

1 supporting the Petitioners.

2 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf

3 of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 07-1090, Republic of Iraq v. Beaty, and the consolidated case.

Mr. Franklin.

ORAL ARGUMENT OF JONATHAN S. FRANKLIN

ON BEHALF OF THE PETITIONERS

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

Acting with express statutory authority and in furtherance of important foreign policies following the fall of the Saddam Hussein regime, the President made inapplicable with respect to Iraq all provisions of law that had applied to countries that sponsored terrorism.

Under the plain language of the statute, those provisions included former section 1605(a)(7), which was a provision of law that applied only to such countries. Because section 1605(a)(7) was made inapplicable as to Iraq effective on the President's determination, it cannot now serve as the applicable statutory basis for abrogation of Iraq's foreign sovereign immunity and therefore subject matter jurisdiction in this case.

1 JUSTICE GINSBURG: Mr. Franklin, even if you
2 are right about that, the legislation was an emergency
3 measure with a sunset. It was revived for 1 year, but
4 then no more. So, didn't this suspension of Iraq's lack
5 of immunity -- didn't the immunity come back? Didn't
6 the bar to immunity come back again once the emergency
7 law sunsetted?

8 MR. FRANKLIN: No, Your Honor. The language
9 of the sunset provision to which you are referring
10 states only that the authorities contained in the
11 section would expire. That means the authorities to the
12 President given to him to act. Congress did not say
13 that the effect of what the President had done would be
14 nullified once his authority to act had expired.

15 And it's important to recognize that the
16 President not only made inapplicable provisions of law
17 addressed to state nations that had sponsored terrorism,
18 but he also suspended the Iraq Sanctions Act under the
19 same authority. The Iraq Sanctions Act has never been
20 repealed.

21 So, if it were correct that the -- that the
22 -- everything that the President had done became
23 nullified upon the expiration of his authority to act,
24 then the Iraq Sanctions Act would not only currently be
25 in effect today, but would have been in effect since

1 September 30th, 2005. And if there's -- that is not
2 what Congress intended. The Iraq Sanctions Act has a
3 huge panoply of sanctions, both dependent on and
4 independent of the legislative determination of Iraq as
5 a state sponsor of terrorism.

6 But if there's any question about this, when
7 Congress acted again, the same Congress acted in 2003 to
8 extend the expiration date, Congress -- the -- when that
9 Congress acted, the legislative history said quite
10 expressly that the extension was not necessary to extend
11 what the President had already done, because that had
12 already happened and that was permanent. But it was
13 necessary according to Congress for other reasons.

14 So both because of the plain language of the
15 sunset provision and because of what Congress
16 subsequently did in 2003 to extend it, as well as the
17 interpretation of the United States on this point, the
18 President's actions didn't sunset. It was emergency
19 legislation to be sure, but the emergency was to give
20 the President the authorities. We were at war at that
21 time, and our foreign policy was changing 180 degrees
22 almost overnight away from penalizing the government of
23 Saddam Hussein as a state sponsor of terrorism, as an
24 outlaw regime, and immediately towards helping the
25 people of Iraq.

1 And Congress gave the President the broad
2 catch-all authority to, if he deemed it appropriate, to
3 relieve the people of Iraq from all, not just some, of
4 the very onerous restrictions and disabilities that had
5 applied to them as a result of the prior regime's
6 support for terrorism.

7 The President did this in exercise of his
8 foreign policy judgment in order that the people of Iraq
9 could better rebuild their country and establish a new
10 democratic government that would in fact prove to become
11 one of the United States' most trusted allies in a
12 region that has not always had very many of them.

13 JUSTICE ALITO: Well, what do you make of
14 the fact that in -- in 2008 Congress said that that was
15 never its -- it was never its intention for the
16 President to have the authority to -- to do this?

17 MR. FRANKLIN: Two things, Justice Alito:
18 The -- the first point is that this was not the Congress
19 that acted in 2003. This was a subsequent Congress.
20 And that statement occurred almost 5 years after the
21 legislation had been enacted and almost 3 years after
22 the President's authority to act had expired. As such,
23 that statement is nothing more than subsequent
24 legislative history that cannot be determinative in
25 deciding whether the President acted validly in 2003.

1 That determination should be judged according to the
2 statute that was in front of the President when he
3 acted.

4 But if there's any question at all in the
5 Court's mind about the application of that provision,
6 the President waived it. He waived its application as
7 to Iraq. It's important to remember that the President
8 would not sign the version of the NDAA that just had
9 that provision in it. He vetoed the bill. He vetoed it
10 only because of its effect that it might have on Iraq,
11 and he would not sign a replacement until he was given
12 the authority to waive any and all of the provisions of
13 section 1083 to the extent they may affect Iraq. So if
14 that --

15 JUSTICE GINSBURG: Including -- including
16 the provision that repealed 1605(a)(7). So that would
17 be revived?

18 MR. FRANKLIN: Well, we don't agree with
19 that, Your Honor, because we think that the scope of the
20 waiver would have been to make inapplicable or to waive
21 application of extant provisions of law to the extent
22 they might affect Iraq. The President wasn't given the
23 additional power to reenact statutes, to put a repealed
24 statute back on the book. The waiver was just like the
25 EWSAA waiver, where the President was authorized to

1 waive with respect to Iraq existing privileges --
2 existing provisions of law. But again, to the extent
3 there's any question about that, Title 1 U.S.C. section
4 108 answers that conclusively. That section provides
5 that even if Congress itself had repealed section 1083
6 in its entirety, that would not bring back section
7 1605(a)(7), which had been repealed by that section.
8 And that is the plain language of 1 U.S.C. 108.

9 Obviously, the President by exercising a
10 blanket waiver authority can't have a better or more
11 effective ability to bring back into existence expired
12 statutes than Congress itself could have done.

13 JUSTICE SOUTER: Of course, technically it's
14 just suspension; it's not -- it's not reenactment. I
15 suppose you could say a suspension is a partial revival,
16 but the provision doesn't exactly fit, does it?

17 MR. FRANKLIN: Well, we are talking here
18 about a waiver applied to a repeal. And I think the
19 temporal point here is that the repeal happened
20 effective upon the President's signature of the NDAA, on
21 January 20, 2008. That was already done. The repeal
22 happened. At that point, section 1605(a)(7) no longer
23 existed. It was not in the U.S. Code.

24 The President was authorized then
25 subsequently to waive existing provisions of law. And

1 here I think that this -- to allow the President to
2 reenact statutes according to a waiver authority is
3 contrary, I think, to 1 U.S.C. section 108, but also
4 common sense as well. He was -- he was allowed to --

5 JUSTICE SOUTER: I agree.

6 MR. FRANKLIN: Okay.

7 JUSTICE GINSBURG: Do we have any other
8 instance in which a jurisdictional provision is
9 withdrawn and applicable to pending cases without
10 Congress having mentioned the jurisdictional provision
11 at all?

12 MR. FRANKLIN: Well, I think the -- the
13 closest analogy that I can give you, Your Honor, is in
14 fact the precise circumstances we have here, and that is
15 the doctrine of foreign sovereign immunity. Prior to
16 the Foreign Sovereign Immunities Act of 1976,
17 determinations upon foreign sovereign immunity were made
18 by the executive, and they had the effect, as the Court
19 stated in the Republic of Mexico case and the Ex parte
20 Peru, of requiring the courts to, quote, "surrender
21 their jurisdiction," even if it had previously attached.

