

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

MIRIAM FULD, ET AL.,)
)
 Petitioners,)
)
 v.) No. 24-20
)
 PALESTINE LIBERATION ORGANIZATION,)
)
 ET AL.,)
)
 Respondents.)
)

UNITED STATES,)
)
 Petitioner,)
)
 v.) No. 24-151
)
 PALESTINE LIBERATION ORGANIZATION,)
)
 ET AL.,)
)
 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:

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, 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.

The government could, for example,

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

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

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

18 I welcome the Court's questions.

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

22 MR. YALOWITZ: So --

23 JUSTICE THOMAS: -- for personal
24 jurisdiction?

25 MR. YALOWITZ: So, first of all, the

1 Fifth Amendment requires fair notice and
2 opportunity to be heard, which the defendants
3 had.

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

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

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

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

25 MR. YALOWITZ: So -- so we don't think

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

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

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

22 MR. YALOWITZ: Certainly, if Congress
23 has not spoken, that would still be the rule
24 under our proposed test. So, for example, in
25 the Daimler case, there was no statute providing

1 for federal jurisdiction. Minimum contacts
2 would apply because the plaintiffs would have to
3 travel under the Fourteenth Amendment and the --
4 and the alien tort statute.

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

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

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

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

1 Bennett against United States, Burnet against
2 Brooks, Cook against 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, I -- if I'm
8 -- can I unpackage your argument? You're
9 basically saying there is no due process
10 protection whatsoever under the Fifth Amendment,
11 even for U.S. citizens, because I don't know why
12 it makes a difference that this is a foreigner
13 or a U.S. 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 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 -- I -- we're not
22 advocating a rule that would eliminate a
23 reasonableness --

24 JUSTICE SOTOMAYOR: Some sort of
25 fairness requirement?

1 MR. YALOWITZ: -- or fairness --
2 right.

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

5 MR. YALOWITZ: Correct.

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

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

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

23 JUSTICE JACKSON: Right.

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

1 65th Street down to --

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

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

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

25 MR. YALOWITZ: Sure. So we would say

1 that the statute has to provide fair warning and
2 that it has to reasonably advance a legitimate
3 government interest in the context of our
4 federal system.

5 JUSTICE GORSUCH: What is that --

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

9 MR. YALOWITZ: Well, I think that my
10 Paris, Texas, example --

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

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

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

25 MR. YALOWITZ: Hmm. Well, it would

1 be -- that -- that would be a more difficult
2 case than ours because it's hard to see what the
3 federal reference is.

4 JUSTICE ALITO: No, I understand it's
5 more difficult than yours.

6 MR. YALOWITZ: Right.

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

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

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

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

24 JUSTICE GORSUCH: Mr. Yalowitz, I'm --
25 I'm struggling to see any of this in your brief.

1 I -- I had understood your argument in your
2 brief to say that under the Fifth Amendment, due
3 process just requires service, a judge, and --
4 and an opportunity to be heard.

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

11 MR. YALOWITZ: So -- you --

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

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

23 JUSTICE GORSUCH: Yeah. You say
24 substantive due process precedents require no
25 more than what I've just described. That's --

1 that's page 22 of your brief.

2 MR. YALOWITZ: Right. Right. So
3 it --

4 JUSTICE GORSUCH: Now I'm hearing
5 slightly different version of your argument.

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

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

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

20 We think that -- we think that --

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

1 MR. YALOWITZ: I don't disagree with
2 that. I -- I understand -- I understand the
3 point you're making and I don't disagree with
4 it.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas, anything further?

8 Justice Alito?

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

14 MR. YALOWITZ: I -- I -- that is --
15 that is the Court's jurisprudence to date,
16 correct.

17 JUSTICE SOTOMAYOR: So all of our
18 cases have spoken about some form -- some
19 version of fairness?

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

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

1 MR. YALOWITZ: No, but I would
2 think --

3 JUSTICE SOTOMAYOR: -- but Justice
4 Gorsuch was limiting -- saying that there is
5 no -- that there is no substantive due process
6 component to due process.

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

14 JUSTICE SOTOMAYOR: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

20 MR. YALOWITZ: Non-arbitrary.

21 JUSTICE KAGAN: Would that -- is that
22 different from a fundamental fairness test?

23 MR. YALOWITZ: I -- I -- I -- I
24 understand it better. I -- I find fundamental
25 fairness to be squishier.

1 JUSTICE KAGAN: Squishier?

2 MR. YALOWITZ: But -- yeah.

3 JUSTICE KAGAN: But we -- we -- we
4 have used that squishy concept when it comes to
5 the Fourteenth Amendment. Yes?

6 MR. YALOWITZ: Indeed.

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

12 So why wouldn't we say the same thing
13 here?

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

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

1 JUSTICE KAGAN: Okay. I mean, I guess
2 I am a little bit -- maybe I'm just not
3 understanding the test, but I do -- do want to
4 understand it, so let me press you a little bit
5 more.

6 MR. YALOWITZ: Sure.

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

12 MR. YALOWITZ: No, that's -- that's
13 not what we're saying. I -- well, let me back
14 off of that a little bit.

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

20 And, here, that test is certainly met.
21 These defendants directed their activity at U.S.
22 citizens who are within the protection of the
23 United States.

24 JUSTICE KAGAN: I don't think that
25 that would be usually the way that we would

1 explain what minimum contacts was looking for.
2 We would usually talk in terms of, like,
3 something like purposeful availment of the
4 sovereign. So, here, that would be the entire
5 United States, something like that.

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

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

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

25 JUSTICE KAGAN: Well, which is like if

1 you direct yourself to individuals with --
2 direct yourself to the sovereign entity, to
3 individuals within the protection of the
4 sovereign entity.

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

11 It's different for federal -- for U.S.
12 citizens. Wherever in the world you travel, the
13 protection of the United States travels with
14 you. And so the sovereign interests are
15 different.

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

23 Sovereignty of the United States is
24 much broader than the sovereignty of the State
25 of Nevada.

1 JUSTICE KAGAN: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch?

4 JUSTICE GORSUCH: So, if I've got it
5 right, you want us to adopt the fundamental
6 fairness language from our Fourteenth Amendment
7 jurisprudence but give it different content in
8 the Fifth Amendment. Is that fair?

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

11 JUSTICE GORSUCH: No. But, to get
12 your five votes, that's -- you're willing to do
13 that?

14 MR. YALOWITZ: I would be willing --

15 JUSTICE GORSUCH: Yeah.

16 MR. YALOWITZ: -- to do that.

17 JUSTICE GORSUCH: Okay. And if we did
18 that --

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

20 JUSTICE GORSUCH: Yeah. No, I --

21 (Laughter.)

22 JUSTICE GORSUCH: -- I appreciate
23 that. I'm -- I'm just trying to understand
24 where the ball has bounced because it's bounced
25 considerably from your brief.

1 And -- and this fundamental fairness
2 test, do you have any historical pedigree for it
3 and -- because it's not what we do in the
4 Fourteenth Amendment. You've conceded that. So
5 where did it come from --

6 MR. YALOWITZ: So --

7 JUSTICE GORSUCH: -- if I'm not just
8 making it up?

9 MR. YALOWITZ: -- the -- the -- the
10 fundamental fairness test comes from
11 International Shoe.

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

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

24 MR. YALOWITZ: I -- I -- I think that
25 if you adopt a -- a substantive due process

1 overlay, then that's where the law takes you.
2 That's where the Court's precedents take you.
3 If --

4 JUSTICE GORSUCH: Do you have any
5 basis in history for that?

6 MR. YALOWITZ: No. I think that if
7 you go back to what -- what the founders were
8 doing, what this Court was doing in the early
9 years, you don't have any --

10 JUSTICE GORSUCH: I mean, back then,
11 it was, yes, there's international law of
12 nations.

13 MR. YALOWITZ: Correct.

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

16 MR. YALOWITZ: Correct. Very clearly,
17 there was -- the -- there were jurisdictional
18 limitations that the courts applied. They came
19 from the general law of nations. They did not
20 come from the Constitution.

21 JUSTICE GORSUCH: But, you know,
22 Justice Story said, if Congress says otherwise,
23 we have to follow that.

24 MR. YALOWITZ: Correct.

25 JUSTICE GORSUCH: And then it becomes

1 a political question between international
2 sovereigns.

3 MR. YALOWITZ: And not just Justice
4 Story. That's -- that is -- that --

5 JUSTICE GORSUCH: Oh, sure.

6 MR. YALOWITZ: I mean, I -- that's
7 all --

8 JUSTICE GORSUCH: He famously said it.

9 MR. YALOWITZ: Right. It's all over
10 the cases.

11 JUSTICE GORSUCH: Yeah. Okay.

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

17 MR. YALOWITZ: Right.

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

20 MR. YALOWITZ: Right.

21 JUSTICE GORSUCH: (B) had to do with
22 maintaining an office here. I -- I -- I get the
23 analogy that (B) is sort of like, a little bit
24 like, what we would do in the Fourteenth
25 Amendment context. You -- you maintain an

1 office in a particular jurisdiction. You're
2 kind of opening yourself up to all manner of
3 suits. But (A) is purely extraterritorial
4 behavior.

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

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

10 JUSTICE GORSUCH: So --

11 MR. YALOWITZ: But Congress gave us
12 both.

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

21 Is that enough for you? Is that
22 enough of a victory for you to pursue this suit?

23 MR. YALOWITZ: We -- that would be a
24 suboptimal solution --

25 JUSTICE GORSUCH: Why?

1 MR. YALOWITZ: -- for us because -- in
2 candor, because the defendants have contested
3 whether they have come within (B). They don't
4 contest that they've come within (A).

5 JUSTICE GORSUCH: Yeah.

6 MR. YALOWITZ: And the -- the case is
7 old enough to go to law school.

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

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

20 MR. YALOWITZ: If -- if the Court were
21 to apply the statute --

22 JUSTICE GORSUCH: Yes.

23 MR. YALOWITZ: -- and say the --
24 the -- the record is sufficient, if -- if this
25 Court were to say the record is sufficient to

1 conclude that the activities set out in the
2 record are within the text of the statute, which
3 is unambiguous, then that's enough for us.

4 JUSTICE GORSUCH: And so there would
5 be no need to opine on what -- what limits
6 are -- may or may not exist under the Fifth
7 Amendment. We could simply say under our
8 Fourteenth Amendment jurisprudence analogy it
9 would -- it -- it's enough?

