

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DAVID J. BEDERMAN, ESQ.	
4	On behalf of the Petitioner	3
5	DOUGLAS HALLWARD-DRIEMEIER, ESQ.	
6	On behalf of the United States, as amicus	
7	Curiae	22
8	CARTER G. PHILLIPS, ESQ.	
9	On behalf of the Respondent	32
10	REBUTTAL ARGUMENT OF	
11	DAVID J. BEDERMAN, ESQ.	
12	On behalf of the Petitioner	55
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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4
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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 07-615, Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran versus Elahi.

Mr. Bederman.

ORAL ARGUMENT OF DAVID J. BEDERMAN

ON BEHALF OF THE PETITIONER

MR. BEDERMAN: Mr. Chief Justice, good morning, and may it please the Court:

At the heart of this appeal is a matter of statutory construction. Respondent received \$2.3 million in public funds under the Victims Protection and Terrorism Risk Insurance Acts. TRIA provides -- and this is at the blue brief, page 11a -- that a party electing to receive such funds must relinquish rights "with respect to enforcement against property that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal."

The property in question here is the Cubic judgment. Respondent renounced rights to attach the Cubic judgment because in Case B/61 before the

1 Iran-United States Claims Tribunal at The Hague, the
2 United States has demanded that any award Iran receives
3 in its claim against the United States be set off by the
4 amount of the Cubic judgment. This can only occur if
5 the Cubic judgment is released from Respondent's lien
6 and is remitted to Iran's Ministry of Defense.

7 CHIEF JUSTICE ROBERTS: Well, they could
8 have agreed that they have a bank account somewhere and
9 any amounts would be set off by that. That wouldn't
10 make that bank account at issue with respect to their
11 claims.

12 MR. BEDERMAN: No, in that scenario I agree
13 with you, Mr. Chief Justice, that that would not be
14 implicated, because I think the clear import of the
15 statutory language here that Congress is trying to
16 achieve is that being at issue -- as you'll notice, the
17 statutory provision in 201(c) is disjunctive. It refers
18 to claims against the United States -- at issue in
19 claims against the United States before an international
20 tribunal or that is the subject of an award. So I think
21 the disjunctive character of the statute might indicate
22 that the "at issue" prong includes a broader set of
23 property than would be indicated possibly by the
24 "subject of awards" --

25 CHIEF JUSTICE ROBERTS: So it doesn't matter

1 that Iran recognizes that this would be used to set off
2 a judgment it might obtain, because you just said, well,
3 they could -- a bank account could be used to set it
4 off, and that's not sufficient.

5 MR. BEDERMAN: Well, the mutual -- let me be
6 clear. The mutual position of Iran and the United
7 States before the claims tribunal is that the Cubic
8 judgment, because it's related to a claim within the
9 tribunal's jurisdiction -- and I think that's a key
10 limiting principle here -- the United States would not
11 be entitled to set off amounts in bank accounts that are
12 attributable to other parties or other aspects that are
13 not implicated in claims or defenses before the
14 tribunal.

15 So, clearly, an examination of the
16 tribunal's jurisdiction and the relevant claims or
17 defenses that are before the tribunal is relevant here.
18 Petitioner is not espousing a position before this Court
19 that any inchoate property located anywhere in the world
20 would be blanketed with immunity under this provision.
21 It's not necessary to reach that conclusion in order to
22 find for Petitioner here.

23 JUSTICE GINSBURG: The United States, at
24 some stage, told the tribunal in The Hague that the
25 Cubic judgment -- and now I'm quoting -- "has nothing to

1 do with matters before the international tribunal."

2 "Nothing to do with."

3 MR. BEDERMAN: Yes, that is the language
4 used by the United States in a memorial before the
5 tribunal. The United States has also indicated -- and
6 this is clear in the gray brief at pages 81 in note 32
7 and the gray brief at pages 83 to 85, and in the
8 lodgment -- that if -- if Iran receives an award in Case
9 B/61, it must be offset or set off -- or "recouped" is
10 sometimes the language used in the correspondence
11 between the two governments before the tribunal -- by
12 the amount of the Cubic judgment.

13 I won't speak for the United States'
14 position before the tribunal. The United States is here
15 to do that, of course, Justice Ginsburg. But the only
16 way I can interpret that remark is to indicate that
17 obviously before the tribunal is the issue of the United
18 States' obligations to Iran under the Algiers Accords.
19 The Cubic judgment deals, of course, with the private
20 disposition of the contractual relationship between
21 Iran's Ministry of Defense and the Cubic military
22 contractor.

23 Now, Respondents have taken the position
24 that these two make the matters unrelated. But if you
25 review carefully the tribunal's jurisdiction as

1 encompassing both claims and counterclaims, and
2 according to the Algiers Accords in the Claims
3 Settlement Declaration, counterclaims include "that
4 which arises out of the same contract, transaction or
5 occurrence that constitutes the subject matter" of the
6 claims.

7 JUSTICE GINSBURG: There is no counterclaim
8 stated before the tribunal as of this moment.

9 MR. BEDERMAN: I'm sorry, I didn't hear the
10 first --

11 JUSTICE GINSBURG: There is no counterclaim
12 in the case before the tribunal.

13 MR. BEDERMAN: That's right. The United
14 States did not file a formal counterclaim in Case B/61,
15 but it has made a demand for a setoff, and within the
16 tribunal rules, a setoff can be the subject of notice
17 under Rule 19-3 or an amendment or certainly comes under
18 waiver of objection provision in Rule 30.

19 JUSTICE KENNEDY: I was going to ask that
20 question. In other words, there are cases or at least
21 it is contemplated that there will be cases under the
22 rules, where the Iran-U.S. Claims Tribunal does
23 determine that there should or should not be an offset.

24 MR. BEDERMAN: There -- there certainly have
25 been cases, if you are speaking of the tribunal's

1 earlier jurisprudence in terms of offsetting claims.

2 JUSTICE KENNEDY: Yes.

3 MR. BEDERMAN: Yes, there has certainly been
4 ample tribunal precedent which the United States has
5 relied upon in making this demand for a setoff.

6 JUSTICE SOUTER: But assuming -- assuming
7 the tribunal takes up some such issue as Justice Kennedy
8 has mentioned, it will start with the assumption that
9 the Cubic judgment is in fact a valid judgment. It will
10 not look behind the Cubic judgment as such, will it?

11 MR. BEDERMAN: I -- of course, the validity
12 of the Cubic judgment does remain on appeal when the
13 Ninth Circuit --

14 JUSTICE SOUTER: But that's an entirely
15 separate proceeding. Assuming the Cubic judgment has
16 not been reversed through the appellate process that it
17 is going through, then the tribunal will take the Cubic
18 judgment as it finds it.

19 MR. BEDERMAN: I would assume it would. And
20 I assume --

21 JUSTICE SOUTER: Okay. Doesn't that make it
22 pretty tough to say that the Cubic judgment is at issue?

23 MR. BEDERMAN: No, Justice Souter. If -- if
24 we understand Congress's -- I don't -- I think this
25 matter can be resolved by a straightforward textual

1 approach in looking at TRIA section 201(c). Evidently,
2 though, if we are looking at congressional intent here,
3 it is to protect the United States' litigation position
4 before the tribunal. To allow the attachment of the
5 Cubic judgment would simply be allowing Respondent to
6 remove a source of money that would be available --

7 JUSTICE SOUTER: I mean, I think we
8 understand that. And -- and it's clear that the United
9 States, in effect, is taking the position that that's
10 all we need to bear in mind. But it suggests to me that
11 the drafting of the statute did not go as far as it
12 might have gone to protect the interests of the United
13 States.

14 MR. BEDERMAN: I won't speak, of course, for
15 the United States' position. Petitioner's position is
16 that where property has been identified to the tribunal
17 as being related to a claim or defense within its
18 jurisdiction, and the availability of that property
19 affects the relief that can be granted by the tribunal,
20 it is at issue.

21 JUSTICE GINSBURG: Explain to me why it
22 would affect the relief? Because suppose Iran doesn't
23 get the proceeds of the Cubic judgment, but instead a
24 creditor of Iran, in this case Elahi, a creditor gets
25 it. It should still be -- you've paid the -- Iran's

1 bill. Iran owes money to X. Why shouldn't the United
2 States equally get the credit, whether the Cubic
3 judgment in the end is pocketed by Iran or by Iran's
4 creditor, Elahi?