22 So here we have the precise situation that
23 had always happened. It had always been this way prior
24 to the FSIA. The President had always been able to make
25 determinations on foreign sovereign immunity that would

1 have the immediate effect of divesting the courts of
2 their ability to hear cases. Now, there were of course
3 jurisdictional provisions at the time that conferred
4 jurisdiction over foreign sovereigns, and the Court had
5 no trouble -- and this was 150 years of practice, dating
6 from Chief Justice Marshall's first recognition of
7 sovereign immunity up until the Foreign Sovereign
8 Immunities Act.

9 So this is actually not any different really
10 than what had occurred before. We have also cited
11 numerous or several examples of jurisdictional statutes
12 that do depend on executive determination. So there's
13 really nothing particularly unusual about that as well.

14 I would like to turn at this point, if I
15 might, just briefly to our alternative argument in case
16 the Court might find it relevant. This is an
17 alternative argument. It's not one that -- that the
18 Court needs to reach, but it is certainly another basis
19 for reaching the same result in this case. And that is
20 the simple fact that in 2008 section 1605(a)(7),
21 regardless of what the President had done previously to
22 it, was repealed. And it was not just repealed, but it
23 was repealed with a simultaneous bestowal of a
24 replacement jurisdictional provision that encompassed
25 every single pending claim that was then pending at the

1 time.

2 So this is the classic example of a
3 jurisdictional repeal that applies to all cases.
4 Congress didn't just repeal a statute, but it gave
5 another provision that encompassed every pending claim
6 and allowed every single pending plaintiff to be able to
7 re-file their cases.

8 Now, to be sure, the plaintiffs against Iraq
9 were not able to exercise their ability under the new
10 statute -- that's 28 U.S.C. section 1605A -- but the
11 only reason they were not allowed to do that was the
12 President's waiver, and the President's waiver was
13 expressly made applicable both to pending cases and to
14 pre-existing claims.

15 So, for both of those reasons, the -- the
16 alternative ground is also one that warrants reversal.

17 JUSTICE GINSBURG: Were there judgments,
18 outstanding judgments that had become final -- judgments
19 outstanding against Iraq, that were not challenged on
20 appeal?

21 MR. FRANKLIN: There's at least two that I
22 am aware of, two default judgments. They are -- they
23 are cited in our brief. And the effective ability of
24 those default judgment creditors, as it were, to execute
25 on those judgments would depend on the application of

1 the new statutes that Congress enacted about judgment
2 execution. Those are not at issue in this case. But
3 the answer to your question is yes, there were at least
4 two judgments that I am aware of that were default
5 judgments where Iraq had not appeared and did not
6 contest the case.

7 JUSTICE GINSBURG: And you're not claiming
8 that those could be reopened?

9 MR. FRANKLIN: We are not claiming in this
10 -- in this proceeding they could be reopened. We're
11 actually not claiming -- we haven't claimed in any
12 proceeding that they can be reopened. But there is a
13 serious question as to whether or not the plaintiffs
14 would be able to execute in the United States on those
15 judgments. Also, they are default judgments and so they
16 are subject to all of the usual rules to the extent
17 about reopening default judgments, not on the grounds of
18 this sovereign immunity issue, but on the normal grounds
19 of reopening of default judgments. So, to the extent
20 there are such bases, I don't want to give up on those.

21 But we're not -- we're not making -- this
22 argument's immunity argument today applies to these
23 pending cases and the ability of courts to enter
24 judgments, not to existing default judgments, but the
25 execution on those judgments may well be affected by the

1 arguments we are making today.

2 In the final analysis, I think this -- this
3 is a case that turns ultimately on the President's
4 exercise of his foreign affairs powers as delegated to
5 him by Congress. The Court has traditionally given the
6 executive a fair amount of leeway and deference in this
7 field. In this case, I think that's particularly
8 appropriate, given that these foreign policies are among
9 the most significant facing the United States today.

10 It's --

11 CHIEF JUSTICE ROBERTS: I take it your
12 argument would be no different if this involved some
13 other area. It doesn't depend upon the deference under
14 the foreign affairs --

15 MR. FRANKLIN: No, it doesn't depend on it,
16 and -- but I do think it's important to recognize that
17 the President was acting in that -- in that field when
18 he made these determinations, and to also recognize that
19 these determinations -- the foreign policy of the United
20 States has not changed. It is still towards supporting
21 the people of Iraq and it's supporting the ability of
22 the people to rebuild their country and also their new
23 democratic government, and all of those policies would
24 be thwarted or seriously disrupted if the Court were to
25 hold that Iraq's sovereign immunity has been abrogated

1 in these cases.

2 JUSTICE SCALIA: I also gather that the
3 ability of the President or the United States to seek
4 some compensation from Iraq through diplomatic channels
5 on behalf of these plaintiffs is not affected at all by
6 this outcome, right?

7 MR. FRANKLIN: Absolutely not, Your Honor.
8 That is the way that these kinds of claims have always
9 been addressed in the past, and these are the way that
10 these kinds of claims, particularly between friendly
11 allies, ought to be addressed. And I would think that
12 in this instance the Court in its Republic of Peru case
13 probably said it best -- and I'm just going to quote
14 from the last page of our brief. The Court said: "Our
15 national interest will be better served in such cases if
16 the wrongs to suitors, involving our relations with a
17 friendly foreign power, are righted through diplomatic
18 negotiations rather than the compulsions of judicial
19 proceedings."

20 CHIEF JUSTICE ROBERTS: That's before the
21 Foreign Sovereign Immunities Act, right?

22 MR. FRANKLIN: That is true, but these --
23 this case involved the doctrine of foreign sovereign
24 immunity, and it embodies the same concerns of
25 reciprocity that were at issue then.

1 If I might, I'd like to reserve the
2 remainder of my time for rebuttal.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Hallward-Driemeier.

5 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

6 ON BEHALF OF THE UNITED STATES,

7 AS AMICUS CURIAE,

8 SUPPORTING THE PETITIONERS

9 MR. HALLWARD-DRIEMEIER: Mr. Chief Justice,
10 and may it please the Court:

11 EWSAA section 1503 authorized the President
12 to make inapplicable with respect to Iraq any provision
13 of law that applies to countries that have sponsored
14 terrorism. The terrorism exception to the Foreign
15 Sovereign Immunities Act falls squarely within the plain
16 language of that authority, but if there were any
17 question about that, certainly the President's exercise
18 of his authority under that statute would be entitled to
19 deference.

20 Even if one were to add the atextual
21 additional limitation that the Acree court majority
22 tried to, that it only encompassed statutes that would
23 stand as an obstacle to the funding of the Iraqi regime
24 in the aftermath of removing the Hussein government,
25 still the President's memorandum to Congress makes clear

1 his determination that the threat of billions of dollars
2 of judgments against Iraq and the seizure or freezing of
3 their assets by attachment constituted an immediate
4 threat to the foreign policy interests of the United
5 States and our critical foreign policy goals in Iraq.

6 JUSTICE GINSBURG: I thought we were just
7 told that because there -- of the limitations on
8 enforcement, the -- there would be no realistic threat
9 to the Iraqi assets in the United States because the
10 judgment creditor wouldn't have access to them.

11 MR. HALLWARD-DRIEMEIER: That is because of
12 the authorities that the President exercised under the
13 second proviso of 1503. There are exceptions to the
14 immunity of foreign states with respect to attachment.
15 There is one that specifically applies to countries that
16 have been designated as having sponsored terrorism, and
17 that exception as well was rendered inapplicable to Iraq
18 pursuant to this same authority.