10 MR. YALOWITZ: Correct.

11 JUSTICE GORSUCH: And that would
12 satisfy you?

13 MR. YALOWITZ: I -- I -- if -- if the
14 Court -- I -- I want to be very clear.

15 JUSTICE GORSUCH: If we applied (B).

16 MR. YALOWITZ: Right. I want to be
17 very clear because --

18 JUSTICE GORSUCH: I want to be clear
19 too.

20 MR. YALOWITZ: Yeah. We've -- we've
21 had -- we've had a very long journey.

22 JUSTICE GORSUCH: I do appreciate
23 that.

24 MR. YALOWITZ: And -- and -- and --
25 and a -- a -- a remand back to the panel for

1 further application of the injunction --

2 JUSTICE GORSUCH: That's not what
3 I'm --

4 MR. YALOWITZ: Right.

5 JUSTICE GORSUCH: That's not what I'm
6 asking about.

7 MR. YALOWITZ: -- would not be good
8 for us.

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

11 MR. YALOWITZ: The -- the -- the
12 Congress has made it an either/or.

13 JUSTICE GORSUCH: Yeah.

14 MR. YALOWITZ: Right.

15 JUSTICE GORSUCH: Okay. Thank you.

16 MR. YALOWITZ: All right.

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh?

19 JUSTICE KAVANAUGH: I understood your
20 argument in the brief to be arguing in the
21 alternative --

22 MR. YALOWITZ: That's correct.

23 JUSTICE KAVANAUGH: -- and to have
24 a -- what I would say, a broader argument
25 that -- that Congress -- there are no limits on

1 Congress, constitutional limits, other than
2 service of process, et cetera, but there's no
3 extra personal jurisdictional limits on Congress
4 and then that you are arguing, even if that were
5 rejected or even if that's not correct, we have
6 a second argument that even under the Fourteenth
7 Amendment precedents, you still win.

8 MR. YALOWITZ: That's correct.

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

11 MR. YALOWITZ: Absolutely not.

12 JUSTICE KAVANAUGH: Okay. Just making
13 sure.

14 Okay. And then what role does
15 international law play? Any? Congress can
16 override that, I --

17 MR. YALOWITZ: Right.

18 JUSTICE KAVANAUGH: -- assume to be
19 your position, but I just want to make sure I
20 have that nailed down.

21 MR. YALOWITZ: Right. So -- so, if
22 Congress hasn't spoken or hasn't spoken clearly,
23 then international law, would there be a
24 presumption of compliance with international
25 law? In -- in this case, there's no conflict

1 between what Congress has done and international
2 law. But Congress is free to override
3 international law.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: So I want to
8 describe one way to understand your argument,
9 and I'd like you to tell me if -- if this is one
10 way to understand your argument.

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

18 Then we have a distinct line of cases
19 that pick up with International Shoe that
20 interpret the Fourteenth Amendment differently.
21 So we have competing lines of precedent.

22 Is one way to understand your
23 argument, like, let them just -- keep going
24 separately and parallel, maybe International
25 Shoe is wrong, maybe the Fourteenth Amendment

1 precedent is wrong, but don't disturb it, just
2 stay the course with the Fifth Amendment
3 precedent, and, if they're in tension, so be it?

4 MR. YALOWITZ: Right. This is not the
5 case to resolve how the Court should deal with
6 Fourteenth Amendment cases.

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

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

21 MR. YALOWITZ: Hmm. That's an
22 interesting question. So I -- I think that -- I
23 -- I think it wouldn't be overruling those cases
24 to say that the -- the sovereign power of the
25 government is sufficient to protect Americans

1 abroad. And the reason I think that is --

2 JUSTICE BARRETT: Well, that's not
3 quite the question.

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

14 Is that correct?

15 MR. YALOWITZ: Correct.

16 JUSTICE BARRETT: Okay. So, if that
17 is your argument, you are arguing for the Fifth
18 Amendment to be interpreted differently from the
19 Fourteenth, correct?

20 MR. YALOWITZ: Correct.

21 JUSTICE BARRETT: If we say, no, no,
22 no, no, no, the Fourteenth Amendment analysis,
23 not the interstate federalism prong but the
24 minimum contacts prong, the fairness prong,
25 applies in the Fifth Amendment context, is it

1 your view that we would be overruling cases from
2 the 19th Century in, say, the Justice Story line
3 or at least rendering a decision that would be
4 in some tension with those cases which took a
5 different view of the Fifth Amendment?

6 MR. YALOWITZ: I think that -- I think
7 that a decision to that effect would be in
8 tension with those cases, yes.

9 The -- the -- at the time that -- at
10 the time that the Due Process Clause was
11 ratified, there was no excerpt --

12 JUSTICE BARRETT: Which Due Process
13 Clause? The Fifth Amendment?

14 MR. YALOWITZ: The 1791.

15 JUSTICE BARRETT: Okay.

16 MR. YALOWITZ: The -- the one we're
17 here about.

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

25 JUSTICE BARRETT: So was Pennoyer

1 wrong to house a territorial understanding of --
2 you know, of personal jurisdiction within the
3 Due Process Clause of the Fourteenth Amendment?

4 MR. YALOWITZ: I -- I don't -- I -- I
5 think that what Pennoyer -- the way I read
6 Pennoyer and the way Professor Sachs reads
7 Pennoyer is that Pennoyer was -- was
8 constitutionalizing kind of a narrower view of
9 due process, which is there has to be a judge
10 with -- with jurisdiction, there has to be
11 opportunity to be heard, the Murray's Lessee
12 view of -- of due process.

13 I -- I think the territorial
14 restriction, the idea that there was a
15 territorial horizontal federalism basis, I think
16 that came into the Court's jurisprudence in the
17 Lochner era.

18 JUSTICE BARRETT: Do you agree with
19 Professor Sachs's amicus brief?

20 MR. YALOWITZ: Oh, yeah.

21 JUSTICE BARRETT: Okay. Thank you
22 very much.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: Yeah, I just want to

1 know: Is that amicus brief and Professor
2 Sachs's opinion the basis for your certainty
3 about what happened at the founding? I mean, is
4 there other evidence?

5 MR. YALOWITZ: It -- it's confirmatory
6 of our views. Judge Sofaer also put in an
7 amicus brief that talked about Founding Era
8 evidence.

9 JUSTICE JACKSON: But -- but did
10 you -- did -- did you go to the original sources
11 or are you relying on them for your view as to
12 what the ratification state of affairs was?

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

15 JUSTICE JACKSON: And did you -- you
16 found no evidence? How -- how many sources?
17 What -- what is the scope here of our
18 understanding of what actually happened then?

19 MR. YALOWITZ: I -- I -- I think --
20 I -- I -- it's -- it's very clear that at the
21 convention and at the rat -- the Philadelphia
22 Convention and at the ratifying conventions,
23 the -- the members of the convention and the --
24 the founders urging ratification viewed the
25 power of the judiciary and the power of the

1 legislature to be coextensive.

2 That's in the ratifying conventions.

3 That's in Hamilton's Federalist Number 80.

4 The -- the -- it's also clear from --
5 this is secondary sources, but they're cited in
6 my brief, Bourguignon, for example, and Deirdre
7 Mask's article -- that -- that the founders
8 litigated those cases, those extraterritorial
9 cases.

10 And then the only question is: Well,
11 did the Fifth Amendment change that? Did the
12 Due Process Clause erase that baseline
13 understanding?

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

22 JUSTICE JACKSON: But you concede, as
23 Justice Barrett pointed out, that we do have a
24 Fourteenth Amendment due process set of cases
25 and interpretations that have a different view

1 about the extent to which there are limitations
2 that relate to contacts?

3 MR. YALOWITZ: Right. So two -- I
4 agree with that, and I -- I -- I would say two
5 things about it.

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

12 JUSTICE JACKSON: How -- how do you
13 explain Insurance Corporation of Ireland then?

14 MR. YALOWITZ: Insurance Corporation
15 of Ireland --

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

21 MR. YALOWITZ: Right.

22 JUSTICE JACKSON: -- waive this if it
23 was all about territorial sovereignty.

24 MR. YALOWITZ: Right. And, as -- as
25 Your Honor pointed out in -- in Mallory, it's

1 a -- it's a -- it's a waivable right. There is
2 a right and it's waivable. Of course.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER

8 ON BEHALF OF THE PETITIONER IN CASE 24-151

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

11 The act of Congress at issue here is
12 an integral component of the foreign policy and
13 national security policy of the political
14 branches, including the securing of compensation
15 for victims of terrorism.

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

23 Both of those forms of conduct that
24 are jurisdiction-triggering are knowing and
25 voluntary. They have a clear nexus to United

1 States territory and to United States nationals
2 and to the compelling U.S. interests in
3 deterring terrorism.

4 And the sculp -- the scope -- excuse
5 me -- of the resulting submission to United
6 States jurisdiction is very limited. It is not
7 a general jurisdiction. It is narrowly limited
8 to terrorism cases.

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

18 Congress's judgment on these issues,
19 as in all issues of national security and
20 foreign policy, are entitled to great deference.

21 The Act providing for jurisdiction
22 here is eminently fair and does not deprive
23 Respondents of due process. This Court should
24 sustain the statute.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: Mr. Kneedler, just to
2 take a step back, do the PLO and the Palestinian
3 Authority have constitutional rights?

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

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

1 taken consistent efforts -- efforts to dissuade
2 the PLO and the PA from supporting terrorism.

3 JUSTICE THOMAS: Didn't the Justice
4 Department take a different position in the
5 1980s, that the PLO did not have constitutional
6 rights?

7 MR. KNEEDLER: Well, you say a
8 different position. We're not taking a position
9 here. But, in those -- those cases were --

10 JUSTICE THOMAS: Well, it's different
11 from the non-position.

12 (Laughter.)

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

22 And we think, in those situations, the
23 United States surely has the authority to expel
24 the PLO, to close an information office, to
25 close any office for that matter, and to limit

1 what they may engage in in the United States.

2 I think that the due process question
3 of being deemed to be -- have submitted to the
4 courts of the United States may present a
5 different question.

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

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

23 In that circumstance, we have proposed
24 a test that depends on whether the conduct that
25 is jurisdiction-triggering is knowing and

1 voluntary and whether the resulting submission
2 to jurisdiction is fair and not exorbitant.
3 The -- the dissenting opinion from rehearing en
4 banc in the court of appeals also said that
5 there should be a nexus between the United
6 States and -- and the -- and the conduct
7 involved.

8 I think the nexus -- I'm sorry. But,
9 if -- if you're -- if you're not relying on
10 consent, then you have perhaps a different
11 analysis.

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

17 I mean, it -- it -- could you be a
18 little more precise about what exactly we should
19 be looking for or --

20 MR. KNEEDLER: Well, the -- the --
21 what I was describing is linked to the question
22 of consent, and we were building on the consent
23 theory that came from this Court's decision in
24 Mallory and other cases under the Fourteenth
25 Amendment, where the conduct has to be voluntary

1 and -- and I -- I think some element of -- of
2 fairness or nexus to the -- to the jurisdiction.

3 So, in that part of what I was saying,
4 in that part of our argument, we were saying
5 that the circumstances here can be analyzed
6 under the Fourteenth Amendment standards. It's
7 obviously not the Fourteenth Amendment itself,
8 and the United States is different from states.

9 But, with respect to consent, the
10 factors that I have identified -- and this
11 statute is written in terms of consent -- are --
12 would be relevant to consent.