5 MR. BEDERMAN: Well, the -- obviously, we
6 await the tribunal's award in this respect. And I
7 believe, based on the tribunal's past precedents, the
8 benefit in terms of finding a breach of the Algiers
9 Accords, as it would or must in this case to find in
10 favor of Iran, would indicate that the benefits accruing
11 for certain setoffs must ultimately come back to Iran in
12 order to be credited in the way that you suggest.

13 I think it is an improper position to
14 suggest that if a creditor of Iran or Iran's Ministry of
15 Defense in this instance can claim or assert the lien so
16 that somehow it's credited to Iran's account, so to
17 speak, in calculating the setoff at the tribunal --
18 that has not been the tribunal's jurisprudence in terms
19 of examining the implications of a breach by the United
20 States under the Algiers Accords. And in a number of
21 cases --

22 JUSTICE GINSBURG: Would you -- something
23 that I would just like clarification on. You mentioned
24 that the Cubic judgment is on appeal to the Ninth
25 Circuit. It has been on appeal since June of '98?

1 MR. BEDERMAN: Yes, ma'am.

2 JUSTICE GINSBURG: And there are cross
3 appeals. What are the positions taken about that
4 judgment by the respective sides, and why is it pending
5 for ten years?

6 MR. BEDERMAN: That has been a mystery to me
7 as well. In fact, there has been a resolution by Cubic
8 Defense Systems and Iran's Ministry of Defense, and as
9 soon as the Court renders its judgment in this case,
10 that matter will finally move to disposition. It is a
11 bit odd that the underlying issue of Cubic's objections
12 to the district court's enforcement of the International
13 Chamber of Commerce, or ICC, arbitral award has pended
14 for so long. I would have thought, logically, it would
15 have made more sense to have disposed of those issues
16 and then allow the disposition of the liens to be
17 resolved by the courts.

18 Essentially, it is Cubic's appeal
19 challenging aspects of the district court's enforcement
20 under the New York convention of the ICC arbitral award.
21 I think to the extent that there is a counterclaim, it's
22 simply that there were some bases for support of the
23 judgment which Iran's Ministry of Defense would have put
24 forward, in addition, to the district court. That's
25 what I understand in terms of the ruling of Judge

1 Brewster originally in the district court on this
2 matter.

3 So, yes, it is unfortunate that the
4 underlying validity of the Cubic judgment still remains
5 open as a matter of appeal.

6 But again, to return to your point,
7 Justice Ginsburg, in Cases A/15 and A/21 before the
8 tribunal, this question of what would be the
9 implications, financial and otherwise, for the United
10 States being found by the tribunal to be in breach of
11 the Algiers Accords because of the failure of not
12 allowing the export of Iranian property or repatriation
13 of Iranian property to the United States has been
14 explicated. And, in fact, in already one instance the
15 tribunal has found the United States to be in breach of
16 its Algiers Accords obligations.

17 So, again, I can't speak for what a ruling
18 of the tribunal would be. All I would suggest is
19 certainly the Iranian position before the tribunal would
20 be that in the instance that if Mr. Elahi or any other
21 lienor were successful in attaching the Cubic judgment,
22 that in such a situation it should not be credited as a
23 setoff under these circumstances.

24 JUSTICE GINSBURG: Could it -- let's assume
25 that the -- that Iran is able to execute on the Cubic

1 judgment. Could it take the proceeds out of the United
2 States, given the 2007 blocking order?

3 MR. BEDERMAN: Well, I mean, the issue of
4 the Secretary of State's October 2007 designation, which
5 I think is what you are referring to, is a late
6 development in this case. Of course, that occurred
7 three months after the Ninth Circuit's amended opinion.

8 My submission to this Court is that the
9 appropriate disposition, assuming the Court well takes
10 Petitioner's position that Respondent has actually
11 relinquished its claim under TRIA, is to remand back to
12 the district court, because then we would have two new
13 sets of lienors, Mr. Rafii and Mr. Rubin. It would be
14 before the district court that factual issues like
15 whether the designation of "Ministry of Defense and
16 Armed Forces Logistics," which is what is actually named
17 in the blocking order, actually covers the Ministry of
18 Defense and Support for the Armed Forces of the Islamic
19 Republic of Iran, who is your Petitioner today.

20 The issue of whether designations cover
21 particular entities or aliases of entities is an
22 intensely factual one. In the D.C. Circuit in the
23 National Council of Resistance case -- Chief Justice
24 Roberts, an opinion you are well aware of, at the D.C.
25 Circuit. These are intensely factual inquiries about

1 whether aliases of particular organizations are covered
2 by designations. And I --

3 JUSTICE GINSBURG: You mentioned -- you
4 mentioned that there were other claimants for this --
5 others who would like to execute --

6 MR. BEDERMAN: Other lienors.

7 JUSTICE GINSBURG: -- other lienors -- other
8 attachments. And so, you said in the end -- well --
9 well, what would be the effect of those other liens?

10 MR. BEDERMAN: My understanding,
11 Justice Ginsburg, is in both the cases of Mr. Rubin and
12 Mr. Rafii, as far as I am aware, they have not made the
13 relinquishment election under TRIA as Dr. Elahi has done
14 here. And because they have not made the relinquishment
15 proviso, they would not be subject to the "at issue"
16 question that is now before the Court.

17 Iran's Ministry of Defense has other
18 substantive defenses against their liens, which we
19 appropriately presented before the district court.

20 The only submission I am making to this
21 Court at this time is that it is not necessary for this
22 Court, exercising plenary authority, to decide whether
23 it's a blocked asset. That is appropriate for remand
24 because, notwithstanding the U.S. position, I think
25 there are questions of whether your Petitioner is a

1 covered entity under the -- under the designation, and
2 whether in fact it is the beneficial owner, whether
3 Iran's Air Force is the beneficial owner of this claim.
4 And there are other substantive defenses that claim
5 retroactivity, as well. So, again, I just don't think
6 it's appropriate --

7 JUSTICE KENNEDY: But going back to the main
8 issue, the only reason that this is at issue before the
9 Iran tribunal is because it might be a setoff in the
10 event of judgment in favor of Iran?

11 MR. BEDERMAN: Yes. Whether it is available
12 for setoff. And again, I want to be clear that --

13 CHIEF JUSTICE ROBERTS: That's the -- that's
14 the only basis for your argument? I thought it was a
15 broader suggestion that these are, to some extent,
16 substitute assets for the assets that are at issue?

17 MR. BEDERMAN: Well, I mean, that may be one
18 useful analytic in thinking about this. I was trying in
19 imagining the interest of the Court in understanding the
20 tribunal's jurisdiction under the Algiers Accords and
21 what the tribunal has already ruled, and that's why I
22 think respectful consideration might be appropriate
23 here, inasmuch as the tribunal, in interpreting its
24 jurisdiction under the Algiers Accords, which is
25 essentially its organic instrument, has made a

1 determination in Case B/66 that the substantive
2 contracts at issue here between Cubic and the Iranian
3 Air Force are at issue in Case B/61.

4 CHIEF JUSTICE ROBERTS: Can you --

5 MR. BEDERMAN: And the response --

6 CHIEF JUSTICE ROBERTS: Can you articulate a
7 general test in a sentence or two about how you decide
8 whether particular assets are at issue?

9 MR. BEDERMAN: Yes. I will repeat the one I
10 -- I rendered before because I think it is the most
11 useful analytic, and I -- I take no credit. This is
12 essentially Judge Fisher's analysis in dissent below.
13 As he indicated, that -- that -- where property has been
14 identified to the tribunal -- and certainly the Cubic
15 judgment and the proceedings that have occurred in the
16 Federal district court in Southern California and now
17 the Ninth Circuit and now here have been identified to
18 the tribunal in mutual representations and undertakings
19 by the parties. Where this property has been identified
20 to the tribunal as being related to a claim or defense
21 within the tribunal's jurisdiction -- and I think that
22 is the key limiting principle here. That's -- there is
23 a criticism that an expansive reading of TRIA's "at
24 issue" provision will allow Iran and the United States,
25 as unlikely as it sounds, to mutually collude to cover

1 various properties and assets around the world. I think
2 noting that the -- that the Cubic judgment is within the
3 Court's jurisdiction as understood under the Algiers
4 Accords Claims Settlement Declaration, Article 2,
5 paragraph 3.