19 And so, again, it is essential to the
20 government's foreign policy interests in Iraq that these
21 judgments, the ability to attach Iraqi assets -- in
22 fact, at the time, in the summer of 2003, there were
23 plaintiffs that were running around trying to attach the
24 very assets, the very bundles of cash, that the United
25 States Government was attempting to ship to Iraq in

1 order to pay immediate needs in -- in Iraq in the
2 immediate aftermath of having removed the Hussein
3 regime. These critical foreign policy goals would have
4 been frustrated had the President not been able to make
5 our Foreign Sovereign Immunity Law conform to our
6 foreign policy.

7 And, of course, the Court in *Altmann*
8 recognized that foreign sovereign immunity is an
9 expression of our present foreign policy interests.
10 That has always been the case. And although Congress
11 can establish the general rule, and did in the FSIA,
12 section 1503 recognizes that there had perhaps never
13 been as dramatic a transformation in our foreign policy
14 with respect to a country as happened in the spring of
15 2003; whereas there had been a whole panoply of
16 sanctions and other provisions of law that had applied
17 to Iraq because of the Hussein regime's sponsorship of
18 terrorism. On a -- on a dime, our policy shifted
19 180 degrees, and we became intensely concerned in the
20 success of the new Iraqi regime.

21 JUSTICE GINSBURG: Is -- is all of this -- I
22 won't say "academic," but it ultimately doesn't matter
23 if the D.C. Circuit was right in that *Acree* case in
24 saying, well, 1605(a)(7) allowed suit against Iraq, but
25 there's no cause of action.

1 MR. HALLWARD-DRIEMEIER: No, Your Honor.
2 The judgment in the Acree case dismissing the claims for
3 failure to state a claim was because counsel in that
4 particular suit was unable to identify a source of law
5 for their claim. The D.C. Circuit has correctly held
6 that Federal law did not at that time provide a cause of
7 action under 1605(a)(7), and counsel was unable when
8 pressed at oral argument to identify the source of law.

9 But numerous district court judgments exist
10 where the courts have upheld the availability of
11 transitory tort under the law of the forum State, under
12 the law of the residence of the plaintiff, or under the
13 law of the -- of the place where the wrong occurred to
14 provide a cause of action. So --

15 JUSTICE GINSBURG: Where the wrong occurred
16 would have been Iraq.

17 MR. HALLWARD-DRIEMEIER: That's -- that's
18 right. And -- and, of course, the courts have to apply
19 a choice of law analysis. As I said, a number of these
20 judgments apply the law of the forum State where the
21 plaintiff resided. The United States has expressed its
22 view that there are constitutional limitations on the
23 ability of a State to project its substantive law to a
24 tort that occurs abroad, but -- but those issues have
25 not yet I don't think been resolved by the D.C. Circuit,

1 at least.

2 So plaintiffs have successfully obtained
3 judgments in suits brought under 1605(a)(7). And there
4 were billions of dollars in claims that were asserted
5 against Iraq. And -- and, as I said, plaintiffs were
6 actively going and trying to seek the actual money that
7 the United States was trying to transfer over to Iraq to
8 pay immediate costs of the reconstruction.

9 But this does not mean -- and I think
10 Justice Scalia's question was critical here. It does
11 not mean that the plaintiffs are left without any
12 remedy, rather that these plaintiffs have been put on
13 the same footing as any other claimant against a foreign
14 state that is not on the very small list of designated
15 state sponsors of terrorism. Their claims are subject
16 to state-to-state diplomatic resolution. And, in fact,
17 there have been discussions -- there are ongoing
18 discussions -- to establish a framework for resolving
19 the claims against the Hussein regime.

20 JUSTICE GINSBURG: Wouldn't any such
21 settlement have to take into account that Iraqi -- the
22 Iraqi people themselves were the most numerous and
23 probably the worst victims of the terror?

24 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I
25 think that -- that that is one consideration. The

1 United Nations has established a mechanism for funding
2 many of the victims of the Hussein regime. And -- and
3 -- but the United States would have the obligation to
4 represent the interests of the United States citizens
5 that were injured. But, as -- as Your Honor's question
6 points out, there are a lot of considerations that go
7 into the diplomatic or state-to-state resolution of the
8 claim beyond those that would be available to a court to
9 consider in just adjudicating the particular plaintiff's
10 claims. And that is why these have historically been
11 reserved for diplomatic resolution. So --

12 CHIEF JUSTICE ROBERTS: Well, you don't
13 doubt, in absence of the waiver, that this is a claim
14 that could proceed under the Foreign Sovereign Immunity
15 Act?

16 MR. HALLWARD-DRIEMEIER: No. No, I don't.
17 And -- and Congress has established as a means to deter
18 further acts of terrorism by states that have been so
19 designated --

20 CHIEF JUSTICE ROBERTS: And that claim could
21 --

22 MR. HALLWARD-DRIEMEIER: -- for the
23 abrogation of immunity.

24 CHIEF JUSTICE ROBERTS: Putting aside the
25 waiver, that claim could proceed despite the fact that

1 there has been a change in the governing authority in
2 Iraq?

3 MR. HALLWARD-DRIEMEIER: That's right. The
4 -- the general rule that Congress established in
5 1605(a)(7) was that the jurisdiction of the courts would
6 continue for any claim that arose from acts committed
7 while the state was designated. But the authority that
8 the President was given in 1503 was to render those
9 statutes immediately inapplicable to Iraq. And, of
10 course, it would not be inapplicable to Iraq to hold
11 that today a court would have jurisdiction over Iraq and
12 authority to enter a judgment against Iraq pursuant to
13 1605(a)(7). It would be application of that statute.

14 So the only way that one can give full
15 effect to the plain language of the statute, "make
16 inapplicable," is to say that as soon as the President
17 exercised that authority, 1605(a)(7) became
18 inapplicable, unavailable, as a basis of exercising
19 jurisdiction over Iraq.

20 JUSTICE GINSBURG: You said that there
21 should be deference to what the executive did because of
22 his role in foreign affairs. But in the Foreign
23 Sovereign Immunities Act, Congress deliberately withdrew
24 what had been the executive's traditional authority and
25 said: President, no more; we are going to set rules of

1 how sovereign immunity will operate.

2 MR. HALLWARD-DRIEMEIER: That is true. And
3 in 1503, Congress restored to the President in a sense a
4 very small portion of the authority he had previously
5 exercised before the FSIA's adoption. 1605(a)(7) on its
6 own terms turns on determinations by the executive.
7 It's a statute that can be turned on and turned off by
8 designating or de-designating a country. It has a
9 particular temporal consequence, the rule that -- that
10 the Chief Justice alluded to.

11 In 1503, the Congress gave the President a
12 different authority to turn that statute off, the
13 authority to make it inapplicable only with respect to
14 one country, Iraq, and in the context of the most
15 dramatic transformation of foreign relations that --
16 that could transpire.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Goldstein.

19 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

20 ON BEHALF OF THE RESPONDENTS

21 MR. GOLDSTEIN: Mr. Chief Justice, and may
22 it please the Court:

23 The Court will want to have available to it
24 the blue brief for the Petitioners and Joint Appendix
25 Volume 2, which together reproduce the statutes that are

1 relevant to this case. And I do want to talk about the
2 text of the statutes.

