  
2 different kettle of fish to deal with in terms  
3 of personal jurisdiction.

4           So it's more than notice. And I think  
5 that's why, even if you want to give full  
6 significance to Picquet -- and then I promise  
7 I'll shut up and sit down -- what the Court said  
8 in Toland, what Justice Story said in Toland,  
9 take a look at page 613, it said we have to deal  
10 separately with notice and regular -- regular  
11 personal appearance in court. So even Justice  
12 Story thought there was something more than  
13 notice in the form of a summons.

14           And jurisdiction, he likewise referred  
15 separately to jurisdiction and process at page  
16 613. They are different things, and they have  
17 been different things from the founding.

18           JUSTICE ALITO: What exactly is the  
19 unfairness in -- in this case?

20           MR. BERGER: In --

21           JUSTICE ALITO: It's the -- it's too  
22 burdensome to litigate this in New York, where  
23 the PA and the PLO conduct some activities?

24           MR. BERGER: Well, so I --

25           JUSTICE ALITO: What's the unfairness?

1                   MR. BERGER: The unfairness, as we  
2                   said -- I think you'll see it at pages either 56  
3                   or 57 to 58 of our Second Circuit brief in  
4                   full -- is the notion that we can be divested of  
5                   a liberty interest for -- and selectively at  
6                   that, for being divested of a liberty interest  
7                   for engaging in activity previously held  
8                   constitutionally insufficient to support  
9                   jurisdiction.

10                   And a second point if I may, which is,  
11                   if you look at Fourteenth --

12                   JUSTICE ALITO: That doesn't sound  
13                   like a personal jurisdiction argument. But  
14                   anyway, go ahead.

15                   MR. BERGER: So -- but, when you look  
16                   at all the traditional Fourteenth Amendment  
17                   jurisprudence of this Court, it's got two  
18                   prongs, right? It has minimum contacts and then  
19                   it has reasonableness. And so, when we get the  
20                   commentary like in the dissent at the -- from  
21                   rehearing en banc, that it's not inconvenient  
22                   for us to go from the PLO's U.N. mission in the  
23                   East 60s to the Southern District of New York,  
24                   that misses the point. That deals with the  
25                   reasonableness prong. But that's prong two.

1           Prong one is, is there reciprocal  
2 fairness sufficient to support jurisdiction in  
3 the form of minimum contacts? That's the  
4 unfairness, which is -- you ever been on a train  
5 where it's sitting still and another train's  
6 moving and you have the impression you're moving  
7 backwards? That's what Congress keeps doing  
8 with these statutes, which is we're doing the  
9 same thing, and Congress keeps moving the  
10 context around us, and that's what makes this  
11 statute as applied unconstitutional.

12           And so we'd respectfully ask that this  
13 Court affirm the judgment of the court.

14           JUSTICE ALITO: Before -- before you  
15 sit down, do you think any degree of deference  
16 is owed to Congress and the president in this?

17           MR. BERGER: No more deference than in  
18 the context of Holder, where the Court said,  
19 sure, we understand their policy judgment, but  
20 that does not require us to abdicate the  
21 judicial role when it comes to constitutionally  
22 protected rights. And that is certainly a, you  
23 know, a protected right committed to the  
24 judicial branch, is jurisdiction.

25           JUSTICE ALITO: Well, the question

1 wasn't whether there should be judicial  
2 abdication but whether there should be any  
3 degree of deference. So is there any degree of  
4 deference owed or none?

5 MR. BERGER: I would say, in the  
6 context of jurisdictional due process, the  
7 answer is none. In the context of another  
8 statute that four -- hits four square on these  
9 same issues, like the Taylor Force Act, which  
10 says, if the Palestinian government continues to  
11 make these payments, we will withhold foreign  
12 aid, of course, deference is owed in that  
13 context.

14 But, when it comes to a  
15 constitutionally protected right, like  
16 jurisdictional due process, no, you don't defer  
17 away the protection for that right.

18 JUSTICE ALITO: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you.

20 Justice Thomas, anything further?

21 Justice Alito?

22 Justice Sotomayor?

23 Justice Kagan?

24 Justice Gorsuch, anything further?

25 Justice Kavanaugh?

1 Justice Barrett?

2 Justice Jackson?

3 Now you may sit down. Thank you.

4 MR. BERGER: Thank you, Mr. Chief  
5 Justice.

6 CHIEF JUSTICE ROBERTS: Rebuttal,  
7 Mr. Kneedler?

8 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER  
9 ON BEHALF OF THE PETITIONER IN CASE 24-151

10 MR. KNEEDLER: Several points,  
11 Mr. Chief Justice.

12 First of all, with respect to  
13 reciprocal fairness, which I -- which I think  
14 counsel's deriving from the minimum contacts, if  
15 there are minimum contacts then you're subject  
16 to jurisdiction, but under the Fifth Amendment,  
17 minimum contacts is not the test. Perhaps some  
18 nexus is, but -- and that's because the United  
19 States, in the exercise of its powers, is not  
20 limited to the territorial jurisdiction of the  
21 United States.

22 It could criminalize the making of  
23 these payments, as I had understood Respondents  
24 to say at page 30 of their brief. If -- if it  
25 could criminalize them, it seems clear that it

1 should be able to count them as a basis for U.S.  
2 jurisdiction.

3           But, again, with respect to reciprocal  
4 fairness, it's important to bear in mind that  
5 the payments being made here are payments to  
6 persons who have killed or injured Americans in  
7 acts of terrorism abroad. And -- and I think,  
8 when one is -- is weighing reciprocal fairness,  
9 that basis for jurisdiction hardly seems unfair,  
10 particularly since it direct -- is a direct  
11 corollary to the lawsuits to which personal  
12 jurisdiction attaches, with -- which is lawsuits  
13 under the ATA, which is designed to protect  
14 Americans from -- from terrorism abroad. So, if  
15 we're talking about reciprocal fairness, I think  
16 this case clearly satisfies it.

17           Now, also, the reciprocal fairness  
18 seems to be tied to some sense -- sense of an  
19 exchange or a -- a balance on either side. We  
20 don't think that that really comes from Mallory,  
21 but, certainly, in the context of the PA and the  
22 PLO, it doesn't make sense because we're talking  
23 about a 40-year relationship between the two in  
24 which fighting terrorism has always been a core  
25 part.



1           And to try to find whether there's a  
2 bargain or an exchange at one point in time  
3 along that continuum of four decades of the  
4 relationship just doesn't make sense because  
5 Congress's statutes -- and, again, this is its  
6 third try to make sure that these lawsuits can  
7 be brought -- it's a continuation of a policy  
8 over that period of time, and the Court should  
9 not focus only on the particular statute in --  
10 in isolation.

11           But coming back to what is at the core  
12 of this case and, actually, the Court wouldn't  
13 have to decide more, and that is that -- that  
14 under the Fifth Amendment, Congress and the  
15 president made a judgment that is entitled to  
16 virtually absolute deference that it is  
17 appropriate to subject the PA and the PLO to  
18 jurisdiction in this case.

19           Respondents had a chance to avoid that  
20 by just stopping those activities, but they  
21 didn't. So whether one thinks of that as  
22 consent or just an element of -- of fairness or  
23 overall suitability, that should count for a  
24 lot. The Court should sustain the act of  
25 Congress.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 The case is submitted.

4 (Whereupon, at 11:58 a.m., the case  
5 was submitted.)

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## Official - Subject to Final Review

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