6 And then the second prong is that the
7 availability of that property affects the relief that
8 can be granted by the tribunal. And, again, we are not
9 hypothesizing here. The tribunal has already indicated
10 in cases like Owens Corning, Futura Trading and Computer
11 Services, that when you have a situation avoiding a
12 double recovery, that a setoff derived from collateral
13 proceedings, even absent privity of contract with the
14 sovereign seeking adjustment and with respect to
15 different causes of action, a setoff is still
16 appropriate within the tribunal.

17 So it's both an avoidance of a -- of a
18 double-recovery rule and also a notion that a -- a
19 certain offset is related as within the -- the
20 jurisdiction of the tribunal as arising again from the
21 same contract transaction or occurrence.

22 JUSTICE SOUTER: "At issue" means related to
23 -- "at issue" means related to an issue in a separate
24 case.

25 MR. BEDERMAN: I mean, I --

1 JUSTICE SOUTER: That's what it boils down
2 to, doesn't it?

3 MR. BEDERMAN: Petitioner is not taking the
4 same --

5 JUSTICE SOUTER: Well, doesn't it?

6 MR. BEDERMAN: No, Your Honor. I'm sorry.
7 Petitioner's position is slightly more modulated than
8 the United States'. The United States' position here is
9 all it has to be is relevant. I will leave it to the
10 Court to -- to speak with the United States about that
11 in a moment.

12 I think a more nuanced understanding of the
13 tribunal's jurisdiction is appropriate here. Is -- and
14 here there is no question, based on the materials that
15 you have not only in the joint appendix but also in the
16 lodgment, that the Cubic contracts have been identified
17 to the tribunal. And now the Cubic judgment as an
18 offset -- or setoff or "recoupment" is sometimes the
19 language used in the diplomatic exchanges and filings
20 before the tribunal -- has now been identified to the
21 tribunal.

22 JUSTICE BREYER: Is it the case that there
23 are two other individuals who have attached this
24 judgment?

25 MR. BEDERMAN: Yes, Justice Breyer. I think

1 I spoke about that a moment ago. That would be --

2 JUSTICE BREYER: All right. And is it the
3 case that Iran's position in respect to those
4 attachments is that those attachments, insofar as they
5 are valid and executed, require a setoff from whatever
6 we owe Iran or vice versa?

7 MR. BEDERMAN: My understanding, if you are
8 speaking of me characterizing the United States'
9 position or --

10 JUSTICE BREYER: No. I'm saying -- I take
11 it from something I have read in this that Iran believes
12 that if, in fact, it won a judgment and that judgment is
13 from someone like Cubic --

14 MR. BEDERMAN: Yes.

15 JUSTICE BREYER: -- who they thought was
16 prevented from delivering planes because of the embargo
17 -- so it was relevant -- that that judgment, which they
18 get if they collect on it, should be deducted from other
19 money the United States owes them.

20 MR. BEDERMAN: Yes, and --

21 JUSTICE BREYER: -- unless instead of them
22 getting it, the attacher gets it.

23 MR. BEDERMAN: It's the --

24 JUSTICE BREYER: The attachee gets it.

25 MR. BEDERMAN: It's the "unless," I suppose,

1 that, of course, Iran objects to. As in order for the
2 setoff to be effective within the tribunal's
3 jurisprudence and jurisdiction, Iran's Ministry of
4 Defense or -- or the --

5 JUSTICE BREYER: Has to get the money --

6 MR. BEDERMAN: Has to --

7 JUSTICE BREYER: -- rather than the
8 attaching person. That's my point.

9 MR. BEDERMAN: Yes, sir.

10 JUSTICE BREYER: And so that is at issue
11 before the -- and -- and it is at issue in those cases.
12 If the person who attaches it gets the money rather than
13 Iran, Iran will say: We do not have to have a setoff.

14 MR. BEDERMAN: I agree. It's at issue --

15 JUSTICE BREYER: Is that right or not?

16 MR. BEDERMAN: Correct. It's at issue --

17 JUSTICE BREYER: And that is the same
18 question that you think would be presented through this
19 attachment; is that right?

20 MR. BEDERMAN: I thought that's what we were
21 speaking of: The status of the Cubic judgment and --
22 and Dr. Elahi's attachment of the --

23 JUSTICE BREYER: Dr. Elahi is one of several
24 persons; is that right?

25 MR. BEDERMAN: That is correct. There is a

1 queue of individuals who have lined up to -- to --

2 JUSTICE BREYER: What I'm trying to get at
3 is Iran's position vis-a-vis the Elahi judgment is the
4 same as its position vis-a-vis the other two attachments
5 on the Elahi judgment.

6 MR. BEDERMAN: Yes.

7 JUSTICE BREYER: That if Iran ends up with
8 the money, you can subtract it from other money the
9 United States owes them. But if the attaching people
10 end up with the money, you cannot.

11 MR. BEDERMAN: Yes. So it's at issue -- I'm
12 sorry for having been so opaque, Justice Breyer. It's
13 at issue in the sense of joinder of issue, of a
14 legitimate disagreement between the parties. It's also
15 at issue, I believe -- I think in the sense that
16 Congress intended by this provision of saying that the
17 funds are available for a tribunal ruling and,
18 therefore, to allow an attachment under these
19 circumstances would frustrate the United States'
20 litigation position. So any way you parse what "at
21 issue" means --

22 JUSTICE BREYER: And you would take the same
23 position if, in fact, this money which is owed to Iran
24 by -- by Cubic -- that is, Cubic, which then Iran got a
25 judgment on -- instead of a judgment in favor of Iran,

1 Cubic had written them a check, and they had taken the
2 check and bought a house in Manhattan, or they had put
3 it in an Iranian bank account, and either Mr. Elahi or
4 one of the other two people sought to attach the bank
5 account or the house or the grocery store, which they
6 might also have used. Am I right --

7 MR. BEDERMAN: Yes.

8 JUSTICE BREYER: -- or wrong?

9 MR. BEDERMAN: Yes, Justice Breyer, you are
10 correct. There is a concern, which is a very natural
11 concern, that the more attenuated you get, can you
12 attribute a particular property, whether it's a bank
13 account or a -- or a New York condo --

14 JUSTICE BREYER: I don't see why either is
15 the slightest bit more attenuated. In either case they
16 are owned by the Ministry of Defense of Iran.

17 MR. BEDERMAN: I would certainly concur,
18 and, if I may, I'd reserve the balance of my time.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr.
20 Bederman.

21 Mr. Hallward-Driemeier.

22 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

23 ON BEHALF OF THE UNITED STATES,

24 AS AMICUS CURIAE SUPPORTING REVERSAL

25 MR. HALLWARD-DRIEMEIER: Mr. Chief Justice,

1 and may it please the Court:

2 The United States does not appear here today
3 in support of Iran, but, rather, in defense of critical
4 interests of the United States before the United States
5 -- Iran-U.S. Claims Tribunal. In particular, the
6 holding of the court of appeals that the United States
7 never unblocked Iranian military assets after the
8 Algiers Accords is directly contrary to the position of
9 the United States before the tribunal, and Iran
10 immediately indicated that it would use that holding
11 against the United States and in support of its
12 multimillion-dollar --

13 JUSTICE GINSBURG: But that's not the same
14 now. Isn't that -- that issue is moot?

15 MR. HALLWARD-DRIEMEIER: Well, Your Honor,
16 there is now a new and independent reason why the asset
17 is blocked. And, in fact, Respondent no longer defends
18 the holding of the court of appeals on that basis.

19 It is, we wish to emphasize, essential that
20 this Court vacate that holding and indicate that it is
21 no longer legally valid so that it is not -- that
22 erroneous holding is not used against us in support of
23 Iran's \$2 million claim.

24 JUSTICE GINSBURG: But if we -- if we took
25 the position that you are expressing about what is at

1 issue, we would never reach the second question.