3 And the point that I'm going to make from
4 the text of the statutes is that the Solicitor General
5 just correctly described to you what it was that
6 Congress was trying to accomplish when he said that the
7 structure of -- of 1605(a)(7) of the Foreign Sovereign
8 Immunities Act says, if you are the victim of torture by
9 a nation designated as a state sponsor of terror and
10 that designation changes so that you are no longer on
11 that list, then you still have a cause of action under
12 the FSIA. The fact that the country changes its ways
13 and gets de-designated doesn't change that result.

14 Now, what the Solicitor General says is that
15 Congress changed that rule in 1503, and that's the
16 debate in this case: Did Congress, when it said that
17 the President may make inapplicable various statutes --
18 which they say include section 1605(a)(7), did it change
19 the basic rule about what the effect of a designation
20 and a rescindment of a designation was, or instead was
21 it giving the President a special power to remove the
22 designation?

23 If all it was doing was giving the power to
24 the President to immediately rescind Iraq's designation
25 as a terrorist state, if it was a more modest power

1 rather than effectively writing into 1605(a)(7) "except
2 for Iraq," if it's just a power about rescindment, then
3 the rule of 1605(a)(7) that the Solicitor General just
4 cited to you, that changing somebody's designation
5 doesn't affect their liability, would apply here. So
6 just put it in terms --

7 JUSTICE SOUTER: Why would -- why would
8 Congress have wanted to make that distinction?

9 MR. GOLDSTEIN: Let's -- let me take you to
10 the reason, and that is in Joint Appendix Volume 2.
11 Section 620A of the Foreign Sovereign Immunities Act is
12 reproduced at 344. And this is the way that a
13 country -- that that -- that a statute relating to
14 torture and terrorism is made applicable and made
15 inapplicable under ordinary processes to a nation.

16 So to explain it to you, right now Syria,
17 Iran, and Sudan -- this statute applies to them. It is
18 inapplicable to Libya and North Korea. And the reason
19 is that Libya and North Korea were originally designated
20 --

21 JUSTICE SCALIA: It's a long section. Which
22 part of the section are you --

23 MR. GOLDSTEIN: I'm going to take you
24 straight to the text. I'm giving you the overview right
25 now.

1 So, they were de-designated. It works in
2 two parts; (a) is the prohibition. This is how you get
3 designated. "Prohibition. The United States shall
4 not" --

5 JUSTICE SOUTER: Okay. Where -- where are
6 you?

7 MR. GOLDSTEIN: Sorry. I'm at 344, and I'm
8 in "(a) Prohibition."

9 JUSTICE SOUTER: Okay.

10 MR. GOLDSTEIN: Okay, this is how you get
11 designated: "Prohibition. The United States shall not
12 provide any assistance under this Act" -- this is our
13 principal foreign aid statute -- "the Agricultural
14 Trade, Development, and Assistance Act of 1954, the
15 Peace Corps Act, or the Export-Import Bank Act of 1945
16 to any country" -- and here's how you get designated "if
17 the Secretary of State determines that the government of
18 that country has repeatedly provided support for acts of
19 international terrorism." So we've designated Syria,
20 Iran, and Sudan.

21 Now, that designation can be rescinded, and
22 that's usually what happens. But there are important
23 restrictions on the rescindment that gave rise to the
24 enactment of section 1503, and they are in "(c)
25 Rescission." The Congress limited the President's

1 ability to immediately rescind the designation: "A
2 determination made by the Secretary of State under
3 subsection (a) ... may not be rescinded unless" -- and
4 there are two rules. It can happen in one of two ways.
5 The first is you get a new government: "(A) there has
6 been a fundamental change in the leadership and policies
7 of the government of the country concerned." Or, number
8 (2), the old government changes its ways. That's
9 (2)(a): "the government concerned has not provided any
10 support for international terrorism during the preceding
11 6-month period."

12 So here's the dilemma -- and,
13 Justice Souter, this is the complete explanation for why
14 Congress gave the President the power it did in section
15 1503. Remember, when the EWSAA is enacted, there's a
16 whole discussion in the first 30 minutes about the new
17 regime. There was no new regime. The -- there was a
18 discussion about how the Saddam Hussein regime had been
19 toppled. No, it hadn't.

20 When the EWSAA had been enacted -- was
21 enacted, Baghdad had fallen 7 days earlier. There was
22 no new Iraqi government. We would not recognize an
23 Iraqi government until June of 2004 --

24 CHIEF JUSTICE ROBERTS: Well, there may have
25 not been a new one, but there certainly wasn't the old

1 one either.

2 MR. GOLDSTEIN: Yes. But, Mr. Chief
3 Justice, I'm making a very particular point, and that is
4 that the President lacked the power under this statute
5 that I have just cited to you, 620A -- and it's also the
6 statute that's cited in 1503 -- the President lacked the
7 power at that time because there was no new government
8 and there wasn't a change in policy in the old
9 government --

10 JUSTICE KENNEDY: But there's nothing better
11 settled -- well, perhaps that's a broad view. It is
12 very well settled that the President is the one to
13 determine who is the lawful and legitimate government
14 that he would deal with. And that's all --

15 MR. GOLDSTEIN: That's exactly --

16 JUSTICE KENNEDY: That's all that was
17 happening here. And it's not just a question of one
18 against the other. It's a question of what government
19 has survived.

20 MR. GOLDSTEIN: Exactly right --

21 JUSTICE KENNEDY: And that is under -- and
22 under our law something that has always been committed
23 to the very large discretion of the President.

24 MR. GOLDSTEIN: I couldn't agree with you
25 more, Justice Kennedy. And here's the relevant point.

1 In the spring of 2003 when Congress enacted this
2 statute, we had not recognized a new Iraqi government.
3 We did that in June of 2004. So my point is -- and I
4 think this is very clear from the history -- Congress
5 enacted section 1503 of the EWSAA because the President
6 was powerless under the existing state of the law to
7 rescind Iraq's designation as a terrorist state. That's
8 what --

9 JUSTICE SOUTER: But -- but it was -- the
10 text of it was not limited to rescinding that
11 designation. I mean, that's the problem, it seems to
12 me.

13 MR. GOLDSTEIN: Okay. Well, let's go to the
14 text, if we could, and that is in the blue brief. It's
15 in the appendix to the blue brief, and it's at 4a. And
16 it's the second proviso, of course, and it appears seven
17 lines down.

18 "Provided further, that the President may
19 make inapplicable" -- that's the language that we are
20 going to focus on, Justice Souter -- "make inapplicable
21 with respect to Iraq" -- and then it identifies the
22 statute -- "section 620A of the Foreign Assistance Act
23 of 1961 or any other provision of law that applies to
24 countries that have supported terrorism."

25 Now, we have -- we are putting aside the

1 debate of whether section 1605(a)(7) is such a law. We
2 are assuming it is. And you say, Justice Souter, but he
3 is given the power to make inapplicable section
4 1605(a)(7). He isn't just given the power to rescind
5 the designation.

6 And the question -- the term "make
7 inapplicable" doesn't appear in this context anywhere
8 else in the U.S. Code. We have to figure out what it
9 means. And the way that laws that apply to countries
10 that have supported terrorism apply or are rendered
11 inapplicable, there is a method in the U.S. Code for how
12 they are made applicable and inapplicable.