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

18 JUSTICE GORSUCH: Well --

19 MR. KNEEDLER: -- though, in response
20 to just --

21 JUSTICE GORSUCH: -- Mr. Kneedler --

22 MR. KNEEDLER: I'm sorry.

23 JUSTICE GORSUCH: -- are you asking us
24 to apply the Fourteenth Amendment standards, or
25 are you saying the Fifth Amendment is different?

1 MR. KNEEDLER: I -- we do believe the
2 Fifth Amendment is different, but even if in
3 this --

4 JUSTICE GORSUCH: And -- and the Fifth
5 Amendment, as Justice Barrett was pointing out,
6 was historically understood to assume the law of
7 nations, general law applies, but Congress
8 can -- can reject that.

9 MR. KNEEDLER: Yes.

10 JUSTICE GORSUCH: And when it does,
11 this Court has to follow it. That -- that
12 was -- that was the historical rule in the Fifth
13 Amendment as I understand it, unless I'm
14 mistaken.

15 MR. KNEEDLER: Well, that was the
16 understanding certainly.

17 JUSTICE GORSUCH: Oh -- okay.

18 MR. KNEEDLER: Justice Story expressed
19 that. I don't think any of those cases were
20 actual --

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

23 MR. KNEEDLER: Right. With -- with
24 respect to sovereign immunity or other aspects
25 of -- of jurisdiction, yes. But the -- the --

1 those cases -- those decisions, particularly the
2 Justice Story ones, were not presented with a
3 case in which Congress actually had disagreed
4 with -- with international law.

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

6 MR. KNEEDLER: And we think that
7 that --

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

15 And if all that's true, then -- then
16 how do we have this fundamental fairness overlay
17 that you're now discussing in your brief in the
18 Fifth Amendment context?

19 MR. KNEEDLER: Well, again, I was --
20 those -- that -- the articulation of that test
21 was looking at it under -- under the rubric of
22 consent, which --

23 JUSTICE GORSUCH: Under the Fourteenth
24 Amendment rubric? I -- I just want to be clear.
25 We're talking about --

1 MR. KNEEDLER: Yes. But -- but --
2 but --

3 JUSTICE GORSUCH: Okay. I'm talking
4 about the Fifth Amendment.

5 MR. KNEEDLER: No, I understand that.
6 All I meant is that if -- because the statute is
7 written in terms of consent, if the Court chose
8 to analyze it under consent --

9 JUSTICE GORSUCH: I'm -- I'm -- and
10 I'm asking you to put aside the Fourteenth
11 Amendment concepts for now.

12 MR. KNEEDLER: Okay.

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

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

20 JUSTICE GORSUCH: Yes. And -- and
21 that's what -- that's the tension I see in your
22 argument. On the one hand, you say,
23 historically, the Fifth Amendment was understood
24 to mean we respect what Congress does in this
25 area. And you -- you started off -- your

1 introduction was all about how we owe deference
2 to the political branches in this area.

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

6 MR. KNEEDLER: Well, I --

7 JUSTICE GORSUCH: -- and defease
8 international law.

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

16 Well, I think it would be prudent for
17 the Court to look at the particular act of
18 Congress involved, what the rationale for that
19 statute was, and see whether it -- whether it
20 would comport with due process.

21 JUSTICE GORSUCH: My -- my -- my --

22 JUSTICE KAGAN: Mr. --

23 JUSTICE GORSUCH: -- last question.

24 I'm sorry. I'm almost done.

25 If we were just to analyze this under

1 the Fourteenth Amendment precedents, same
2 question I asked your -- your friend earlier.
3 (B) I kind of understand. You have an office,
4 okay?

5 MR. KNEEDLER: Right.

6 JUSTICE GORSUCH: And I get the
7 Mallory analogy. I do. I understand that. Now
8 whether it works is another thing.

9 But (A) is a little bit different.
10 It -- it's purely extraterritorial behavior.
11 And that -- that's a little harder to square in
12 my mind with our Fourteenth Amendment
13 jurisprudence.

14 Do we need to decide (A)? Is it
15 enough to say this case survives under (B) even
16 applying our Fourteenth Amendment?

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

20 JUSTICE GORSUCH: But do we need to?
21 I mean, if -- if -- if there's jurisdiction
22 under (B), do we need to say there's also
23 jurisdiction under (A)?

24 MR. KNEEDLER: Well, with respect to
25 the activities, the lower courts have not

1 decided whether the -- whether the activities
2 that -- that are alleged would -- would be
3 protected or not protected, so there would be
4 yet a further remand.

5 And we think the payments -- and I --
6 I do want to address, I think, a premise of your
7 question. Because the payments occur outside of
8 the United States, there can't be minimum
9 contacts with the United States.

10 But this is a place where we think the
11 Fifth Amendment would differ from the
12 Fourteenth.

13 JUSTICE GORSUCH: Okay. That -- that
14 answers my question if you say it's different
15 than the Fourteenth, so we'd need to do
16 something different.

17 I'm sorry, Justice Kagan.

18 JUSTICE KAGAN: No, no, no, that was
19 helpful.

20 I hear you, Mr. Kneidler, as being
21 reluctant to go to a place where you say that
22 anything Congress says goes. I mean, obviously,
23 you're saying here Congress -- what's Congress
24 said goes, but you're reluctant to say
25 anything -- may I continue?

1 CHIEF JUSTICE ROBERTS: Sure.

2 JUSTICE KAGAN: -- you know, anything
3 Congress says goes, there are constitutional
4 constraints.

5 And is that because there would be
6 foreign policy implications that would result
7 from an extremely broad congressional assertion
8 of jurisdiction over foreign nationals?

9 MR. KNEEDLER: There could well be. I
10 mean, I think that would be one of the -- one of
11 the reasons. And Congress proceeded cautiously
12 here. It tried a number of -- of ways to
13 provide for these suits.

14 It could, but -- but one can imagine,
15 especially in -- in these days, if you subjected
16 someone around the globe to general jurisdiction
17 in U.S. courts, the Court might be troubled by
18 that. And this is far from that.

19 JUSTICE KAGAN: Well, the -- the Court
20 might be troubled. I'm -- I'm really asking
21 whether the Solicitor General representing the
22 United States is troubled by that.

23 I could understand an argument which
24 would say that if Congress does something that
25 really stretches very far and wide, it could

1 have foreign policy consequences, it could
2 encourage other nations to retaliate and treat
3 U.S. citizens in the same way, that sort of
4 thing, where the United States might be -- you
5 tell me if you are -- but might be reluctant to
6 have a court rule that says anything Congress
7 says goes in this area.

8 MR. KNEEDLER: Yeah, there would --
9 there could well be -- problems with other
10 countries' reactions to that and -- and
11 retaliation perhaps.

12 I do want to complete the thought, if
13 I -- if I could, about why the Fifth Amendment
14 would be different with --

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

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

24 But the -- but the point I wanted to
25 make, which -- which I think could be part of

1 the test if you're not looking at -- at consent,
2 is that I don't think minimum contacts would be
3 the right way to look at it.

4 It would be, I think, at most, a nexus
5 of some sort to the United States, which is what
6 Judge Menashi in the -- in -- in his dissenting
7 opinion in the court of appeals said.

8 And, here, you have a nexus. It -- it
9 doesn't have to be territorial contacts because,
10 as plaintiffs' counsel pointed out, the United
11 States has sovereign authority to extend laws
12 and judicial jurisdiction beyond the borders of
13 the United States.

14 Here, the conduct abroad plainly has a
15 nexus to the United States. The payments prong
16 concerns acts of terrorism that injure United
17 States persons --

18 JUSTICE KAGAN: Thank you.

19 MR. KNEEDLER: -- abroad.

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

22 It -- it -- it might help me get a
23 handle on the positions of the respective
24 parties if you could tell me in what significant
25 respects the position of the United States

1 differs from that of Petitioner.

2 MR. KNEEDLER: I -- I don't think
3 the -- I -- I don't think the position really --

4 CHIEF JUSTICE ROBERTS: Not
5 necessarily the judgment. The analytic
6 approach.

7 MR. KNEEDLER: I -- I think the
8 analytical approach that I've described is -- is
9 consistent -- entirely consistent with what
10 plaintiffs have argued. They are making a
11 broader argument sort of categorically and
12 affirmatively at this time.

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

19 But -- but, here, we don't -- we -- we
20 think this fits comfortably into even Fourth
21 Amend -- Fourteenth Amendment principles but,
22 certainly, the Fifth Amendment principles with
23 respect to Congress's ability in this area to --
24 to provide for jurisdiction.

25 CHIEF JUSTICE ROBERTS: Thank you.

1 Justice Thomas?

2 JUSTICE THOMAS: Mr. Kneedler, the
3 Chamber of Commerce amicus brief indicates that
4 the Justice Department has had a consistent view
5 that these organizations did not have
6 constitutional rights.

7 Do you think the brief is accurate?
8 And, if it is accurate, is this now a change of
9 positions?

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

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

23 So that -- that has been -- once we
24 have now looked at the due process question --
25 and this goes back, I think, at least 10

1 years -- I -- I forget when the -- when the
2 prior was. So we -- we have not advanced a
3 position with respect to due process in those
4 intervening years.

5 CHIEF JUSTICE ROBERTS: Justice Alito?

6 JUSTICE ALITO: Mr. Kneedler, I
7 understand that you're trying to wend your way
8 through some sensitive territory, but I could
9 use some help about the problems that I see
10 along the course that you are recommending.

11 You start with the argument that we
12 could say that this -- that there is
13 jurisdiction -- there would be jurisdiction
14 under the Fourteenth Amendment's case law
15 because of consent.

16 What -- what are -- what limit do you
17 see on the ability of a state to impose a -- a
18 regime of constructive intent?

19 I mean, suppose that a state said that
20 anyone who commits a tort against one of our
21 citizens is deemed to have consented to our
22 jurisdiction, regardless of where the tort
23 occurs. Would that be consistent with our
24 Fourteenth Amendment case law?

25 MR. KNEEDLER: No, it would not. And

1 I -- and I think maybe I misspoke or -- or
2 wasn't clear about Fourteenth Amendment.

3 I didn't mean literally the Fourteenth
4 Amendment standards as if the United States was
5 a state. I -- I meant that the Fourteenth
6 Amendment principles as applied to the United
7 States rather than a state.

8 And so, with -- with respect to a -- a
9 state, there may be issues, as -- as you
10 suggested in -- in Mallory, with respect to the
11 ability of a state to condition subjection to
12 jurisdiction on the basis of doing business in
13 the state.

14 But Congress has a much broader
15 authority with respect to -- under the Commerce
16 Clause, for -- for example, to condition
17 someone's participation in our economy than a --
18 than a -- an individual state does. So --

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

25 MR. KNEEDLER: No. What our -- what

1 our -- our brief said or tried to say is you can
2 look at Fourteenth Amendment principles, not the
3 literal application of them, Fourteenth
4 Amendment principles with respect to consent,
5 apply those to the somewhat distinct situation
6 of the United States under -- under the Fifth
7 Amendment, where the -- where Congress is not
8 limited in the way a state is in conditioning
9 access to the economy or to other aspects of
10 United States interests in the way that a state
11 is.