2 MR. HALLWARD-DRIEMEIER: Well, we -- we
3 think that the Court would not. It would vacate the
4 decision of the court of appeals. It would be helpful
5 certainly to the United States if the Court emphasized
6 the natural fact that that would mean that the court of
7 appeals' erroneous holding was not any longer legally --

8 CHIEF JUSTICE ROBERTS: But it's not our job
9 to help you -- it's not our job to help you in other
10 tribunals. If a -- if a judgment is moot, it's moot.
11 We are not going to go back and tell the Ninth Circuit
12 to revise its opinion just because that's helpful to
13 you.

14 MR. HALLWARD-DRIEMEIER: No. The -- the
15 Court would vacate the decision, certainly.

16 CHIEF JUSTICE ROBERTS: So is it your
17 position that that -- that is moot?

18 MR. HALLWARD-DRIEMEIER: It is our position
19 that the -- because Respondent has relinquished his
20 right to attach these assets, the decision of the court
21 of appeals should be vacated. And that would have the
22 effect of rendering inoperative that erroneous -- the
23 other erroneous holding of the court of appeals with
24 respect to blocked assets.

25 It is the position of the United States --

1 and we agree with Respondent on this point -- that as of
2 now, because of the October 2007 designation, the
3 property of Petitioner is blocked and subject to
4 attachment under TRIA. And I don't believe there is any
5 need for further proceedings on that.

6 The Secretary of State designated the
7 Ministry of Defense of Iran, and the position of
8 Petitioner in the court of appeals on remand from this
9 Court was that it is the Ministry of Defense of Iran, a
10 central core constituent part of the Iranian state.
11 That is the entity that was designated.

12 JUSTICE GINSBURG: Do I understand correctly
13 that that means that because it's a blocked asset, then
14 Dr. Elahi can get it, but Iran itself couldn't get it?

15 MR. HALLWARD-DRIEMEIER: Elahi, Respondent
16 Elahi, could get it if he had not relinquished his right
17 to attach --

18 JUSTICE GINSBURG: Yes.

19 MR. HALLWARD-DRIEMEIER: -- assets at issue
20 before the tribunal. As of right now, the asset is
21 blocked and Iran could not repatriate it, as of right
22 now. Of course, blocking orders can be amended, but as
23 of right now, it is frozen and Petitioner cannot
24 repatriate it.

25 CHIEF JUSTICE ROBERTS: So why isn't the

1 consequence that you are so worried about under the
2 Victims of Trafficking and Violence Protection Act, that
3 this is going to hurt your position by the tribunal, the
4 same consequence that is going to come from the fact
5 that these assets are blocked?

6 MR. HALLWARD-DRIEMEIER: Well, Your Honor,
7 again, the blocking order is the present status of the
8 assets. It doesn't mean that they could not later be
9 repatriated to Petitioner; whereas, execution by
10 Respondent against the assets would mean that they would
11 be forever denied to Petitioner.

12 JUSTICE GINSBURG: But why wouldn't the
13 United States get credit for that, too, on the theory
14 that I suggested before?

15 MR. HALLWARD-DRIEMEIER: Well, you are
16 right, Your Honor, that is the position of the United
17 States. And earlier Your Honor quoted language from the
18 oral argument of the United States that the -- or maybe
19 it was one of our briefs -- that the Cubic judgment
20 is -- that the tribunal doesn't have to --

21 JUSTICE GINSBURG: It has nothing to do with
22 matters before the --

23 MR. HALLWARD-DRIEMEIER: That is in the
24 context of our saying that, whether or not -- in the

1 view of the United States, whether or not Petitioner
2 ever collects that money, the United States is entitled
3 to an offset, and in fact, we believe it's a complete
4 defense to Iran's claim.

5 Of course, Petitioner's argument -- or
6 Iran's argument before the tribunal is that it is --
7 that the United States is entitled to a reduction of
8 liability only if Iran actually receives the assets.
9 And that's why the language of the statute is written
10 more broadly when the litigation before the tribunal is
11 ongoing. At that point any property that is at issue
12 before the tribunal is not subject to attachment by one
13 who has relinquished, and that's because this Court nor
14 any other lower court in the United States is supposed
15 to prejudge the merits of those respective positions.
16 Iran's position -- and it's on page 85a of the United
17 States' appendix -- is that the awarded amount, unless
18 received by Iran, cannot be offset against any relief
19 which the United States may be found to owe Iran.

20 So that is Iran's position. That is at
21 issue before the tribunal.

22 The Respondent would have the Court believe
23 that the proceedings in the tribunal are in the nature
24 of an in rem proceeding, that it's a property dispute.
25 They use that term repeatedly in the brief, "a property

1 dispute." But that is not the nature of the proceedings
2 in the tribunal. Iran has asserted a claim that the
3 United States violated its obligations under the Algiers
4 Accords. The remedy it seeks is, and I quote -- this is
5 from -- excuse me -- from the -- let's see -- "the
6 remedy they seek" -- "they seek is the value of the
7 Cubic sale to Canada." They have said that in the
8 state -- in Iran's reply in statement -- claim 16 that
9 Respondent relies upon, they say that the remedy they
10 seek is not the asset itself.

11 Of course, the asset had been dissipated
12 before Iran ever filed a statement of claim against the
13 United States. The remedy is the proceeds of that sale
14 to Canada. The proceeds of the sale to Canada, which
15 are the subject of Iran's claim against the United
16 States in the tribunal, have been reduced to judgment in
17 the Cubic judgment. That --

18 CHIEF JUSTICE ROBERTS: I guess this may be
19 the same question Justice Breyer asked. I mean, where
20 do you cut this off? You've got the proceeds from the
21 sale to Canada that presumably go to Cubic, and then
22 Cubic, you know, builds a new facility somewhere with
23 those proceeds and then sells it to somebody else. I
24 mean, are those still assets at issue in the claims
25 before the tribunal?

1 MR. HALLWARD-DRIEMEIER: Well, I believe
2 that in fact the language of the statute makes it -- the
3 assertions of the parties before the tribunal that
4 define the property that is at issue before the
5 tribunal. That, again, is so that the courts are not
6 put in a position of adjudicating, prejudging, the
7 merits of the parties' arguments before the tribunal.

8 CHIEF JUSTICE ROBERTS: Well, that's kind of
9 a -- that's a broad assertion. In other words, so long
10 as you and Iran get together and say this asset is at
11 issue, in a situation where whether it's at issue or not
12 saves you money and gives money to Iran, that seems to
13 be a very self-serving legal test.

14 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I
15 don't believe that this Court needs to consider what the
16 outer reaches are. In this case, this is -- Iran
17 characterizes it -- and this is at page, again, at page
18 85 of the U.S. appendix -- that the Cubic judgment,
19 quote "constitutes an integral part of the remedy sought
20 in Case B/61."

21 This isn't an offset or a counterclaim.
22 Justice Ginsburg, you previously alluded to the fact the
23 United States did not file a counterclaim. And that's
24 because this is not some unrelated counterclaim the
25 United States has against Iran. This is a critical part

1 of Iran's claim against the United States. It defeats,
2 in the view of the United States, Iran's claim entirely.
3 It, at the very least, reduces the amount of Iran's
4 claim against the United States.

5 This isn't somehow unrelated; we're
6 asserting, well, we can use this as an offset because
7 you also owe us money from something else. This is in
8 Iran's own statement, and this is the statement that you
9 --

10 JUSTICE KENNEDY: But how is that effected
11 -- how is that effected, depending on whether or not the
12 judgment is executed or not? Would the Iran tribunal
13 have the authority to order Cubic not to satisfy the
14 judgment, but to just hold the funds?

15 MR. HALLWARD-DRIEMEIER: I -- I don't know.
16 Cubic is not before the tribunal. But what we can ask
17 is, can we conceive of -- and I think it's relatively
18 easy to conceive of -- an award of the tribunal that
19 says, the United States owes Iran \$2.8 million; if the
20 Cubic judgment is received by Iran, the United States
21 owes Iran nothing. And clearly, in that circumstance,
22 the Cubic judgment is the subject of the award of the
23 tribunal.

24 JUSTICE KENNEDY: I don't know that it's the
25 subject of the award. And it's really not at issue;

1 it's just recognizing that there has been some prior
2 transaction.