13 So, to return to my examples. If you were
14 to ask the United States or Mr. Franklin -- so this
15 statutory scheme of laws -- sanctions that apply to
16 nations that have supported terrorism -- applies to
17 Syria, to Iran, it applies to Sudan. It is inapplicable
18 to Libya, North Korea, Guinea-Bissau, Britain, France.
19 How is it that they it apply to some and not apply it to
20 others? It's through designation. That's the process
21 for taking something that applies and make it
22 inapplicable. And I can -- I can give you a lot of
23 other --

24 JUSTICE GINSBURG: But this statute
25 specifically short-circuits that process. It says the

1 President may at once make inapplicable. The very
2 purpose of it is that the normal process is going to
3 take time, and therefore it's being replaced with an
4 emergency measure that becomes effective immediately.

5 MR. GOLDSTEIN: Yes, the de-designation
6 becomes effective immediately. What -- the distinction
7 that I am drawing is that there is a strong version of
8 the words "make inapplicable," and there is a more
9 modest version of the words "make inapplicable."

10 Iraq and the United States say that when he
11 made it inapplicable, he in effect essentially wrote it
12 out of the U.S. Code or wrote in an exception that says
13 "except for Iraq." We say that "make inapplicable" in
14 this context is a term of art that deals with
15 designation and rescindment. And that process is all
16 that Congress was trying to do, was to allow the
17 President to immediately --

18 JUSTICE SOUTER: All right. Let's -- let's
19 assume --

20 MR. GOLDSTEIN: Yes.

21 JUSTICE SOUTER: -- for the sake of
22 argument, that the -- the reasons for -- otherwise the
23 reasons for and against the point you've just made are
24 evenly balanced. We're on the fence. Don't we resolve
25 this -- shouldn't we resolve this in favor of the

1 President's position, simply because in the absence of
2 the statutes that we're talking about, starting with the
3 Foreign Sovereign Immunities Act, the President would
4 have had, under the foreign policy power of Presidents,
5 the -- the authority to stop suits like this dead
6 in the water simply by taking the position that that
7 should be the result? So that, if in doubt,
8 shouldn't we construe these statutes consistently with
9 the traditional foreign policy authority of the
10 President, in which case we get off the fence and we go
11 in -- the way of the Petitioners, rather than your way?

12 MR. GOLDSTEIN: I would say no, because that
13 regime, as was indicated in the first 30 minutes, has
14 been profoundly changed by the enactment of the FSIA.
15 We adopted a different --

16 JUSTICE SOUTER: Well, it's been profoundly
17 changed if we accept your argument. I mean, if -- at
18 the moment the question is whether it has been
19 profoundly changed or not. We've got a statutory mess.
20 And in -- in a case in which the statutes are seemingly
21 subject to -- to arguments either way, why don't we go
22 with tradition?

23 MR. GOLDSTEIN: Okay. Well, I -- I do want
24 to come to whether we are in equipoise in just a second.
25 I do think the fact that Congress changed the model so

1 that we don't use, in effect, the Tate Memorandum model.

2 Second, remember, Justice Souter, that this
3 isn't a return to that model. What used to happen
4 before the FSIA is the President would come into court
5 and say, I think that this nation has immunity. And the
6 court would decide on the basis of that case by case.
7 But it was the President making the determination, case
8 by case. This is something unknown. This is very
9 different, if I could just explain how on their --

10 JUSTICE SOUTER: Yes, but the President --
11 quite apart from the immunity designation, the President
12 had the authority to compromise suits.

13 MR. GOLDSTEIN: Well, fine, and if that
14 espousal power continues to exist, then the President
15 can attempt to exercise it.

16 JUSTICE SOUTER: I don't know whether it
17 continues to exist or not, for the sake of this
18 argument, and I'm not -- I'm not making that point for
19 the sake of this argument. I'm simply saying that if it
20 is otherwise unclear, given that that power was
21 traditionally enjoyed by the President, why do we not
22 construe the -- or resolve the equipoise, if it gets to
23 that point, in the President's favor rather than in your
24 favor?

25 MR. GOLDSTEIN: Okay. So the -- two

1 reasons, the first is this is not an attempt at
2 espousal, unlike Dames & Moore and cases like that.
3 Remember the President hasn't set up some sort of
4 mechanism for resolving these claims. He is simply
5 saying that they are --

6 JUSTICE SOUTER: Well, he hasn't set it up
7 because he thinks he's got the authority under this
8 statute or had the authority under this statute.

9 MR. GOLDSTEIN: Justice Souter, it wouldn't
10 work like that. If the President were engaging in an
11 act of espousal, then he would have set up some
12 mechanism for resolving the claims --

13 JUSTICE SOUTER: Oh, I -- I quite -- I quite
14 agree with that.

15 MR. GOLDSTEIN: So can I --

16 JUSTICE SOUTER: But I suppose the first
17 step in that direction is to stop the suit that's going
18 on now.

19 MR. GOLDSTEIN: Well, the President
20 purported to do that 9 -- excuse me -- 5 or 6 years ago,
21 and if he were going to set up a mechanism, I think he
22 would have.

23 But can I then just come to the premise of
24 whether we are --

25 JUSTICE GINSBURG: But why -- why shouldn't

1 we treat this -- yes, the Foreign Sovereign Immunities
2 Act said Congress is setting the rules. But why doesn't
3 this emergency measure effectively restore to the
4 President under these special circumstances the power
5 that he once had? Congress ceding back to the
6 President, for the purposes of dealing with Iraq,
7 the authority -- the control authority he once had?

8 MR. GOLDSTEIN: Okay. So let's -- if I
9 could accept the premise that -- and not try and combat
10 the premise of what we would do in the case of
11 equipoise, let me turn to the question of what statute
12 really means and why we shouldn't be in equipoise. The
13 Court generally has not assumed that emergency
14 appropriations measures, particularly their provisos,
15 changed the jurisdiction of the Federal courts, much
16 less give the President the power to change the
17 jurisdiction of the Federal courts. And it has, in
18 related contexts, taken language like "any provision"
19 and said, well, we are looking for a clear statement of
20 law by Congress to make sure that it has confronted this
21 situation.

22 When it attempts to -- when the argument on
23 the other side is that the Congress has passed a law
24 that shifts the balance of power between Congress and

1 the legislature and the executive in cases like
2 Atascadero, in cases like Raygor, Will -- these are all
3 cases that had said statutes that said "any," and the
4 Court said, well, because this a -- a relatively strange
5 thing to find in a proviso to an appropriations measure,
6 for example, we would ask that there be a clear
7 statement. So that would be one reason that we are not
8 in equipoise.

9 JUSTICE ALITO: But as a practical matter,
10 isn't this closely associated with appropriations and
11 with foreign aid? The issue is -- billions of dollars
12 were going to be needed to reconstruct Iraq in -- in the
13 wake of the war, and the money could be provided
14 directly by the United States through foreign
15 assistance, which is part of the thrust of -- of this
16 provision, certainly. And the argument is that this is
17 closely related to it, because it freed up other money
18 that would be used for reconstruction. So why is there
19 anything odd about this being in an appropriations
20 provision?

21 MR. GOLDSTEIN: Because this -- well,
22 because what Congress was doing was confronting an
23 emergency. There is not a breath, in either the
24 President's transmittal of the statute, the legislative
25 history of the statute, or anything else that says that

1 Congress was dealing with the sort of medium- to
2 long-term health of the Iraqi population or the Iraqi
3 government or the Iraqi economy. It didn't -- one thing
4 you would have expected if that was Congress's intent is
5 that Congress would have dealt with Iraq's debts, Saddam
6 Hussein's debts, and you would have also expected that
7 this provision wouldn't sunset, which is the eighth
8 proviso, which hasn't been discussed very much --

9 JUSTICE SCALIA: Why -- why does it say then
10 "any other provision of law"? You know, Congress could
11 have explained its more narrow purpose in a few words.