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

19 MR. KNEEDLER: Yes.

20 JUSTICE ALITO: -- by the lower
21 courts? So we would have to do that in the
22 first instance?

23 MR. KNEEDLER: Or -- or remand to the
24 court of appeals.

25 JUSTICE ALITO: Or remand.

1 MR. KNEEDLER: Yeah. It -- it -- it
2 -- it's really activities. There are no
3 offices, aside from the U.N. office, although
4 there are allegations that that office is being
5 used or has been used for activities extending
6 beyond the role at the U.N.

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

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

1 MR. KNEEDLER: Well, you say we -- we
2 don't want you to say -- I mean, it -- we -- we
3 are -- we are not disagreeing with the basic
4 proposition that Congress has broad authority in
5 this area.

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

12 MR. KNEEDLER: I -- it -- it -- I -- I
13 --

14 JUSTICE ALITO: -- you didn't -- you
15 really don't want that because --

16 MR. KNEEDLER: -- I -- I did not mean
17 to say that.

18 JUSTICE ALITO: Okay.

19 MR. KNEEDLER: And -- and -- and I
20 think that the -- the question of how far
21 Congress's powers go could -- as Justice Kagan
22 pointed out, you know, the farther it goes may
23 create other problems for us.

24 JUSTICE ALITO: No. No, I appreciate
25 that. But how can we -- if we don't say Justice

1 Story was right, you know, end of case, then we
2 have to say that there is some standard that has
3 to be met, and then we would have to explain why
4 this case does or does not meet that standard,
5 right? So then we have to say what the test is.

6 MR. KNEEDLER: Well --

7 JUSTICE ALITO: And that gets more
8 difficult.

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

17 If those interests are affected, like
18 U.S. citizens or -- or terrorism or other
19 actions of the United States in the Middle East,
20 if whatever's being done has a -- has a nexus to
21 that, that would be a sufficient basis for the
22 exercise --

23 JUSTICE ALITO: Okay. Well --

24 MR. KNEEDLER: -- of jurisdiction.

25 JUSTICE ALITO: -- just to -- to

1 wrap -- to wrap up, you -- you want -- on
2 consent, you want us to say there's consent here
3 even though there might not be consent or there
4 would not be consent if a state tried to do
5 something analogous and had to meet the
6 Fourteenth Amendment?

7 MR. KNEEDLER: There -- there may well
8 not be because this is conduct -- the -- the
9 payments prong is -- is conduct occurring
10 outside the United States, so, if minimum
11 contacts is thought of in terms of a territorial
12 connection, we don't think that that applies to
13 the United States.

14 JUSTICE ALITO: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

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

19 Justice Story did not -- did not have
20 a case in front of him involve -- establishing
21 personal jurisdiction -- over a person who had
22 no connection to the United States whatsoever,
23 correct?

24 MR. KNEEDLER: Right. Yes.

25 JUSTICE SOTOMAYOR: That was not at

1 issue there.

2 MR. KNEEDLER: Those -- those --

3 JUSTICE SOTOMAYOR: It's interesting
4 that he and other commentators spent so much
5 time making these broad statements when Congress
6 consistently -- that's what Professor Sachs
7 pointed to -- for over a hundred years, pretty
8 much stayed within International Shoe's
9 limitations, no, in all the Acts that it
10 created?

11 MR. KNEEDLER: Well, it -- it -- yeah,
12 I mean, it created nationwide service of process
13 or even worldwide service of process like under
14 the --

15 JUSTICE SOTOMAYOR: Yes.

16 MR. KNEEDLER: -- antitrust laws.
17 And it has proceeded, but it -- but it has
18 regulated some things outside the United States
19 that affect --

20 JUSTICE SOTOMAYOR: Absolutely.

21 MR. KNEEDLER: -- its interests.

22 JUSTICE SOTOMAYOR: But -- but the
23 absolute statement, it never did?

24 MR. KNEEDLER: No, it's never -- it's
25 never -- it's never gone to that extent.

1 JUSTICE SOTOMAYOR: It's always --
2 okay. Now, going back to your concession, I
3 think, to Justice Alito, don't think that this
4 fits within our minimum contacts theory of the
5 Fourteenth Amendment, so go with me.

6 If I can't see this as consistent with
7 the Fourteenth Amendment, then those circuits
8 who have said that the Fourteenth and the
9 Fifteenth, like the Second, are identical are
10 wrong? The Second Circuit was wrong in that --

11 MR. KNEEDLER: Yes. We --

12 JUSTICE SOTOMAYOR: -- assumption?

13 MR. KNEEDLER: -- we -- we think it
14 was clearly wrong, yes.

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

24 MR. KNEEDLER: Well, what I think the
25 Court can assume that. I -- I -- you know,

1 again, if Congress passes a statute --

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

4 MR. KNEEDLER: Well, I --

5 JUSTICE SOTOMAYOR: Well, you know --

6 MR. KNEEDLER: No, I -- no, I think
7 the Court could assume that there's a nexus
8 requirement. If Congress passes a statute where
9 there isn't one, then there will be time enough
10 to decide whether that -- whether that's --
11 that's valid.

12 JUSTICE SOTOMAYOR: So I guess the
13 opinion, the way we would write it is to say we
14 don't have to reach the question whether
15 Congress has the constitutional power to -- to
16 submit to our jurisdiction something without a
17 federal interest, but this federal interest is
18 enough?

19 MR. KNEEDLER: I -- I think that would
20 be sufficient. It may also -- another different
21 context may be if it's a U.S. citizen, as
22 opposed to somebody outside the United States or
23 a foreign entity.

24 JUSTICE SOTOMAYOR: All right. Now
25 let's go to another part of this question, which

1 is the office or lack thereof. I understood
2 that the -- the -- the provision at issue here,
3 (B), as opposed to (A), which is the payment
4 prong, but the (B) prong, do they have to have
5 an office, or could they just be present here at
6 all?

7 MR. KNEEDLER: Well --

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

16 MR. KNEEDLER: And -- yeah. First of
17 all, there's no personal immunity here.
18 There -- the U.N. --

19 JUSTICE SOTOMAYOR: It --

20 MR. KNEEDLER: -- agreement provides
21 for access to the U.N. --

22 JUSTICE SOTOMAYOR: Right.

23 MR. KNEEDLER: -- by observers like
24 the -- like the PLO and PA. But --

25 JUSTICE SOTOMAYOR: But no -- nothing

1 says that the U.S. has to give them -- that that
2 activity of having access --

3 MR. KNEEDLER: The -- the headquarters
4 agreement --

5 JUSTICE SOTOMAYOR: Right.

6 MR. KNEEDLER: -- does but not -- but
7 Congress -- I mean, that -- the United States
8 acceded to that. So --

9 JUSTICE SOTOMAYOR: It acceded to
10 that, but it didn't have to.

11 MR. KNEEDLER: Yes. Well -- and --
12 and we don't want to suggest that the defendants
13 --

14 JUSTICE SOTOMAYOR: No.

15 MR. KNEEDLER: -- might draw away from
16 it.

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

21 MR. KNEEDLER: I -- I -- I think
22 the -- the Court could hold that. I mean,
23 there -- and -- and process was served in the
24 United States --

25 JUSTICE SOTOMAYOR: Well, exactly.

1 MR. KNEEDLER: -- as -- as -- as -- as
2 well. But the only office is the office -- the
3 U.N.-related office. The allegations are
4 that --

5 JUSTICE SOTOMAYOR: But that's
6 irrelevant to --

7 MR. KNEEDLER: -- that that office was
8 abused --

9 JUSTICE SOTOMAYOR: That's irrelevant
10 to the point we're discussing, which is, if the
11 statute is written so that any presence for any
12 reason in the United States subjects them to
13 jurisdiction here for purposes of service.

14 MR. KNEEDLER: If -- if there was such
15 a -- a statute. Here, there's -- the statute
16 itself providing for personal jurisdiction
17 protects or doesn't include or doesn't count the
18 U.N. office and activities that are ancillary to
19 that or meeting with U.S. officials. Those are
20 not activities that count for purposes of
21 triggering personal jurisdiction.

22 JUSTICE SOTOMAYOR: (B) -- you -- you
23 don't think it triggers (B) or it can't trigger
24 (B)? Is that what you're telling me?

25 MR. KNEEDLER: Yeah, the -- the

1 statute exempts from the triggering activities
2 activities at the office that are -- that are --

3 JUSTICE SOTOMAYOR: I don't --

4 MR. KNEEDLER: -- connected to the
5 U.N.

6 JUSTICE SOTOMAYOR: I don't think
7 that's what they -- I'll let plaintiff -- I'll
8 let Petitioners' counsel address that.

9 All right. Thank you, counsel.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?
11 Justice Gorsuch?

12 Justice Kavanaugh?

13 JUSTICE KAVANAUGH: I just want to
14 make sure I understand. The -- this is a
15 national security and foreign policy case, as
16 you started with, right?

17 MR. KNEEDLER: Yes.

18 JUSTICE KAVANAUGH: And Congress and
19 the president have agreed, acting pursuant to
20 the national security and foreign policy
21 principles set forth in the Constitution, on
22 what the proper rule here is, correct?

23 MR. KNEEDLER: That is correct, yes.

24 JUSTICE KAVANAUGH: And there's no
25 doubt that the -- in terms of regulating the

1 conduct, that they acted per -- pursuant to
2 those Article I powers -- the Article I and
3 Article II powers, correct?

4 MR. KNEEDLER: Right. And Article
5 III, Congress -- or I guess Article I, Congress
6 establishing the lower courts.

7 JUSTICE KAVANAUGH: So it seems like,
8 you know, it's Youngstown category 1 situation,
9 where the president and Congress have acted
10 together. Now there is still a role for
11 judicial review to -- to make sure they're not
12 crossing some other constitutional line, but,
13 usually, that's a very sensitive judgment for a
14 federal court to make.

15 And, usually, we would require
16 something in either the text of the Constitution
17 or in the historical practice over the years
18 that would suggest some principle that the
19 courts could rely on that would disagree with
20 the foreign policy and national security
21 judgment of Congress and the president acting
22 together.

23 MR. KNEEDLER: Right. That --
24 that's -- that's absolutely correct. And even
25 to the extent there is a fairness element here,

1 Congress is in a position to weigh what --

2 JUSTICE KAVANAUGH: But Congress and
3 the president --

4 MR. KNEEDLER: Congress and the
5 president --

6 JUSTICE KAVANAUGH: I mean, I think --
7 I think you're going to agree with what I'm
8 about to say, but Congress and the president are
9 the ones who make fairness judgments when we're
10 talking about the national security and foreign
11 policy --

12 MR. KNEEDLER: Yeah.

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

22 MR. KNEEDLER: Yeah, I completely
23 agree with that and, as I said, Congress's
24 assess -- Congress and the President's
25 assessment of what's fair in these

1 circumstances, what -- what could be problematic
2 in these circumstances, the ongoing relationship
3 of which terrorism has always been a major -- a
4 central element of the foreign policy and
5 national security.