3 MR. HALLWARD-DRIEMEIER: Well, I guess, Your
4 Honor, you have to think what does it mean for any
5 property -- property to be at issue before the tribunal
6 or the subject of the award?

7 JUSTICE SOUTER: It means that at the end of
8 the proceeding one side or the other gets the property.

9 MR. HALLWARD-DRIEMEIER: Well --

10 JUSTICE SOUTER: And that is not going to be
11 the -- what one side or the other gets in this
12 proceeding is going to be a new judgment. And that new
13 judgment may or may not be satisfied by dealing with the
14 prior judgment. But that doesn't mean that the prior
15 judgment is at issue; it simply means that the prior
16 judgment may be used to discharge, in an appropriate
17 case, an obligation which is determined in the later
18 proceeding.

19 MR. HALLWARD-DRIEMEIER: If I may respond.
20 Your Honor, on that view, even the ACMR is not at issue
21 before the tribunal, because the tribunal cannot order
22 the United States to hand over the ACMR to Iran. In the
23 A/15 judgment to which Petitioner's counsel alluded
24 earlier, the tribunal recognized that it is not a
25 violation of the United States' obligations under the

1 Algiers Accords not to issue an export license.

2 Therefore, Iran --

3 JUSTICE SOUTER: Okay. So Iran --

4 MR. HALLWARD-DRIEMEIER: -- is not entitled
5 to the ACMR. It's entitled to its loss, and its loss
6 has been reduced to judgment in the Cubic judgment.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 MR. HALLWARD-DRIEMEIER: Thank you, Your
9 Honor.

10 Mr. Phillips.

11 ORAL ARGUMENT OF CARTER G. PHILLIPS

12 ON BEHALF OF THE RESPONDENT

13 MR. PHILLIPS: Thank you, Mr. Chief Justice,
14 and may it please the Court:

15 I think the previous 25 or so minutes has
16 demonstrated one sort of overarching fact, which is that
17 there is an enormous risk, if this Court decides to
18 interpret the language of this statute broadly, that it
19 will easily sweep beyond any kind of arrangements
20 between Iran and the United States in ways that
21 fundamentally, obviously, disadvantage the very people
22 that Congress clearly intended to benefit by this entire
23 statutory scheme.

24 This is a scheme that was designed to
25 provide remedies, recoveries, to the victims of

1 terrorism. And somehow in the scheme of everything that
2 was discussed in the first 25 or so minutes of this
3 argument, the victims of terrorism are completely
4 shunted aside on basic -- on the basis of very technical
5 ways of reading it.

6 But if we go back to the language of the
7 statute, which is in the Petitioner's brief at 11a, it
8 talks about "enforcement against property that is at
9 issue in claims against the United States." So the
10 notion that we would focus on the word "property," as it
11 relates to the tribunal and that the tribunal has in
12 front of it, is a natural consequence of the language of
13 that provision. And to me, at least, the best way to
14 look at the lodgings is to review how often the United
15 States has described and Iran has described what was the
16 property at issue before the claims tribunal in the B/61
17 proceeding? And this is at 65a of the joint -- of the
18 government's brief: "The property at issue consists of
19 one air combat maneuvering range system and all
20 necessary subparts." There is no dispute that the
21 property was within the jurisdiction of the United
22 States. Now --

23 CHIEF JUSTICE ROBERTS: So that if you had
24 these military assets, which are clearly the assets that
25 are at issue in Iran's claim --

1 MR. PHILLIPS: Absolutely.

2 CHIEF JUSTICE ROBERTS: -- and Cubic is
3 worried about what to do with it, and so they sell them
4 to the Canadians, but they keep the proceeds in escrow,
5 on the theory that, look, we may end up owing this to
6 the Iranians under the tribunal, a setoff. This may not
7 be our assets, which -- I mean, the Iranians have a
8 claim to these. Would those -- would those escrow funds
9 be assets at issue?

10 MR. PHILLIPS: I think they would be because
11 of the way the Iranians actually pled this. They said
12 give us either back -- give us either the military
13 equipment that we bought, or give us the economic value
14 of that. But that's -- and that's why --

15 CHIEF JUSTICE ROBERTS: Well, why is that
16 very different from this situation, where you have an
17 arbitration award saying that you, Cubic, owe the
18 equivalent of what you should have -- what you would
19 have provided to Iran if there hadn't been the
20 revolution?

21 MR. PHILLIPS: Well, there are two answers
22 to that: The first one is remember precisely what the
23 arbitration award is. The arbitration award is not the
24 value of the asset. That was asked for; that was
25 rejected by the arbitrator. The arbitration award is

1 for the value of a separate contract between Cubic and
2 the Canadian government. You will recall in the award,
3 specifically the arbitrator said with respect to the
4 underlying ACMR contract with Iran, that was mutually
5 walked away from by both parties, and then there was a
6 separate agreement that was entered into between the
7 parties, and that was the basis for the arbitration
8 award saying the value of the breach of that secondary
9 agreement is the part that serves as the arbitral award.

10 That, it seems to me, ought to be regarded
11 at a minimum as one step too far removed, because that's
12 not the property that is at issue before the claims
13 tribunal in any way that the parties are disputing about
14 it. They accept that number. And then --

15 JUSTICE BREYER: Right. What is the -- it
16 seems at the moment, frankly, you could read it either
17 way. Let's imagine that -- that Cubic sold some jets
18 that we blocked and they get some money, and they did
19 that under their contract, and they got \$2 million. And
20 suppose they said, we owe Iran this money, and they pay
21 Iran the money, and Iran puts it in a bank account or
22 buys the grocery store. All right?

23 MR. PHILLIPS: Right.

24 JUSTICE BREYER: Now suppose that happened.
25 It makes it simpler. And then what happens is three

1 people, including Mr. Elahi and two others who don't
2 accept any money, the other two, attach it, on the
3 ground Iran owes us this money.

4 MR. PHILLIPS: Right.

5 JUSTICE BREYER: We want the grocery store.
6 And suppose, further, Iran then says, if they get their
7 money, you cannot subtract it, United States, from what
8 you owe us. But if we get the money, then you can
9 subtract it. That's their view.

10 The United States' view is different. Who
11 will resolve that question? The tribunal. So they say,
12 what is at issue is not who owns the grocery store; what
13 is at issue is the question of whether we get the money
14 or you get the money. What money? The money that is
15 the value of the grocery store, or the bank account, in
16 which case it's identical.

17 Now, I think in that situation it's easy for
18 me to say that money, the grocery store, or the bank
19 account, of course is at issue before the tribunal. For
20 the question is, does Iran get it or does the United
21 States get it, in the situation where the two other
22 people -- leaving Elahi out of it -- can attach it? I
23 can easily read it that way. I also can read it the way
24 you want.

25 MR. PHILLIPS: Right.

1 JUSTICE BREYER: All right? So now, which
2 do I do?

3 (Laughter.)

4 MR. PHILLIPS: Well, you clearly -- and I
5 agree with you; there is no question you can read this
6 statute either way.

7 JUSTICE BREYER: All right. I'll then add
8 that the strongest argument against you, it seems to me,
9 is the whole point of this was not simply to compensate
10 victims of terrorism. That's a worthy goal, and that's
11 one of the points. But it was to compensate them
12 consistent with the proper running, in the interests of
13 the United States, of the Iranian-American Claims
14 Tribunal.

15 And so this is just the kind of issue we
16 don't want to simply take away and let the victim have,
17 because there is a strong risk the tribunal will rule
18 against us, and we will have to pay it twice. Okay.
19 That's the argument against you.

20 Now, what's the argument for you?

21 MR. PHILLIPS: Right. First of all, they --
22 a significant purpose of this entire exercise obviously
23 is to provide redress to the victims of terrorism.

24 JUSTICE BREYER: That's one, but --

25 MR. PHILLIPS: 201(d) is a specific

1 statutory construction provision which seems to suggest
2 that Congress says that if there are doubts about how to
3 apply this particular provision, you ought to put the
4 thumb on the scale in favor of the victim. So you do --
5 you will give meaning to section 201(d)(4) of the TRIA
6 if you adopt a position consistent with our position.