12 MR. GOLDSTEIN: Well --

13 JUSTICE SOUTER: And I mean, just to add to
14 that --

15 MR. GOLDSTEIN: Yes.

16 JUSTICE SOUTER: It says, "under 620A of
17 Foreign Assistance ... or any other provision of law."
18 Clearly, they are going beyond, it seems to me, the --
19 the premise which your argument rests on, the argument
20 that you just made.

21 MR. GOLDSTEIN: Oh, Justice Souter, I don't
22 think that that -- let me, if I could take the
23 two points in turn. In cases like Atascadero, Will,
24 Raygor, it's the same language; it's "any." And the
25 Court has said we require a plain statement when

1 Congress is going to do something that would change the
2 balance in the relationship between the branches of the
3 government or between the Federal and State governments.

4 And, Justice Souter, we don't deny it goes
5 beyond section 620A of the Foreign Assistance Act; it
6 goes to other things that involve aid to the Iraqi
7 government. What it doesn't do is reach pending --

8 JUSTICE SOUTER: Okay. Fine. But there is
9 no textual basis for drawing the line once you get
10 beyond 620A at the point you want to draw it.

11 MR. GOLDSTEIN: I actually do disagree and
12 believe that you can logically look at the statute -- in
13 the sense that the word "any" means "every," that is
14 true. But if you look at what Congress was trying to
15 accomplish, it was much more focused on questions of the
16 immediate economic impact of the need to begin
17 reconstruction in Iraq right away.

18 JUSTICE STEVENS: Mr. Goldstein, could I ask
19 this question? You're reading into it the exception for
20 the words "any other provision of law." And I can
21 understand your argument in one of two ways, and I want
22 to be sure which. Are you saying it means any other
23 provision of the law except those that affect the
24 jurisdiction of courts? Or are you saying any other
25 provisions of law that relate to foreign assistance?

1 MR. GOLDSTEIN: I am saying that except for
2 those that relate to jurisdiction, because that is the
3 kind of thing that you would expect Congress to deal
4 with directly.

5 The answer to Justice Ginsburg's question in
6 the first 30 minutes is has this Court ever confronted a
7 statute and construed it to remove the jurisdiction of
8 the Federal courts without expressly saying so, is no.

9 JUSTICE BREYER: Can you -- I would like to
10 follow up on Justice Stevens's question. Think of three
11 categories, A is the category which you concede that
12 other questions of law apply to. B is this case. And C
13 is the other -- other things -- other things that it
14 might apply to, but in your opinion it would be absurd
15 to apply them to that. All right, what's in category C?

16 MR. GOLDSTEIN: If it's anything, it would
17 be the export of military hardware. In the immediate
18 wake of the fall of Baghdad, when there is no new
19 government, right? There is no replacement regime. If
20 you read "any" to mean literally "every," then you could
21 ship munitions, nuclear materials, and the like when
22 there is no state there, and it's silly to think that
23 Congress intended that. Its reasons for enacting the
24 statute had to be more --

25 JUSTICE BREYER: Wait, wait. After Saddam

1 Hussein falls --

2 MR. GOLDSTEIN: Yes.

3 JUSTICE BREYER: -- and we have a new
4 government --

5 MR. GOLDSTEIN: We don't have a new
6 government.

7 JUSTICE SCALIA: Oh --

8 JUSTICE BREYER: You mean some period of
9 days, or something?

10 JUSTICE SCALIA: Who's paying for these
11 shipments? I mean, is that a real problem when there's
12 nobody over there to pay for them? You are worried
13 about -- about armaments producers shipping -- shipping
14 goods when there's nobody who has ordered them and who
15 is going to pay for them?

16 MR. GOLDSTEIN: Well, it's not --

17 JUSTICE SCALIA: I mean, that's absurd.

18 MR. GOLDSTEIN: It's not entirely clear
19 there is still a government in Iraq.

20 JUSTICE BREYER: All right, is there any one
21 other than that?

22 MR. GOLDSTEIN: No.

23 JUSTICE BREYER: No. Okay.

24 MR. GOLDSTEIN: I think -- I think --

25 JUSTICE BREYER: So basically -- basically

1 your reading --

2 MR. GOLDSTEIN: Yes.

3 JUSTICE BREYER: -- is that the word "any
4 other" does apply to any other.

5 MR. GOLDSTEIN: Yes.

6 JUSTICE BREYER: Except your case.

7 MR. GOLDSTEIN: Yes.

8 JUSTICE BREYER: And possibly this thing for
9 a couple of days.

10 MR. GOLDSTEIN: Yes.

11 JUSTICE BREYER: Well, that isn't exactly an
12 absurd result then, to say "any other" really means any
13 other including this case.

14 MR. GOLDSTEIN: Well, Justice Breyer, in --
15 the same point was made in cases like Atascadero and
16 Raygor. "Any" means "every" except for the States in
17 that example.

18 But can I just make quite clear, we have two
19 lines of argument, and I think it's important to
20 recognize that. We have the debate over what "any
21 other" means and does that include section 1605(a)(7).
22 That's what we have been discussing here, and the idea
23 that "any" means "every," and Congress spoke broadly and
24 so that's what we have.

25 But we have the other incredibly important

1 arguments of what it means to make a sanction
2 inapplicable, which is separate and independent of that
3 point, and the question of whether the statute sunset,
4 as the Acree court did. And I want to return the first
5 to those points of what it is to make inapplicable a
6 statute that applies to nations that have supported
7 terrorism. And I want to return to the statutory text
8 and explain why our more modest reading of "make
9 inapplicable" is the right one.

10 So the statutory text again is at 4a. Here
11 are, I think, the strong statutory indications that we
12 are right, that what Congress was trying to do was to
13 allow the President to immediately de-designate Iraq as
14 a terrorist state. First, there is a direct parallel
15 between the language "a statute that applies to
16 countries that have supported terrorism" and the
17 directive that the President can make it inapplicable.
18 That tells you, look at how it is that these statutes
19 apply in the first place, and the linguistic term of art
20 is to do the reverse. Take something that applies and
21 make it inapplicable.

22 And something that applies to an -- statutes
23 apply to countries that have supported terrorism under
24 American law only in one way, through designation. And
25 what happens is that the President was allowed to

1 rescind it.

2 The second textual reason for our more
3 modest reading of "make inapplicable" is the reference
4 to section 620A of the Foreign Assistance Act. So we
5 know one thing: Even if we debate and disagree, Justice
6 Breyer, about what "any" means in this context, we know
7 that Congress told the President that he could
8 immediately make inapplicable section 620A --

9 JUSTICE SOUTER: Why did -- why did he need
10 the statute to do that? In other words, if the
11 President had the power to designate in the first place,
12 normally that assumes the power to -- to rescind the
13 designation.