6 JUSTICE KAVANAUGH: And that's why you
7 see bipartisan amicus briefs from the House of
8 Representatives, bipartisan amicus briefs from
9 the Senate.

10 MR. KNEEDLER: Yes.

11 JUSTICE KAVANAUGH: This is not --
12 this is a considered judgment that is across the
13 two branches.

14 So I -- I think you said -- you
15 started with great deference as the principle,
16 and I -- I agree with that, obviously, based on
17 what I've said so far. I'm wondering when the
18 great deference runs out.

19 MR. KNEEDLER: Well, it -- it -- as I
20 stand here, I can't think of a circumstance in
21 which it would, particularly with respect to
22 entities such as the PLO and Palestinian
23 Authority, which are foreign non-sovereign
24 entities.

25 Yes, they exercise some governmental

1 power, but there's a unique relationship.
2 They -- they're -- they have diplomatic
3 relations around the -- around the world. So
4 Congress should have particular latitude. And a
5 court, I think, should be reluctant, if ever, to
6 second-guess that judgment.

7 JUSTICE KAVANAUGH: And I think you'll
8 probably agree with this too, but it also
9 doesn't strike me as the proper judicial role to
10 seize on international law principles that might
11 be lurking out there somewhere to tell the
12 president and Congress together, acting
13 together, that somehow they've crossed some
14 line.

15 MR. KNEEDLER: No, Congress is
16 perfectly -- and the president are perfectly
17 capable to take into account whatever
18 international law there may be.

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

23 But it's up to Congress and the
24 president to weigh whatever -- if -- even if
25 it's not international law, what international

1 practice would be or what -- what the reaction
2 of other nations might be in a particular
3 circumstance.

4 But this is narrowly focused on a
5 particular recurring problem that Congress
6 desperately wants to address. This is its third
7 try in doing that.

8 JUSTICE KAVANAUGH: The recurring
9 problem of terrorism?

10 MR. KNEEDLER: Yes.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 JUSTICE BARRETT: Mr. Kneedler, I just
15 want to follow up on Justice Kavanaugh's
16 questions.

17 Given your answers to Justice
18 Kavanaugh, I just want to make sure. I might
19 have misunderstood your colloquy with Justice
20 Kagan earlier. But I had thought that you
21 said -- and -- and I may well have
22 misunderstood -- that one reason for us not to
23 go the full-bore route as broadly as Petitioner
24 has asked us to is because that might have
25 foreign policy implications or that might have

1 national security implications that would blow
2 back.

3 But is that what you said?

4 MR. KNEEDLER: Well, I think there
5 might -- I think there -- I'm -- I'm -- I'm not
6 in a position to -- to say that categorically,
7 but I -- but I -- I do think there's some reason
8 for cautious there -- caution there.

9 JUSTICE BARRETT: Why? I mean, as you
10 just told Justice Kavanaugh, these judgments
11 about foreign policy considerations are for
12 Congress and the president to make.

13 So, if at some point in the future
14 Congress and the president passed a statute that
15 went farther than this one on personal
16 jurisdiction, why would what we do be a foreign
17 policy -- I mean, wouldn't we defer to president
18 and Congress then?

19 I guess I'm just struggling to see
20 what the foreign policy concern is with our
21 taking the broad theory.

22 MR. KNEEDLER: Well -- well, but --
23 but, if -- if you announce a broad categorical
24 view here in a situation which it is not -- when
25 the Court wouldn't be required to do so, it's

1 that -- it's that statement that might --

2 JUSTICE BARRETT: Like, even if it's
3 true, like the government -- like you've said
4 that you're okay with that rule, you think we
5 should just not say it.

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

7 JUSTICE BARRETT: So, even if it's
8 true or even if it's the accurate interpretation
9 of the Fifth Amendment --

10 MR. KNEEDLER: I --

11 JUSTICE BARRETT: -- you're saying,
12 shhh?

13 MR. KNEEDLER: I -- I -- no, I don't
14 think I -- I -- I didn't mean to say we're okay
15 with that. I think we would want to examine
16 questions of -- of -- of fairness to see whether
17 that should be an element or not or whether
18 Congress, in fact, has plenary power.

19 And it may well be that -- that the
20 Court, if -- if a situation actually confronted
21 it, that the Court would conclude that or that
22 we might submit that. I can't say we wouldn't.
23 But I think -- I think it's important,
24 particularly given the -- the parallel
25 development of the Fourteenth Amendment, not to

1 dismiss that out of hand in a case that
2 doesn't -- doesn't require that analysis.

3 Also, there could be other situations
4 in which Congress would provide for personal
5 jurisdiction, like in the person -- in the
6 commercial sphere, which would not present as
7 starkly the questions of national security and
8 foreign policy, although there would obviously
9 be some foreign policy concerns about extending
10 jurisdiction, but the circumstances might be
11 different.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: So can I go back
15 with -- to your colloquy with Justice Gorsuch?
16 I didn't read your brief as conceding that
17 historically, the Fifth Amendment imposed no
18 limits.

19 In fact, on page 47, you say that that
20 theory is not easily confirmed as a historical
21 matter. And there's nothing in your brief that
22 seems to embrace the proposition that as a
23 historical matter, there were no limits on
24 Congress's ability to do this sort of thing.

25 So I just want to give you an

1 opportunity to clarify what the position of the
2 United States is related to Justice Gorsuch's
3 point about whether the -- what the history
4 shows.

5 MR. KNEEDLER: Yeah. We are not
6 making that affirmative argument, and, if we
7 were going to make that argument, we would want
8 to present a full -- a full argument on it
9 either way and -- and fully addressing the --

10 JUSTICE JACKSON: But, to the -- Chief
11 Justice's point, this then creates some daylight
12 between you and the other Petitioners because
13 they are in fully on this kind of originalist
14 take on what the Fifth Amendment requires and
15 are encouraging us to -- to adopt that broader
16 theory.

17 MR. KNEEDLER: As one of two
18 alternatives, they make --

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

21 MR. KNEEDLER: Yes. Yeah. Yes. No,
22 yes.

23 JUSTICE JACKSON: -- but -- but the
24 government is not asking us to do that as one of
25 the things?

1 MR. KNEEDLER: We are not asking you
2 to do that. We are -- but we are also not
3 saying -- what we're just not addressing --

4 JUSTICE JACKSON: Yes. Understood.

5 MR. KNEEDLER: -- that question either
6 way.

7 JUSTICE JACKSON: Understood.

8 But going to Justice Kagan's point in
9 response to Justice Barrett, I mean, I -- I
10 would take your point to be that there could be
11 foreign policy implications either way and that
12 to the extent that there are announcements that
13 the Constitution of the United States imposes no
14 limit on Congress or the president with respect
15 to their activities internationally or
16 concerning international citizens, that -- that
17 could -- you could conceive of a world in which
18 that could be problematic?

19 MR. KNEEDLER: Yes, I -- I -- I can
20 conceive of that world. And I -- and I think,
21 again, before the Court -- I -- I doubt that the
22 Court would want to announce that without the
23 executive branch and -- and Congress supporting
24 it either in an act of Congress --

25 JUSTICE JACKSON: So that's one reason

1 why the broader theory might be we -- we should
2 be cautious in -- in going down that road.

3 I -- I wonder if another possible
4 reason is that we, as far as I can tell, have
5 never applied this sort of methodology to
6 considerations of the Fifth Amendment, and there
7 could be all kinds of unintended consequences to
8 starting to do that, like how do we interpret
9 the scope of the Due Process Clause, do we do it
10 as an originalist kind of exercise, and we
11 haven't done that in other areas.

12 And -- and the concern is that that
13 might open cans of worms that would imperil, for
14 example, you know, what we said in *Bolling*
15 versus *Sharpe*, the idea that the Fourteenth
16 Amendment's Equal Protection Clause is
17 reverse-incorporated through the Fifth
18 Amendment's Due Process Clause.

19 We didn't reach that through an
20 originalist methodology. And so, if we're
21 starting down that road, it just seems like
22 there's all kinds of problems that might arise
23 that we should be worried about.

24 MR. KNEEDLER: Yeah, I -- I -- I can't
25 say as I stand here that all those problems

1 would be true, but I do think that there -- that
2 there would benefit from an analysis by
3 Congress --

4 JUSTICE JACKSON: We've had different
5 methodologies, and we just have to be careful in
6 where -- in thinking about how we go about
7 interpreting the Constitution and the
8 implications that might have on existing
9 precedents in other areas that deal with these
10 same constitutional provisions, correct?

11 MR. KNEEDLER: Right. Now, with
12 specific reference to personal jurisdiction,
13 this issue should not come up unless Congress
14 first passes a statute providing for personal
15 jurisdiction, and then we would know what --
16 what Congress found and what the rationales for
17 it are.

18 JUSTICE JACKSON: Yes. And, in this
19 case, we have the statute. And -- and -- and I
20 appreciate your consent theory. I just -- I'm
21 just trying to understand, though.

22 You say that consent -- you agree that
23 consent has to be knowing and voluntary, and you
24 said that both forms of the conduct in this
25 statute are -- both forms of the conduct are

1 knowing and voluntary.

2 But I thought the knowing and
3 voluntary had to go to the assent to
4 jurisdiction. I -- I -- it's not that they
5 continue to do something that they've already
6 done. It's that if they agree to do this, they
7 are consenting to the jurisdiction --

8 MR. KNEEDLER: They -- they are deemed
9 to consent.

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

12 MR. KNEEDLER: Yes. No, no. And
13 that --

14 JUSTICE JACKSON: -- in a situation
15 like this.

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

19 JUSTICE JACKSON: Yeah.

20 MR. KNEEDLER: -- on consent. But --
21 but, like in the Carnival Cruise Lines, the
22 passengers probably did not -- did not
23 consciously submit to the jurisdiction of the
24 court that was designated in those contracts, so
25 they don't -- there doesn't have to be a

1 conscious awareness that the conduct --

2 JUSTICE JACKSON: All right. One
3 final question.

4 MR. KNEEDLER: Yeah.

5 JUSTICE JACKSON: I'm sorry, I'm --
6 I'm mindful of the time.

7 The Second Circuit in this case said,
8 as Justice Sotomayor pointed out, that the
9 statute does not suffice to establish personal
10 jurisdiction because the Fourteenth Amendment
11 standards apply in the Fifth Amendment context,
12 and they read those as precluding personal
13 jurisdiction here.

14 Would it be enough for this Court at
15 this time to just say, if we agreed to this,
16 that the Fourteenth and Fifth are not equivalent
17 with respect to what is required, the minimum
18 context -- contacts test, and send it back for
19 an assessment of what the Fifth Amendment
20 requires as it relates to the facts of this
21 case?