7 The reality is that given that there are two
8 more lienholders in line, none of this has anything to
9 do with Iran and with the way the tribunal is going to
10 proceed, because even if you were to say that Dr. Elahi
11 is not entitled to this, there is no relinquishment
12 claim with respect to the others, so this money is never
13 going back to Iran, under any set of circumstances.

14 JUSTICE BREYER: That creates the issue,
15 because the question is whether money that never goes
16 back to Iran, but rather goes to an attaching person, is
17 money that is or money that is not subtracted from the
18 amount that the United States owes Iran.

19 MR. PHILLIPS: But -- but --

20 JUSTICE BREYER: And that question is the
21 question --

22 MR. PHILLIPS: But, Justice Breyer --

23 JUSTICE BREYER: -- is the question that is
24 before the commission.

25 MR. PHILLIPS: But the problem with this,

1 Justice Breyer, is that this is a relinquishment
2 provision. It -- it is saying to us in return for these
3 limited resources, 20 percent of the judgment -- and
4 that is only 20 percent of the compensatory judgment and
5 completely lose the punitive judgment -- in return for
6 that you have to relinquish certain rights; and it seems
7 to me that Congress would not have adopted a provision
8 that said, and the rights you relinquish are essentially
9 unknowable under any circumstances and extend to the
10 ends of the earth. What Congress says --

11 JUSTICE BREYER: They are totally knowable.
12 They are totally knowable. In order to decide what they
13 are, all you have to do is to look at the issues before
14 the commission and decide whether those issues concern
15 specific, concrete property; that is, the property that
16 you have an interest in.

17 With my grocery store, with my bank account,
18 and with this claim, it is absolutely specific, and Iran
19 has put before the commission the question of whether if
20 you pay the money to an attaching person, we don't get
21 it, or we do get it.

22 MR. PHILLIPS: Justice Breyer --

23 JUSTICE BREYER: That's what I gather. Now
24 you can tell me I'm wrong on that if you want.

25 MR. PHILLIPS: The parties have been very

1 specific about it, and we cited in a series of
2 quotations about what is the property at issue here; and
3 the property at issue in this case, Justice Breyer, is
4 the ACMR system or the economic value of the ACMR
5 system. What is not at issue in this case is the value
6 of the Cubic judgment. First of all, there was an
7 effort to bring the Cubic judgment specifically before
8 the tribunal, and it was rejected as having no
9 jurisdiction, certainly no jurisdiction over Cubic and
10 then no jurisdiction over the United States' part of the
11 Cubic judgment because that was not a contract
12 between --

13 JUSTICE BREYER: They are trying to attach
14 the ACMR system.

15 MR. PHILLIPS: They did try --

16 JUSTICE BREYER: They are trying to attach
17 the Cubic judgment. The ACMR system is in Canada.

18 MR. PHILLIPS: But that's the whole point of
19 this. The property at issue before the tribunal is the
20 ACMR system, and indeed in 1981 when this was originally
21 brought what Iran wanted was the ACMR system.

22 JUSTICE BREYER: And that's one piece of
23 property. The other piece of property that is at issue
24 is the judgment, and the way it's at issue is, I take
25 it, that two other people are saying, we attach it; Iran

1 says because they attach it, you don't subtract it from
2 the ACMR judgment; and we are saying, even though they
3 attach it, you subtract it, and therefore it's before
4 the tribunal as well.

5 That's my understanding at the moment, and
6 I'm asking you to explain why that's wrong.

7 MR. PHILLIPS: Right, Justice Breyer, there
8 is no question that the fact that there are subsequent
9 lienholders in line affects the possibility, but I would
10 have thought it would only affect it in a way that is
11 positive for me. Because Iran is saying, look, this
12 doesn't have any relevance to the -- to the Iran
13 tribunal if we don't ever get the money; and the reality
14 is whether Dr. Elahi gets the money or the other
15 lienholders get the money, Iran is never going to get
16 this money, which says to me it's not at issue under any
17 theory of the case in front of the U.S.-Iranian Claims
18 Tribunal.

19 And so that would be my quickest answer to
20 that; to the extent that you have other lienholders, it
21 simply means that there really is nothing at issue
22 there. But it still seems to me that the better way --

23 JUSTICE GINSBURG: Why not? I mean, the
24 question I raised before, why wouldn't the United States
25 be urging that it gets credit, whether Iran gets the

1 money or whether the people who are creditors of Iran
2 get the money. In either case, the United States should
3 be able to have --

4 MR. PHILLIPS: Right, the United States
5 would still have that -- would still have that argument,
6 but it's not a claim against the United States, which is
7 what's required under the statute that we are dealing
8 with here when it's viewed that way.

9 JUSTICE KENNEDY: But Iran might say in the
10 tribunal, in responding to the setoff argument, this
11 claim that we brought against you, the United States,
12 implicates a breach of obligations that you have that
13 are somewhat unrelated to what was at issue in the -- in
14 the -- in the Cubic judgment. And then the United
15 States would say, no, that's not true. So they would
16 have to examine the Cubic judgment. So that means it's
17 at issue before the court.

18 MR. PHILLIPS: No, I don't think there is
19 anybody whose going to -- well, I mean, maybe there is
20 some sense in which examining the Cubic judgment -- but
21 I don't think the tribunal has remotely been asked to,
22 or will under any circumstances be asked to, review the
23 Cubic judgment.

24 JUSTICE KENNEDY: Well, it might be in the
25 setoff proceedings. There might -- there might be an

1 argument that there are for two different obligations,
2 and there's no setoff or that there is a setoff.

3 MR. PHILLIPS: Well, I mean, I think there
4 is no question these are for two different obligations.
5 And I think that's why, candidly, the Court ought to
6 decide that this is not property at issue here, because
7 it is so clearly unrelated to the weapons system itself
8 or to any monetization of the weapons system. Remember
9 the Cubic judgment comes from an arbitral award that
10 doesn't have anything to do with that arms sale. It has
11 to do with a completely separate contractual undertaking
12 between Cubic and the Canadian government --

13 JUSTICE KENNEDY: Well, I think you might
14 get --

15 MR. PHILLIPS: -- and Iran.

16 JUSTICE KENNEDY: -- substantial -- a
17 substantial degree of argument on that point.

18 MR. PHILLIPS: I don't know how there can be
19 an argument on that point, Justice Kennedy. If you read
20 the opinion of the arbitrator, it is absolutely clear
21 that the -- that the underlying agreement between Iran
22 and Cubic with respect to the arms sales was mutually
23 terminated by the parties, and a new agreement entered
24 into in order to resell those properties to Canada. The
25 opinion is crystalline in that regard.

1 And it was on the basis of the violation of
2 that separate agreement that the -- that Cubic was then
3 held to be liable to Iran for the \$2.8 million.

4 CHIEF JUSTICE ROBERTS: The agreement
5 between who -- between who --

6 MR. PHILLIPS: Between Iran and Cubic.

7 CHIEF JUSTICE ROBERTS: So Iran, I assume,
8 would say, look, we entered into this agreement to take
9 the place of what was at dispute, which is what they
10 owed us because they didn't ship us the arms that we'd
11 paid for. I don't see that that adds anything to your
12 argument.

13 MR. PHILLIPS: Well, it -- it just says that
14 you move even further down the road from what are the
15 properties that are, in fact, at issue before the
16 tribunal.

17 CHIEF JUSTICE ROBERTS: Right, so Iran says,
18 look, you're not going to ship us the planes, whatever
19 it is; you're not going to give us --

20 MR. PHILLIPS: Although they wanted that.

21 CHIEF JUSTICE ROBERTS: You're not going to
22 give us the money, right?

23 MR. PHILLIPS: And they still want that.

24 CHIEF JUSTICE ROBERTS: And we still have a
25 dispute. So, I tell you what, you're going to sell this

1 stuff to Canada, you're going to get some money from
2 them, and we've got an agreement that that money is
3 ours.

4 MR. PHILLIPS: Mr. Chief Justice, that --
5 that -- they may have been able to make that argument.
6 That is not an argument they have made. The argument
7 they made, which represents the property at issue in the
8 claims, is, first, give us back the arms; and then, two,
9 give us the value of those arms, not as they have been
10 reformulated in a completely separate contract; give us
11 the value of those arms. It seems to me the --

12 CHIEF JUSTICE ROBERTS: Well, why would
13 Cubic enter into a contract with Iran to give them money
14 if it wasn't taking the place of the money they owed
15 them in the original agreement?