14 MR. GOLDSTEIN: That's exactly right, but
15 that's the point. When I took you to the text of 620A,
16 which was at 344 of the Joint Appendix Volume 2,
17 Justice Souter, he didn't have the power to do it right
18 away. Remember, Baghdad falls; there is no new
19 government; and the old government hasn't changed its
20 ways. So he lacks the power to remove the designation.
21 And I can prove that to you. It wasn't until there was
22 a new government that the President actually did
23 formally rescind the designation pursuant to the Foreign
24 Assistance Act. It wasn't until 2004. After --

25 CHIEF JUSTICE ROBERTS: But that's -- that's

1 just a belt-and-suspenders act. I mean, he -- he has
2 the authority here, and he -- although it may look
3 difficult, he has to envision there may be people who
4 challenge that -- his interpretation of the law. So he
5 says, there's the other provision, and I'll make it
6 inapplicable under that as well.

7 MR. GOLDSTEIN: I -- I disagree, but we'll
8 accept that. Mr. Chief Justice, my point isn't, hey,
9 look, he himself acknowledged that he needed to exercise
10 his de-designation power. My point is different, and
11 that is the fact that he didn't do this under the
12 Foreign Assistance Act until 2004 is a strong indication
13 that he couldn't do it before. If he could have done it
14 before, he would have.

15 JUSTICE SOUTER: And it may also be an
16 indication that he thought he had effectively
17 accomplished what he wanted by -- by acting under this
18 statute, and therefore he had other fish to fry.

19 MR. GOLDSTEIN: I -- I don't understand,
20 Justice Souter, why he would in 2004, after a new
21 government is recognized, suddenly decide to
22 de-designate Iraq. There wasn't any -- the only --

23 JUSTICE SOUTER: I -- I don't know, either.
24 I mean, I can't -- I can't read minds, but there is an
25 interpretation that is quite possible consistent with

1 the text of this statute, that he thought that by acting
2 under 1503, he had done everything that he needed to do.
3 Why he at some subsequent time said, well, you know,
4 I'll -- I'll use belt as well as suspenders, I don't
5 know. But it would be consistent with the assumption
6 that he had the authority here.

7 MR. GOLDSTEIN: Well, it -- I agree it would
8 be consistent with the assumption that he had the
9 authority here. That's -- I'm not trying to negative
10 that. What I'm trying to say is that the authority
11 under 620A -- the fact that he exercised it in 2004 is a
12 strong indication that that's -- it's not the only
13 possible reading, but it's a strong indication that
14 that's when he thought he got the power. The --

15 JUSTICE GINSBURG: But, Mr. Goldstein,
16 before you finish your argument, I'd like to know what
17 you think about the claim for relief. The D.C. Circuit
18 said this is a mere jurisdictional provision and it
19 doesn't provide a private right of action. The new
20 statute does, but that doesn't apply to Iraq. So, what
21 was the source of the claim -- what is the source of
22 these plaintiffs' claim for relief?

23 MR. GOLDSTEIN: The Solicitor General has it
24 right. Post-Acree, these claims -- these types of
25 claims were pleaded principally as State-law claims, and

1 that has been recognized as providing a substantive
2 cause of action.

3 JUSTICE GINSBURG: Which -- which State law?

4 MR. GOLDSTEIN: The State law generally of
5 the home State of the plaintiffs.

6 JUSTICE GINSBURG: So that -- by that
7 reasoning, people all over the world could sue the
8 United States in their courts alleging that the United
9 States has engaged in cruel and inhuman treatment with
10 respect to their nationals. The same theory would apply
11 -- use the law of the state where the national comes
12 from. So, it could be Iraq, could be Belgium, could be
13 Yemen -- any place. So -- but the claim that you are
14 saying exists would be a kind of universal one, if it's
15 -- the United States could use it, any other place in
16 the world could, too.

17 MR. GOLDSTEIN: Well, that is clear -- well,
18 in -- in terms of whether or not a foreign country would
19 look to our law and say, well, we're just doing the same
20 thing as you do, that would arise from -- also from new
21 section 1605A.

22 JUSTICE GINSBURG: No. Looking to their own
23 law.

24 MR. GOLDSTEIN: Yes, I understand,
25 Justice Ginsburg. Section -- for example, section

1 1605A, the statute that's created by the 2008 NDAA,
2 creates an affirmative U.S. cause of action. There is
3 always going to be an underlying domestic cause of
4 action that underlies the FSIA, whether it's State law
5 or instead it's Federal law. That is a -- a debate
6 about whether the FSIA is a good statute or not, but
7 it's one that Congress has resolved --

8 JUSTICE SCALIA: Well, no. I mean, it's
9 also a debate as to whether the call on that question
10 should be a Federal one or a State one, whether -- there
11 are all sorts of conditions attached to the -- the suits
12 that are allowed under 620A. And you are saying that,
13 even without those conditions, any State -- Oklahoma --
14 can decide Americans can -- can sue foreign countries.

15 MR. GOLDSTEIN: Well, Justice Scalia, the --
16 the source of the underlying cause of action is not
17 presented by this case. The D.C. Circuit has resolved
18 that question in our favor.

19 JUSTICE SCALIA: I know, but we have been
20 talking about it --

21 MR. GOLDSTEIN: Sure --

22 JUSTICE SCALIA: -- for a couple of minutes,
23 so we --

24 MR. GOLDSTEIN: Okay. I'm here to talk
25 about what you want to talk about, and all I'm --

1 JUSTICE SCALIA: I didn't start this.

2 (Laughter.)

3 JUSTICE GINSBURG: I did, and you can --

4 MR. GOLDSTEIN: All right.

5 JUSTICE GINSBURG: You can go back to your
6 jurisdiction argument.

7 MR. GOLDSTEIN: Okay. Maybe I can finish
8 it. The -- the -- I had said that I also wanted to
9 continue with the text, on the question of what it is
10 "to make inapplicable." I have pointed out how it is
11 that all of these statutes are applied and made
12 inapplicable. I also want to draw the contrast between
13 the two operative powers that are given to the
14 President. At the beginning, the statute says the
15 President may suspend the application of any provision
16 of the Iraq Sanctions Act, which is the kind of power
17 that they are talking about, essentially to lift the
18 statute; whereas, the term of art, we think, "make
19 inapplicable" in the context of these statutes is the
20 narrower power to de-designate the state as a state
21 sponsor of terror.

22 But let me just return, if I can --

23 CHIEF JUSTICE ROBERTS: If I could just
24 pause --

25 MR. GOLDSTEIN: Yes.

1 CHIEF JUSTICE ROBERTS: -- for a moment.

2 The -- the President in exercising this
3 waiver purported to act not only under the statute but
4 under the Constitution as well. So if we were to accept
5 your argument, we would have to decide whether or not he
6 had that power under the Constitution.

7 MR. GOLDSTEIN: I don't think the question
8 is presented here. It could have been an argument that
9 was made, but I don't believe it's presented by this
10 case.

11 CHIEF JUSTICE ROBERTS: Well, it's not
12 presented because your -- your friends on the other side
13 think the -- on a narrower ground, that the statute
14 applies. But if we agree with you and disagree with
15 that, it seems to me that he has an argument -- the
16 President has the argument that he has this authority
17 under the Constitution.

18 MR. GOLDSTEIN: I agree he has that
19 argument; he just hasn't made it in -- in this case --
20 in his -- in the Iraq's -- Iraq hasn't made it in the
21 cert petition, I should say, in the question on this
22 Court -- on which this Court granted certiorari.