22 MR. KNEEDLER: I suppose it could do
23 that, but I would urge the Court to actually
24 decide the question. I mean, it was held
25 unconstitutional. We think the -- the

1 circumstances for this statute are compelling,
2 that it would be useful for the Court to decide
3 that and enable this at least in the Sokolow
4 case, a long-pending case, to be resolved
5 finally.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Berger.

10 ORAL ARGUMENT OF MITCHELL R. BERGER

11 ON BEHALF OF THE RESPONDENTS

12 MR. BERGER: Mr. Chief Justice, and
13 may it please the Court:

14 The PSJVTA purports to be a
15 constructive consent statute, but it fails the
16 due process test for constructive consent to
17 jurisdiction established in Bauxites. Bauxites
18 requires that the defendants' actions support a
19 presumption of legal submission to the
20 jurisdiction of the court.

21 But, as alleged here, the defendants'
22 actions do not support a presumption of
23 submission to the court's jurisdiction. Among
24 other things, the D.C. Circuit and the Second
25 Circuit previously held that the same types of

1 PA and PLO conduct are constitutionally
2 insufficient to support jurisdiction over them.
3 Continuing to engage in jurisdictionally
4 insufficient conduct is the exact opposite of
5 submitting to the court's jurisdiction.

6 And there is no limiting principle if
7 Congress can change that equation and say
8 conclusively what conduct shows submission under
9 the Bauxites due process standard. That would
10 entirely collapse the distinction between
11 prescriptive and adjudicative jurisdiction in
12 all federal question cases.

13 Bauxites also holds that jurisdiction
14 cannot be imposed as mere punishment, as it is
15 here, when the alleged actions of the defendants
16 do not support submission.

17 The PSJVTA also fails due process
18 under Mallory. Mallory, of course, upheld a
19 reciprocal exchange by which Pennsylvania
20 permitted access to its markets in return for
21 submission to the state court's jurisdiction.
22 Applied here, the Mallory question is: Does the
23 United States permit the PA or PLO to do
24 anything on condition that they submit to
25 federal court jurisdiction? And the answer is

1 no three ways.

2 First, the PSJVTA itself doesn't
3 permit any conduct at all.

4 Second, the statute gives no notice
5 that its deemed consent condition attaches to
6 any permission granted elsewhere.

7 And, third, the United States has
8 never identified any permission granted
9 elsewhere to which the deemed consent condition
10 attaches.

11 And also, to address the questions of
12 several of Your Honors, Mallory and Bauxites
13 tell us that federalism plays no role in consent
14 jurisdiction. As a result, Bauxites and Mallory
15 apply equally here under the Fifth and the
16 Fourteenth Amendments and support the court of
17 appeals' decision.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: Mr. Berger, I know
20 this is not the center of your argument, but
21 could you just explain how PLO and PA are
22 persons within the meaning of the Fifth and
23 Fourteenth Amendment?

24 MR. BERGER: Yes. Absolutely, Justice
25 Thomas. And I would respectfully draw the

1 Court's attention back to the February 2018
2 amicus brief filed by the United States in an
3 earlier round of this case, in which the
4 government's non-position was considerably more
5 of a position and basically said there's only
6 one type of person that this Court's precedent
7 has recognized is excluded from the Due Process
8 Clause and that's sovereigns. And, because the
9 PA and the PLO are not recognized as sovereign
10 by the United States, they are, by default,
11 persons entitled to due process protection.
12 That's in pages 8 to 12 of their CVSG brief.

13 JUSTICE THOMAS: So an actual state
14 would not be covered by the Fifth and Fourteenth
15 Amendment, but an organization that is
16 substituting for that is protected by the Fifth
17 and Fourteenth Amendment?

18 MR. BERGER: Well, I -- I think the
19 line, as it's correctly been drawn on, at least
20 in the lower courts, is that if it walks and
21 talks like a government, it's not a sovereign
22 state until the United States recognizes it as
23 sovereign. And there are plenty of entities out
24 there that exercise so-called governmental
25 functions.

1 But, it -- ultimately, it's binary,
2 right? If -- if -- you're either a person for
3 purposes of the Due Process Clause and entitled
4 to due process protections, or you're a
5 sovereign state and you're entitled to the
6 protections of the Foreign Sovereign Immunities
7 Act. But there's no no-man's-land where you're
8 neither a sovereign state nor a person.

9 JUSTICE THOMAS: What if other
10 countries recognize Petitioner -- Respondents as
11 a state --

12 MR. BERGER: I think --

13 JUSTICE THOMAS: -- or a sovereign?

14 MR. BERGER: Excuse me. I think this
15 Court's decision in Zivotofsky makes it very
16 clear that there's only one vote that matters on
17 this issue, and it's not the 140-odd other
18 countries that recognize Palestine as sovereign.
19 It's the vote of the president of the United
20 States, who has exclusive authority to recognize
21 a sovereign state.

22 JUSTICE SOTOMAYOR: Counselor, can I
23 ask you to step away from the Fourteenth
24 Amendment? Assume you're absolutely correct
25 that this statute fails every test we have

1 applied under the Fourteenth Amendment. I'll
2 even grant you that because I think it does,
3 okay?

4 But, assuming that, the argument here
5 has not centered on that. It's centered on the
6 Fifth Amendment. And so would you address why,
7 if we find that the Fourteenth Amendment
8 jurisprudence is not informative of or equal to
9 the Fifth Amendment, why do you win?

10 MR. BERGER: Well --

11 JUSTICE SOTOMAYOR: Meaning there's
12 been a variety of tests proposed. The other
13 side and the government seem to say the Fifth
14 Amendment would look to whether there is a
15 federal interest that -- and -- and jurisdiction
16 reasonably relates to the protection of that
17 interest. I think that's their -- their test.

18 How do you fit that?

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

25 JUSTICE SOTOMAYOR: Yeah, but their

1 struggle is why don't we say there's no
2 limitation. Their struggle doesn't appear to be
3 with creating a limitation. Their struggle
4 seems to be: Well, there's no historical basis
5 for a limitation on Fifth Amendment federal
6 jurisdiction.

7 I don't know why it has to be limited,
8 their theory has to be limited, to the
9 international or foreign affairs. Their theory
10 would say, if there's no limit, it applies to
11 U.S. citizens, as well as to foreign citizens.
12 So we can step past that, okay?

13 MR. BERGER: Well, so I -- I guess I'd
14 build a Fifth Amendment test this way. And I'll
15 start with Your Honor's observation, I think, in
16 your concurrence in Daimler that fundamentally,
17 jurisdiction requires reciprocal fairness. And
18 that's going to be true under the Fifth
19 Amendment and the Fourteenth Amendment equally
20 because both protect liberty interests. And, if
21 it protects a liberty interest, there's no
22 suggestion in any of the previous case law that
23 a liberty interest is worth less under the Fifth
24 Amendment than it is under the Fourteenth
25 Amendment.

1 And if both protect a liberty
2 interest, then it remains true, as the Court
3 said in Murray's Lessee, that Congress cannot
4 simply say what due process is. It's not up to
5 Congress entirely. And I think that goes to the
6 government's concession that the earlier cases,
7 where Justice Story riding circuit or otherwise,
8 they were opining on cases that weren't decided.
9 Murray's Lessee is this Court's precedent that
10 says the legislative will is not enough to
11 define due process.

12 So what is the test? And I would say
13 the test is -- as developed by the court of
14 appeals, is the correct one, which is that you
15 adjust the forum for which a forum connection is
16 required to be the United States as a whole
17 because of the distinct federal interests rather
18 than state interests, but you still apply a
19 minimum contact test because of the reciprocal
20 fairness that underlies the minimum contacts
21 test.

22 JUSTICE KAGAN: Do you think that that
23 reciprocal fairness applies as well when one's
24 speaking of foreigners as -- as it does to a
25 domestic context? I mean, even our view of

1 fairness here, as in large sense being about
2 reciprocity, I would think doesn't quite
3 translate as well into the international context
4 and which we're not used to thinking that way.

5 MR. BERGER: If anything, I would say
6 respectfully, Justice Kagan, that the fairness
7 component is probably exponential when it comes
8 to dealing with foreigners because of the kinds
9 of concerns that the government has articulated
10 here, the kinds of concerns that were
11 articulated in Daimler about overly grasping
12 jurisdiction, that if -- if we purport to have
13 exorbitant jurisdiction for foreigners but not
14 for domestic citizens or residents, then you are
15 really inviting an international comity problem.
16 But there's no reason doctrinally to read into
17 either the Fifth Amendment or the Fourteenth
18 Amendment a different definition of person that
19 would exclude foreigners.

20 A lot of the earlier case law,
21 including those that Justice Gorsuch alluded to,
22 are dealing with foreigners, and there's no
23 assumption that, well, we're dealing with
24 foreigners because they deserve less. If I may
25 give one example that I think helps exemplify

1 this and gets us back to any concern about
2 original public meaning.

3 Nobody likes pirates, right? Pirates
4 have been bad from the founding. Nobody ever
5 thought that even though piracy is a crime
6 against humanity or it's a crime that fits in
7 the Define and Punish Clause, that, certainly,
8 the United States can define piracy as an
9 offense, but the United States does not try
10 pirates in absentia because there's a delta
11 between what Congress can prescribe as laws and
12 what courts can do in adjudicating individual
13 claims against someone who violates a law with
14 extraterritorial effect.

15 Justice Sotomayor in her commentary, I
16 think, in *RJR Nabisco* notes that why are we
17 dealing with a concern about the
18 extraterritorial reach of a statute when there
19 is separately a jurisdictional defense that
20 would have to be considered? And there's always
21 been an understanding from the founding that
22 personal jurisdiction in the custody of the
23 judicial branch is something over and above what
24 Congress can prescribe.

25 JUSTICE GORSUCH: Certainly, that's

1 true in -- in the piracy. You can't try them in
2 absentia. You've got to get personal
3 jurisdiction service process on them and -- and,
4 -- and, therefore, have a court of competent
5 jurisdiction. But the Court's never gone
6 further in the Fifth Amendment context than that
7 to start using principles of substantive due
8 process -- there's that oxymoron again -- from
9 the Lochner era no less to say that more is
10 required beyond the original understanding. And
11 it seems both sides would ask us to kind of play
12 with that toy a bit and you -- you perhaps a
13 little more aggressively than your friends on
14 the other side.

15 MR. BERGER: I -- I think it's a toy
16 that should be left in the box because there's
17 no reason, to sort of paraphrase something that
18 Your Honor said in Mallory, this is a case where
19 you don't need a new rule. This is a case where
20 a very old rule really applies.

21 And the old rule that applies, albeit
22 at the court of appeals level but uniformly, is
23 that the fairness that always underlay the Fifth
24 Amendment and due process, even in Picquet and
25 Toland and all these ancient cases, where they

1 talk about principles of fundamental fairness --

2 JUSTICE GORSUCH: Ancient cases being
3 our precedent.

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

6 JUSTICE GORSUCH: Some of them are.
7 Some of them are lower court opinions, but
8 they're -- they're -- they're precedents on the
9 books --

10 MR. BERGER: Right. And -- and --

11 JUSTICE GORSUCH: -- and perhaps
12 worthy of respect as well as our newer stuff --

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

14 JUSTICE GORSUCH: -- with the Lochner
15 era no less.

16 MR. BERGER: I -- I -- I think I share
17 that -- Your Honor's fondness for Murray's
18 Lessee because you alluded to it in Jarkesy.
19 And Murray's Lessee is a 19th Century precedent
20 of this Court, not some Justice riding circuit
21 opining in dictum what he thinks may be/might be
22 the rule in some case where the question wasn't
23 presented.