16 MR. PHILLIPS: Well, the question was --
17 they were going to try to go forward in these
18 arrangements, and it was a, you know, complicated
19 problem because you couldn't tell whether or not you
20 would ever be able to send things back to Iran, et
21 cetera. And so, they were perfectly happy to enter into
22 an agreement where they would say, look, we will just do
23 the best we can and see how it turns out.

24 I mean, in reality, the litigation in front
25 of the Ninth Circuit, obviously, on the Cubic judgment,

1 Cubic is screaming loud and clear that they don't think
2 they owe a nickel as a consequence of this arrangement,
3 that there had been no breach of anything under any
4 circumstances, and that there is not a penny that's to
5 be owed. And as counsel said earlier, it's in some ways
6 unfortunate that this has moved in this sequence. So,
7 we don't really have --

8 CHIEF JUSTICE ROBERTS: Do you know why
9 that's been pending for ten years?

10 MR. PHILLIPS: Well, it was stayed as a
11 consequence of this other litigation -- as a consequence
12 of these proceedings in order to allow, I think in
13 general, the Iran Claims Tribunal to -- to sort out, at
14 least, some portion of these issues. It would obviously
15 be -- I mean, we have moved -- I mean, we are not a
16 party, but --

17 CHIEF JUSTICE ROBERTS: So it was stayed
18 because it was at issue before the Iranian Claims
19 Tribunal?

20 MR. PHILLIPS: Right. I mean, the truth is,
21 just as the issue was a more important issue for the
22 United States prior to the new blocking order, you know,
23 the questions that could potentially have arisen were
24 potentially more important to the claims tribunal at the
25 outset. As the litigation has played out, it turns out

1 that there's no relationship between the two.

2 JUSTICE BREYER: Well, the -- the other
3 thing -- and I think this counts against you, but maybe
4 you have a good answer to it, that there could be a lot
5 of property that was directly at issue in '79 or '80
6 that Iran didn't get.

7 MR. PHILLIPS: Right.

8 JUSTICE BREYER: And because they didn't get
9 it, all kinds of things happened with property, and you
10 get more of it or you get less of it. And during the
11 interim years, all kinds of things happen.

12 And it could be that those transformations
13 of different kinds are directly before the tribunal,
14 irrespective of how much damages you are going to get,
15 and how much -- we can easily think of cases if we have
16 three or four hours. But, you know, you see where I am
17 going?

18 MR. PHILLIPS: Sure.

19 JUSTICE BREYER: Now, I can understand
20 Congress in passing this statute having one of two
21 possible things: One is to say, we are just going to
22 cut an arbitrary line here because it's a compromise,
23 and what we will do is, you can go ahead, the victim,
24 and seize anything you want as long as it doesn't
25 narrowly fit within this. That's a somewhat arbitrary

1 line but a compromise.

2 MR. PHILLIPS: But it also provides
3 protection for victims, right?

4 JUSTICE BREYER: Correct. Correct. Some.

5 MR. PHILLIPS: And those are the people who
6 are the most --

7 JUSTICE BREYER: It provides some.

8 MR. PHILLIPS: Right.

9 JUSTICE BREYER: The other way to look at it
10 is to say, well, what they that had in mind here was
11 we'll pay these victims something; you know, they are
12 going to get something right from Congress right now,
13 because they are hurt. But in return from that, we
14 don't want you taking action that will really affect our
15 liability to Iran. And if it's the second, then we need
16 the broader definition; if it's the first, we don't.

17 MR. PHILLIPS: Justice Breyer, I think the
18 Hegna cases are the place to look in terms of trying to
19 understand this, because what it's, you know, what --
20 Hegna, that line of cases all involve efforts to seize
21 consular properties of Iran and all arose prior to the
22 accords, and every one of those courts of appeals has
23 concluded that each of those properties is beyond the
24 ability of the courts to attach all of those properties.

25 And -- and it seems to me that what Congress

1 was concerned about was having inconsistent claims
2 potentially arise in both the district -- in federal
3 court in the United States and in front of the claims
4 tribunal.

5 So where you have a situation where the
6 claims tribunal says, look, that's a consular property
7 that belongs to the Iranian government, you should
8 return it, and have the United States have to show up in
9 front of that tribunal and say, oh, excuse me, but
10 unfortunately, we have been forced to sell that property
11 under a federal court order and the embarrassment that
12 arises from that. That seems to me so clearly what
13 Congress had in mind, or at least is clearly covered by
14 this. And the case law -- all the case law up to this
15 point that has dealt with it -- has consistently ruled
16 in favor of the United States and Iran in that context.
17 But there is no reason to go beyond that context in
18 order to deprive the clear victims of terrorism of a
19 meaningful remedy.

20 And I think, Justice Breyer, just to be
21 clear about this, you know, we got money back, to be
22 sure. A substantial portion of the money we got back
23 came from the values of the properties that the United
24 States seized from Iran that they've used, they have
25 leased out embassies and stuff like that. And that is

1 not property that comes out of the United States' fist.

2 So it's not reasonable to assume, as the
3 government does, that simply because these moneys were
4 paid out, that there is some huge relinquishment that is
5 required there. It seems to me that it makes much more
6 sense for this Court to narrowly construe this.

7 I guess the last thing I would say in that
8 regard is, so far as we can tell, this case will affect
9 one party -- actually, I guess the other two lienholders
10 behind us. But realistically, there are no cases in the
11 pipeline. There is no other litigation that is ongoing
12 out there. This is a singular -- I mean, it's kind of
13 unusual for this Court, but this is the only case that
14 we can figure that it applies to.

15 CHIEF JUSTICE ROBERTS: Well, but the point
16 is, depending on how it comes out, once you give an
17 argument to the Iranians that they could raise at the
18 claims tribunal, that will affect far more than your one
19 single case. We -- the argument would be the United
20 States is not living up to the obligations it undertook
21 in the Algiers Accords.

22 MR. PHILLIPS: Right. And,
23 Mr. Chief Justice, that -- I understand why the
24 government filed in support of certiorari at the earlier
25 stages of this proceeding. But after the intervening

1 blocking order that takes the -- I mean, that issue is
2 off the table.

3 We are no longer defending the Ninth
4 Circuit's view that the United States breached the
5 original Algerian Accords in the context of this case.
6 Nothing in the blocking order that is in place now and
7 would prevent Iran from getting this remotely violates
8 the Algiers Accords. And as far as I know, no one is
9 making that argument at this stage.

10 So all you have is a relatively clean pair
11 of issues: Does the blocking order apply here and stop
12 the payment of these funds to Iran? There the answer
13 seems to me unquestionably yes.

14 And then the second question is, do we adopt
15 a rule to the detriment of a single terrorist victim in
16 a way that deprives him of an opportunity to get back
17 fair redress in the absence of some clear indication
18 from Congress that it intended that result where it
19 would affect no one else and where Congress said
20 specifically, in a rule of construction, put your thumb
21 on the scale in favor of the victim of terrorism?

22 That's what we are asking the Court to do in
23 this case. It provides no problems for the United
24 States in its claims tribunal litigation. It's only an
25 issue of money.

1 CHIEF JUSTICE ROBERTS: What provision --
2 could you cite me the provision where the Congress said
3 put your thumb on the scale?

4 MR. PHILLIPS: Yes. It's 201(d)(4), the
5 Petitioner's brief at 11a.

6 CHIEF JUSTICE ROBERTS: 11a. And how does
7 that -- the title of the section says "Statutory
8 Construction." I just don't see what follows as
9 statutory construction.

10 MR. PHILLIPS: Well, I think what you have
11 to do is give the language some credit. And our way --
12 what we think Congress intended there was to say, tip
13 the scale in favor of the victims of terrorism, which is
14 the underlying purpose of the statute.

15 I will confess, the language is not nearly
16 as clear as I would like it to be, but I will also
17 recognize that the -- the Government of Iran's position
18 renders that language a total dead letter.