23 I think to decide the debate, Justice
24 Souter, of whether we're in equipoise here and the
25 debate about whether or not the power here was grand or

1 instead more modest, we have to resolve the -- the
2 question of what it is that Congress intended to do in
3 this proviso to this emergency appropriations measure.
4 Was it confronting a very specific moment in time at
5 which Baghdad had just fallen and we needed to get
6 emergency -- emergency aid to Iraq? Or was it, instead,
7 fundamentally changing our foreign policy, making Iraq
8 an ally despite the fact that there wasn't even an Iraqi
9 government there? Was he given -- was Congress giving
10 the power to the President to immunize Iraq permanently
11 from liability under the FSIA, which doesn't even exist
12 with respect to our closest allies, Britain and France?
13 That is a significant over-reading of what --

14 JUSTICE SOUTER: Why -- why do you say
15 "permanently"?

16 MR. GOLDSTEIN: Because --

17 JUSTICE SOUTER: Just under -- just under
18 this statute, if he makes inapplicable, he can rescind
19 the action that made it inapplicable.

20 MR. GOLDSTEIN: I don't understand how,
21 Justice Souter. The -- the powers of the President
22 expired. This statute sunset. Their whole point is --

23 JUSTICE SOUTER: Well -- no, but during the
24 period in which the statute is applicable, I don't know
25 of any reason why he cannot change his designation of

1 inapplicability. So that the argument for a permanent
2 change in the foreign policy of the United States or the
3 -- or the powers relating to the foreign policy of the
4 United States doesn't seem to me a legitimate argument.

5 MR. GOLDSTEIN: That's fine while it was in
6 effect, but it's not anymore. Their point is that they
7 permanently made the FSIA -- the -- section 620A of the
8 Foreign Assistance Act in 2008 and 2009 inapplicable,
9 and that would be incredibly unusual. Why would we give
10 that power with respect to Iraq when we don't to our
11 very closest allies? Remember the statute expired, and
12 they say it's still in effect. That's their answer to
13 the sunset. It makes no sense at all.

14 The only thing that makes sense is to read
15 it in its context of being a modest attempt to deal with
16 an immediate problem. And section 1605(a)(7) says what
17 happens when you deal with that immediate problem. If
18 you change the designation of a state -- if they become
19 an ally, if they change their ways -- they are still
20 liable for the acts of torture they committed while they
21 were designated.

22 JUSTICE SCALIA: I think -- I think what
23 they say is that the designation remains in effect. I
24 don't think they say that the power to undesignate
25 disappears.

1 MR. GOLDSTEIN: I don't understand --

2 JUSTICE SCALIA: I'd be -- well, I'll ask
3 them, but I'd be surprised if it's --

4 JUSTICE SOUTER: Let me -- let me ask the
5 same question with respect to the new statute, the
6 "capital A" statute.

7 MR. GOLDSTEIN: Yes.

8 JUSTICE SOUTER: Would there be -- and I
9 just -- I don't know the answer to this. Would there be
10 authority under the "capital A" statute to undo the
11 designation?

12 MR. GOLDSTEIN: No. That -- that entire
13 provision was waived with respect to Iraq. And we're --
14 take section 620A --

15 JUSTICE SOUTER: Okay. He waived it, but
16 the question is whether he would have had the authority
17 to undesignate or -- or to rescind the designation of
18 inapplicability if he had wished to exercise the
19 authority under the "capital A" statute.

20 MR. GOLDSTEIN: I have no -- I'm not aware
21 of any provision of the 2008 NDAA that would have given
22 the President any such power. They say that on the day
23 the President exercised his -- his powers that the
24 Foreign Assistance Act, section 620A, became
25 inapplicable to Iraq, that sanction, and that that

1 inapplicability survived the sunset of the statute in
2 2005. How it would come back -- how it would come back
3 and continue to apply to Iraq in the case of a regime
4 change in Iraq, I have no idea at all.

5 JUSTICE GINSBURG: Congress could pass a
6 law.

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Franklin, you have 5 minutes remaining.

10 REBUTTAL ARGUMENT OF JONATHAN S. FRANKLIN

11 ON BEHALF OF THE PETITIONERS

12 MR. FRANKLIN: Thank you, Your Honor --

13 JUSTICE SCALIA: You want to clarify this
14 last part --

15 MR. FRANKLIN: Yes.

16 JUSTICE SCALIA: -- we have just been
17 discussing?

18 MR. FRANKLIN: It is not the position of the
19 Government of Iraq that in the very hypothetical
20 instance in which something would change that they could
21 not be redesignated. We believe they could be
22 redesignated. We believe that is also the position of
23 the United States. When we say "permanent," we mean as
24 opposed to just temporary. And I might add it is our
25 position that --

1 JUSTICE SCALIA: I thought you'd say that.

2 (Laughter.)

3 MR. FRANKLIN: It is our position that it
4 will be permanent because the Government of Iraq is now
5 a very strong ally of the United States in the fight
6 against terrorism, not a sponsor of it.

7 Just a few other points based on the
8 argument that just occurred. They are interpreting the
9 statute apparently now to say that the President only
10 had the power to rescind the -- the previous
11 designations, but that's not what the statute says. If
12 that's what Congress had meant, they would have done
13 that. They said "make inapplicable." And their entire
14 case depends on that statute being applicable today
15 because it serves as the abrogation of Iraq's sovereign
16 immunity, and it serves as the predicate for subject
17 matter jurisdiction.

18 It cannot be both applicable and having been
19 made inapplicable.

20 The other point that was mentioned -- and
21 also I would also say in this regard that our foreign
22 policy towards Iraq is different than our policy towards
23 other former state sponsors of terrorism. Libya, for
24 example, was taken off the list, but there was an
25 express requirement that Libya answer to the claims that

1 were before it. And, of course, that was because the --
2 the government that sponsored that terrorism, the -- the
3 Khaddafi government, was still in power.

4 Here we had gone into a country with U.S.
5 military force aided by our allies, and we had ousted
6 the regime, and we were seeking to support Iraq in its
7 efforts to rebuild.

8 There was a point about the de-designation
9 that was done in 2004. The Secretary of State -- and
10 it's cited at page 5 of the blue brief. The Secretary
11 of State said in the de-designation that it was largely
12 symbolic, or perhaps a belt and suspenders, but he said
13 it was largely symbolic in light of the prior EWSAA
14 determination. However -- and this is relevant to
15 something else that occurred -- the de-designation was
16 also necessary to allow military exports to Iraq because
17 under the proviso 3 of the EWSAA, military exports were
18 specifically exempted from the President's authority.
19 That also shows that Congress knew how to make
20 exceptions to the President's power when it wanted to.

21 And, finally, I would say that we do agree
22 with the analysis that Justice Souter has -- has
23 posited, and that is that this involves a lesser power
24 than the President could have exercised on his own
25 authority to -- to completely espouse the claims. It,

1 therefore, fits entirely within what is normally done in
2 these kinds of cases.

3 And, Justice Ginsburg, it is also the
4 position of the government of Iraq that Iraqi victims
5 ought to be included in any state-to-state diplomatic
6 negotiations. But that is a matter for the two
7 governments to resolve between themselves, and that is
8 one of the reasons why these kinds of claims have always
9 been resolved in that manner in the past. They are
10 reciprocal, bilateral concerns that affect two very
11 close allies. Those governments ought to be negotiating
12 and resolving those claims, whatever claims there are on
13 both sides, between the two of them.

14 If there are no further questions, thank
15 you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 The case is submitted.

18 (Whereupon, at 11:03 a.m., the case in the
19 above-entitled matter was submitted.)

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