24 JUSTICE GORSUCH: Charming Betsy, you
25 know, as well, right?

1 MR. BERGER: Right. But Murray's
2 Lessee says as plain as you like that the
3 legislative will alone cannot define what Fifth
4 Amendment due process is.

5 JUSTICE GORSUCH: No one disputes
6 that.

7 MR. BERGER: Right.

8 JUSTICE GORSUCH: But the question is,
9 if you're going to start adding things onto it
10 beyond what was originally understood and exists
11 in our precedent for a long time, that's quite a
12 toy.

13 That's -- and, as Justice Kavanaugh
14 pointed out, you know, it's -- you're going to
15 be second-guessing the Executive Branch and the
16 Congress and the political judgments they've
17 made about what does and doesn't interfere with
18 international affairs.

19 MR. BERGER: I -- I -- I don't think
20 that's true for at least two reasons if I may.
21 And -- and one is that there's a huge open
22 question in this case, right, about what
23 activity, you're focusing only on the activity
24 prong, as Your Honor had alluded in some earlier
25 questions.

1 Then the question is not what does due
2 process allow. You don't have to reach that
3 question because, as the government conceded,
4 the statute contains a large number of
5 exclusions where, essentially, whatever
6 sovereign power Congress had and the president
7 signed off on, they've -- they've laid down
8 arms. They said, okay, we're not going to count
9 for jurisdiction U.N. activity, meetings with
10 the U.S. Government, and ancillary activities.

11 Well, "ancillary" is a huge, undefined
12 term, and we don't know what that means. And
13 the reason we know that it means that there's
14 not at the moment unanimity between the
15 legislature and the executive is the
16 government's opening brief cites two Office of
17 Legal Counsel opinions dealing precisely with
18 the Palestinian government, one in 2018, one in
19 '22. They are a rich font of guidance, I think,
20 in this area of what is the interest of the
21 United States.

22 JUSTICE BARRETT: Counsel, can I --
23 can I interrupt and ask a question? So, even
24 under the Fourteenth Amendment, we do look back
25 at historical practice. And I'm thinking of tag

1 jurisdiction, for example.

2 So, for purposes of the Fifth
3 Amendment, would tag jurisdiction be okay in the
4 context of a foreign defendant?

5 MR. BERGER: I -- I think that if tag
6 jurisdiction is limited to individuals, as Your
7 Honor pointed out in your opinion in Mallory, it
8 wouldn't apply to entities like the PA and the
9 PLO, but there's no reason if his -- if history
10 tells us, right, and that's the whole purpose of
11 Burnham, is that there's a historical tradition
12 behind tag jurisdiction, then, for individuals,
13 there's really no reason to treat that
14 differently under the --

15 JUSTICE BARRETT: Okay. So, if -- if
16 history matters for things like tag jurisdiction
17 even under the Fourteenth Amendment, could we
18 say that under the Fifth Amendment, we similarly
19 look at history and we see a tradition of
20 treating foreign individuals, foreign
21 defendants, differently from domestic or from --
22 from American citizens?

23 MR. BERGER: I think, analytically,
24 you could say that we could ask the question,
25 but I don't think if that -- if your question

1 implied that that's the answer that history
2 gives, I don't believe --

3 JUSTICE BARRETT: I -- I -- I
4 understand. I'm just asking if we could ask the
5 question because you -- you agree that history
6 informs the content of due process even in the
7 Fourteenth Amendment context.

8 And so it might not be one to one,
9 right, between the Fifth Amendment and the
10 Fourteenth Amendment because history might bear
11 differently on the United States than on any
12 individual state.

13 MR. BERGER: Well, I -- I guess a
14 couple of points on that if I may. One is I --
15 I do think that history matters, if you're
16 writing on a blank slate, that there's a reason
17 why foreigners have not been treated differently
18 under the Fourteenth Amendment.

19 And then just to bring in one concern
20 Justice Jackson raised, as exemplified by Judge
21 Ho's concurring opinion in the Douglass case.
22 He said, if we're going to start treating the
23 Fifth and Fourteenth Amendment differently, then
24 we are going to have to throw out the window the
25 doctrine of incorporation because are we now

1 diluting all of the rights that apply to the
2 states?

3 JUSTICE BARRETT: Well, I mean, I
4 think that's stretching it a -- a bit far. I
5 don't think we're throwing incorporation out. I
6 mean, I think you can still recognize that the
7 Fifth Amendment incorporates fundamental
8 fairness for substantive due process right. And
9 I think this can be about personal jurisdiction.

10 So I think that's kind of a -- a way
11 of -- of trying to -- to -- well, I just don't
12 think it's necessary to go that far. I think
13 they're distinct issues.

14 MR. BERGER: If -- if -- if the Court
15 doesn't need to, doesn't want to, and for
16 whatever reason doesn't go that far, I think
17 that what the historical case law tells us,
18 whether it is Justice Story riding circuit,
19 whether it's the Court in Toland, whether it's
20 The Charming Betsy, you name it, all of the
21 frigate cases, almost all of which involve
22 reaching out to either a ship of a foreign
23 nation or a foreign merchant, that there is,
24 indeed, equal solicitude for foreigners.

25 JUSTICE BARRETT: Okay. And I'll just

1 say one other thing about incorporation. I
2 think one distinction between your situation and
3 that -- and it was kind of what I was struggling
4 with some of the questions I was asking your
5 friends on the other side -- is that, you know,
6 we have doctrine in the context of incorporation
7 already. There's already precedent on point.
8 And, as you point out, then we're not writing on
9 a blank slate, you know.

10 So, in the Fourteenth Amendment
11 context, whatever one thinks of International
12 Shoe, we're not writing on a blank slate. We
13 have quite a long line of precedent after that.

14 We don't have squarely on point
15 precedent in the Fifth Amendment context in
16 personal jurisdiction as we do in substantive
17 due process, and so that's why I think it --
18 it's not -- that's why we're here. It -- it's
19 still an open question.

20 MR. BERGER: And I do understand it's
21 an open question. And -- and to the extent the
22 Court is approaching it with a blank slate, I
23 would say the factors that matter are not just
24 what is the original meaning and what does
25 history tell us. It's certainly important.

1 But, if jurisdiction is supposed to mean
2 anything, it is supposed to provide predictable,
3 reliable rules known in advance.

4 And I believe it was Justice Thomas
5 who alluded to the Chamber of Commerce amicus
6 brief here, which, once it gets past the point
7 of debating whether or not we're persons
8 entitled to due process, lays out all the
9 reliability concerns that says you're going to
10 have to throw out four decades of Fourteenth
11 Amendment due process jurisprudence as
12 understood to apply in federal question cases if
13 you decide the Fifth Amendment provides
14 differential protection from the Fourteenth.

15 And that is given that a core function
16 of jurisdiction is to provide predictable rules
17 in advance, exemplified here by the fact that
18 the PA and the PLO genuinely don't know when you
19 read the statute when you're under the
20 activities prong, what is it that implicates the
21 activities prong, it has to be predictable and
22 reliable. So, if you do write on a blank slate,
23 then you're going to already have opened a
24 Pandora's box of the problem of people saying:
25 All right, I've got to reorder all my affairs.

1 I would like if I have time -- and I
2 don't see the red light is on -- to just address
3 some of the other questions that I heard from
4 the Court. I do believe Mr. Kneedler made an
5 extremely important comment, and I -- to some
6 extent, I believe the plaintiffs have conceded
7 this as well, that there's a large open question
8 if you focus exclusively on the activity prong
9 of what is covered, what is the meaning of
10 ancillary, what is the meaning of official U.N.
11 business.

12 And, earlier, I alluded to but perhaps
13 didn't finish the thought about the Office of
14 Legal Counsel opinions which say two important
15 things. One, it offers a view from the
16 executive's point of view in the context of the
17 Palestinians as to what activity is allowed, and
18 it basically said no matter what Congress says,
19 we, the executive, believe the Palestinians are
20 allowed to engage in incidents of diplomacy,
21 like speaking to the Palestinian diaspora, like
22 speaking to American citizens about Palestinian
23 rights.

24 And the only reason that matters is if
25 we're litigating on remand, should it come to

1 that, what is the meaning of ancillary
2 activities, the OLC opinions are directly
3 germane.

4 Point two about the OLC opinions, it
5 says, look, we, the executive -- and this really
6 goes to the government's point -- have exclusive
7 control of how this country interacts with the
8 Palestinian government. To the extent any
9 statute out there, whether it's the 1987
10 Anti-Terrorism Act or anything else, says we
11 can't do something or what they want us to do
12 imposes a condition contrary to a condition we
13 would impose, we view that as unconstitutional.

14 So I would respectfully say that as
15 far as the statute goes in its uninterpreted
16 form, it reflects, Justice Kavanaugh, executive
17 and legislative unanimity. But the minute you
18 get down into the details of what's ancillary
19 activity, does the executive branch take a
20 contrary position on a case-by-case basis, that
21 unanimity unravels.

22 I think perhaps it was Justice --

23 JUSTICE JACKSON: Can I just ask you
24 about -- just taking you back to the potential
25 equivalence or not of the Fourteenth and the

1 Fifth Amendment. I guess I -- I -- do -- do you
2 concede that there are principles of interstate
3 federalism and sovereignty that are at play in
4 the Fourteenth Amendment context that are not
5 apposite in the Fifth Amendment context?

6 MR. BERGER: The -- the answer is yes
7 but only in the imposed jurisdiction context,
8 not here in the consent jurisdiction context.
9 The -- the plurality opinion authored by Justice
10 Gorsuch and the concurring opinion authored by
11 Justice Alito in Mallory, which counts to five,
12 a number I've heard earlier today, said
13 federalism does not matter for consent
14 jurisdiction.

15 So, yes, federalism matters for
16 imposed jurisdiction but not for consent
17 jurisdiction. And why? Footnote 10 in Bauxites
18 gives you the answer. It says someone may
19 subject himself to powers from which you would
20 otherwise be free, which is why federalism
21 doesn't care if you consent to jurisdiction.

22 JUSTICE JACKSON: So you would have us
23 have a Fifth Amendment doctrine that is parallel
24 to the Fourteenth Amendment in the consent realm
25 with respect to consent? That's the only

1 parallelism that you --

2 MR. BERGER: I -- I think they're
3 identical, Justice Jackson, in the consent
4 realm. I think that is what five members of the
5 this Court said in Mallory, that -- that due
6 process federalism concerns do not arise in
7 consent jurisdiction, however the --

8 JUSTICE JACKSON: And so then you win
9 why? If -- if -- if we agree with you on that,
10 that consent is the same in the two areas, then
11 you say, to the extent that this statute was one
12 that imposed or deemed consent, then we're in
13 that realm and you win because?

14 MR. BERGER: Because of the test --
15 and I don't think the Court needs a new test for
16 consent jurisdiction, which is that Bauxites
17 tells us the defendants' actions must support a
18 presumption of legal submission to the
19 jurisdiction of the court. And our argument
20 below was neither prong of the PSJVTA as applied
21 in this case reflects submission.

22 Payments made overseas, outside of the
23 antecedent sovereign authority of the United
24 States, right? The United States can't say to
25 Palestine do or don't make that payment. That

1 is not submission to a U.S. forum. And, indeed,
2 that's what the court of appeals said.

3 And, as applied in this case, where
4 our contention, unresolved in the courts of
5 appeals has been, is that all of our conduct
6 has -- is U.N.-related conduct and has
7 previously been held to be insufficient to
8 support jurisdiction. And the United States
9 acquiesced in the Southern District of New York
10 decision in the 1980s in U.S. versus PLO that
11 U.N. activity can't support jurisdiction.

12 All of those mean that when we
13 continue to be engaged in U.N. and ancillary
14 activities, we haven't submitted to
15 jurisdiction. No new standard is required.
16 And, for more than 40 years, the Bauxites
17 submission standard, it hasn't turned the -- the
18 lower courts upside down. The courts know how
19 to apply it. It's a facts-and-circumstances
20 test.

21 And the lower courts have been
22 perfectly comfortable with Bauxites. And not
23 only that, all four opinions of Mallory in this
24 Court cited the Bauxites submission standard.
25 It's good law. It remains good law. It shows

1 why we win.

2 If -- I will try to burn quickly
3 through a couple of other points. I think
4 Justice Gorsuch asked if we were operating an
5 office extra-legally. I think Mr. Kneedler very
6 helpfully gave the answer, which is there's no
7 question of extra-legal. We could debate all
8 day long whether what we're doing is legal or
9 not, but the fact of the matter is the statute
10 simply excludes it. So, from a constitutional
11 avoidance basis, you don't need to reach the due
12 process question. If the statute says this
13 conduct does not support jurisdiction, that's
14 the end of the story.

15 The fact that the U.S. activities
16 prong remains unadjudicated, as I think both
17 sets of Petitioners' counsel acknowledge, you
18 know, our position is that this was an
19 as-applied case that looked at various activity,
20 but, if there's an open question as to what the
21 ancillary activities exclusion means, then
22 that's a matter for remand because, as I've
23 heard from time to time, this is a court of
24 review and not first view, and so that's grist
25 for the mill for the court of appeals.

1 I mentioned the OLC opinions. And I
2 guess I would just close with this thought,
3 which is, whether we're searching for historical
4 meaning, whether we're searching for what did
5 the 1st Congress think about jurisdiction, I
6 would -- and I would respectfully say the one
7 analogy that drives all the answers is pirates,
8 right?

9 Piracy has been illegal from the
10 founding. The alien tort statute incorporated
11 it. Nobody from the founding has thought that
12 Congress could say not only do we prohibit
13 piracy, but tell you what, since we've
14 prohibited piracy and because prescriptive
15 jurisdiction and adjudicative jurisdiction is
16 the same, we don't need to go -- to bother --
17 all that trouble of finding, extraditing, or
18 renditioning the pirate. We'll just try him in
19 absentia. That's never been the law and that's
20 because due process requires something more than
21 what Congress prescribes.

22 JUSTICE KAGAN: You -- you might
23 think, though, that what that suggests is that
24 there's an obligation to provide notice and an
25 opportunity to be heard without going as far as

1 requiring minimum contacts in the way we've done
2 under the Fourteenth Amendment.

3 MR. BERGER: Yeah, and I -- I would --
4 I would respectfully say that -- that it's not
5 just an alien tort statute issue, but, in all of
6 this Court's extraterritorial application
7 issues, there's been an observation, including
8 by Justice Sotomayor, that -- that we're dealing
9 with a whole different problem, which is
10 everybody obviously had notice in -- saw a case
11 like RJR Nabisco about what the statute
12 purported to do, but Justice Sotomayor's opinion
13 noted that, okay, but we still have a whole
14 different kettle of fish to deal with in terms
15 of personal jurisdiction.

16 So it's more than notice. And I think
17 that's why, even if you want to give full
18 significance to Picquet -- and then I promise
19 I'll shut up and sit down -- what the Court said
20 in Toland, what Justice Story said in Toland,
21 take a look at page 613, it said we have to deal
22 separately with notice and regular -- regular
23 personal appearance in court. So even Justice
24 Story thought there was something more than
25 notice in the form of a summons.

1 And jurisdiction, he likewise referred
2 separately to jurisdiction and process at page
3 613. They are different things, and they have
4 been different things from the founding.

5 JUSTICE ALITO: What exactly is the
6 unfairness in -- in this case?

7 MR. BERGER: In --

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

11 MR. BERGER: Well, so I --

12 JUSTICE ALITO: What's the unfairness?

13 MR. BERGER: The unfairness, as we
14 said -- I think you'll see it at pages either 56
15 or 57 to 58 of our Second Circuit brief in
16 full -- is the notion that we can be divested of
17 a liberty interest for -- and selectively at
18 that, for being divested of a liberty interest
19 for engaging in activity previously held
20 constitutionally insufficient to support
21 jurisdiction.

22 And a second point if I may, which is,
23 if you look at Fourteenth --

24 JUSTICE ALITO: That -- that doesn't
25 sound like a personal jurisdiction argument.

1 But anyway, go ahead.

2 MR. BERGER: So -- but, when you look
3 at all the traditional Fourteenth Amendment
4 jurisprudence of this Court, it's got two
5 prongs, right? It has minimum contacts and then
6 it has reasonableness. And so, when we get the
7 commentary like in the dissent at the -- from
8 rehearing en banc, that it's not inconvenient
9 for us to go from the PLO's U.N. mission in the
10 East 60s to the Southern District of New York,
11 that misses the point. That deals with the
12 reasonableness prong. But that's prong two.

13 Prong one is, is there reciprocal
14 fairness sufficient to support jurisdiction in
15 the form of minimum contacts? That's the
16 unfairness, which is -- you ever been on a train
17 where it's sitting still and another train's
18 moving and you have the impression you're moving
19 backwards? That's what Congress keeps doing
20 with these statutes, which is we're doing the
21 same thing, and Congress keeps moving the
22 context around us, and that's what makes this
23 statute as applied unconstitutional.

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

1 JUSTICE ALITO: Before -- before you
2 sit down, do you think any degree of deference
3 is owed to Congress and the president in -- on
4 -- in this?

5 MR. BERGER: I -- no more deference
6 than in the context of Holder, where the Court
7 said, sure, we understand their policy judgment,
8 but that does not require us to abdicate the
9 judicial role when it comes to constitutionally
10 protected rights. And that is certainly a, you
11 know, a protected right committed to the
12 judicial branch, is jurisdiction.

13 JUSTICE ALITO: Well, the question
14 wasn't whether there should be judicial
15 abdication but whether there should be any
16 degree of deference. So is there any degree of
17 deference owed or none?

18 MR. BERGER: I would say, in the
19 context of jurisdictional due process, the
20 answer is none. In the context of another
21 statute that four -- hits four square on these
22 same issues, like the Taylor Force Act, which
23 says, if the Palestinian government continues to
24 make these payments, we will withhold foreign
25 aid, of course, deference is owed in that

1 context.

2 But, when it comes to a
3 constitutionally protected right, like
4 jurisdictional due process, no, you don't defer
5 away the protection for that right.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 Justice Thomas, anything further?

9 Justice Alito?

10 Justice Sotomayor?

11 Justice Kagan?

12 Justice Gorsuch, anything further?

13 Justice Kavanaugh?

14 Justice?

15 Justice Jackson?

16 Now you may sit down. Thank you.

17 MR. BERGER: Thank you, Mr. Chief

18 Justice.

19 CHIEF JUSTICE ROBERTS: Rebuttal,

20 Mr. Kneedler?

21 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

22 ON BEHALF OF THE PETITIONER IN CASE 24-151

23 MR. KNEEDLER: Several points,

24 Mr. Chief Justice.

25 First of all, with respect to

1 reciprocal fairness, which I -- which I think
2 counsel's deriving from the minimum contacts, if
3 there are minimum contacts then you're subject
4 to jurisdiction, but under the Fifth Amendment,
5 minimum contacts is not the test. Perhaps some
6 nexus is, but -- and that's because the United
7 States, in the exercise of its powers, is not
8 limited to the territorial jurisdiction of the
9 United States.

10 It could criminalize the pay -- making
11 of these payments, as I had understood
12 Respondents to say at page 30 of their brief.
13 If -- if it could criminalize them, it seems
14 clear that it should be able to count them as a
15 basis for U.S. jurisdiction.

16 But, with -- again, with respect to
17 reciprocal fairness, it's important to bear in
18 mind that the payments being made here are
19 payments to persons who have killed or injured
20 Americans in acts of terrorism abroad. And --
21 and I think, when one is -- is weighing
22 reciprocal fairness, that basis for jurisdiction
23 hardly seems unfair, particularly since it
24 direct -- is a direct corollary to the lawsuits
25 to which personal jurisdiction attaches, with --

1 which is lawsuits under the ATA, which is
2 designed to protect Americans from -- from
3 terrorism abroad. So, if we're talking about
4 reciprocal fairness, I think this case clearly
5 satisfies it.

6 Now, also, the reciprocal fairness
7 seems to be tied to some sense -- sense of an
8 exchange or a -- a balance on either side. We
9 don't think that that's really comes from
10 Mallory, but, certainly, in the context of the
11 PA and the PLO, it doesn't make sense because
12 we're talking about a 40-year relationship
13 between the two in which fighting terrorism has
14 always been a core part.

15 And to try to find whether there's a
16 bargain or an exchange at one point in time
17 along that continuum of four decades of the
18 relationship just doesn't make sense because
19 Congress's statutes -- and, again, this is its
20 third try to make sure that these lawsuits can
21 be brought -- it's a continuation of a policy
22 over that period of time, and the Court should
23 not focus only on the particular statute in --
24 in isolation.

25 But coming back to what is at the core

1 of this case and, actually, the Court wouldn't
2 have to decide more, and that is that -- that
3 under the Fifth Amendment, Congress and the
4 president made a judgment that is entitled to
5 virtually absolute deference that it is
6 appropriate to subject the PA and the PLO to
7 jurisdiction in this case.

8 Respondents had a chance to avoid that
9 by just stopping those activities, but they
10 didn't. So whether one thinks of that as
11 consent or just an element of -- of fairness or
12 overall suitability, that should count for a
13 lot. The Court should sustain the act of
14 Congress.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 The case is submitted.

18 (Whereupon, at 11:58 a.m., the case
19 was submitted.)
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