19 CHIEF JUSTICE ROBERTS: You don't see any --

20 MR. PHILLIPS: So between those two
21 alternatives, it seems to me, you ought to give it --
22 again, give the tie to the victims under this --

23 CHIEF JUSTICE ROBERTS: You don't see any
24 problem with Congress telling us how to conduct
25 statutory construction?

1 MR. PHILLIPS: No, I think Congress does --
2 is entitled to suggest, if it's -- if you have ambiguity
3 in our language, which way to come out as a matter of
4 policy. No, I don't think that's -- that's certainly
5 not dictating a result in a particular case.

6 JUSTICE GINSBURG: Mr. Phillips, one piece
7 of this that I don't grasp: You have agreed that the
8 United States could recoup from Iran the amounts paid to
9 these victims, including Dr. Elahi, including the 2.3
10 million. How would the United States go about recouping
11 from Iran the money it has paid to the victims of Iran's
12 terrorism?

13 MR. PHILLIPS: You mean in the situations
14 where the United States has subrogated -- rights of
15 subrogation?

16 JUSTICE GINSBURG: Yes. How would that
17 work? How would -- how would the United States --

18 MR. PHILLIPS: Well, I think it would almost
19 certainly work as a matter of diplomacy and not as a
20 matter of adjudicated resolution. I think what they
21 will say is, these are rights, these are amounts of
22 money that we have had to pay, and if we are ever to
23 normalize relations with the government of Iran, we are
24 going to expect the government of Iran to recognize
25 those payments and to make some kind of retribution to

1 the United States under those circumstances.

2 And, again, all it does is it shifts the
3 burden of these injuries from the victims, who are in
4 the least best position to deal with them, and put them
5 in the United States, which is in a position of at least
6 some hope of being able to resolve them diplomatically
7 in a way that the United States can, in fact, be
8 recompensed.

9 JUSTICE GINSBURG: You said this is a
10 one-of-a-kind case. Are there no other victims who have
11 successfully sued Iran?

12 MR. PHILLIPS: There are, but the problem is
13 you have to get back into the situation of property that
14 is at issue in the claims tribunal. The claims tribunal
15 was created in '81. There's not a lot of that property
16 around. We're talking 25 years later. So, they have
17 pretty much played out their course.

18 There were the Hegna cases and the Elahi
19 case. The others are going to be resolved without
20 regard to these provisions. And so, the reality is what
21 the Court says today will affect my client but, as far
22 as I can tell, no one else. And certainly, the only
23 interest the United States has at this stage in this
24 litigation is its own financial interest. And it would
25 seem to me, that's not a basis on which to interpret

1 this statute.

2 If there are no further questions, I urge
3 the Court to affirm.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr.
5 Phillips.

6 Mr. Bederman, you have two minutes left.

7 REBUTTAL ARGUMENT OF MR. DAVID J. BEDERMAN

8 ON BEHALF OF THE PETITIONER

9 MR. BEDERMAN: If I could make just a few
10 points: In response to Respondent counsel's assertion
11 that in the International Chamber of Commerce arbitral
12 award, there's been some form of novation here which
13 makes the connection between the ACMR and the Cubic
14 judgment somehow attenuated, I think that's belied by
15 the tribunal's -- the panel's discussion. This is at
16 the joint appendix on page 47.

17 The panel makes very clear that, under the
18 sales contract, credit has to be given to Iran for its
19 advance payments. And here you have a breakout of the
20 salvage value of the ACMR. All that the panel was
21 indicating was that Iran was not entitled to specific
22 performance here. To make that ruling is not a finding
23 of a novation in the sense at least Respondent's counsel
24 is using that phrase. So, I don't see the attenuation
25 here.

1 Speaking to the assertion that, again, the
2 enormous risk presented by this case of a broad
3 construction of the congressional intent, I think if we
4 look carefully at the language at the blue brief at 11a,
5 of the statutory construction provision -- that was part
6 of the colloquy between the Chief Justice and
7 Respondent's counsel. Again, if you read this, it
8 completely reserves, if not begs, the question of
9 whether the Cubic judgment is, quote, "an asset
10 otherwise available under this section for attachment."

11 So, I think it completely doesn't answer,
12 one way or the other, as either a finger on the scale,
13 as Respondent's counsel has evocatively said, or some
14 form of command by Congress to this Court. It simply
15 reserves that question for the Court's analysis.

16 In response to Justice Ginsburg's last
17 question to Respondent's counsel, the only thing I would
18 point out to, again, is another clue in the statute. If
19 we look at the Victims Protection Act, which was the
20 predecessor statute here, section 2002(c), what Congress
21 wanted to protect is the right of the United States to,
22 quote, "pursue these subrogated rights as claims or
23 offsets of the United States in appropriate ways."

24 So, again, Congress has contemplated the
25 notion that there will be a process of setoffs, either

1 before the Iran U.S.-Claims Tribunal or in some other
2 context, which I'm not sure I can imagine beyond what
3 Respondent's counsel has said. So to suggest that the
4 broad remedial thrust of TRIA, which Petitioner is not
5 denying -- it's not our place to deny that -- is
6 nonetheless tempered by these carefully crafted
7 provisions in the statute.

8 We would support, obviously, reversal of the
9 lower court's opinion.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 The case is submitted.

12 (Whereupon, at 12:09 p.m., the case in the
13 above-entitled matter was submitted.)

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24
25

A				
ability 48:24	affect 9:22 41:10 48:14 50:8,18	56:15	37:8,19,20	12:24 44:7
able 12:25 42:3 45:5,20 54:6	51:19 54:21	analytic 15:18 16:11	42:5,10 43:1	50:2
above-entitled 1:14 57:13	affirm 55:3	answer 41:19 47:4 51:12	43:17,19 44:12	assuming 8:6,6 8:15 13:9
absence 51:17	ago 19:1	56:11	45:5,6,6 50:17	assumption 8:8
absent 17:13	agree 4:12 20:14 25:1 37:5	answers 34:21	50:19 51:9	Atlanta 1:18
absolutely 34:1 39:18 43:20	agreed 4:8 53:7	anybody 42:19	55:7	attach 3:24 22:4 24:20 25:17
accept 35:14 36:2	agreement 35:6 35:9 43:21,23	appeal 3:12 8:12 10:24,25 11:18	arguments 29:7	36:2,22 40:13
accords 6:18 7:2 10:9,20 12:11	44:2,4,8 45:2	12:5	arisen 46:23	40:16,25 41:1
12:16 15:20,24	45:15,22	appeals 11:3 23:6,18 24:4,7	arises 7:4 49:12	41:3 48:24
17:4 23:8 28:4	ahead 47:23	24:21,23 25:8	Armed 1:4 3:5 13:16,18	attached 18:23
32:1 48:22	air 15:3 16:3 33:19	48:22	arms 43:10,22 44:10 45:8,9	attachee 19:24
50:21 51:5,8	Algerian 51:5	appear 23:2	45:11	attacher 19:22
account 4:8,10 5:3 10:16 22:3	Algiers 6:18 7:2 10:8,20 12:11	APPEARAN... 1:17	arose 48:21	attaches 20:12
22:5,13 35:21	12:16 15:20,24	appellate 8:16	arrangement 46:2	attaching 12:21 20:8 21:9
36:15,19 39:17	17:3 23:8 28:3	appendix 18:15 27:17 29:18	46:2	38:16 39:20
accounts 5:11	32:1 50:21	55:16	arrangements 32:19 45:18	attachment 9:4 20:19,22 21:18
accruing 10:10	51:8	applies 50:14	Article 17:4	25:4 27:12
achieve 4:16	aliases 13:21 14:1	apply 38:3 51:11	articulate 16:6	56:10
ACMR 31:20,22 32:5 35:4 40:4	allow 9:4 11:16 16:24 21:18	approach 9:1	aside 33:4	attachments 14:8 19:4,4 21:4
40:4,14,17,20	46:12	appropriate 13:9 14:23	asked 28:19 34:24 42:21,22	attenuated 22:11,15 55:14
40:21 41:2	allowing 9:5 12:12	15:6,22 17:16	asking 41:6 51:22	attenuation 55:24
55:13,20	alluded 29:22 31:23	18:13 31:16	51:22	attributable 5:12
Act 26:2 56:19	alternatives 52:21	56:23	aspects 5:12 11:19	attribute 22:12
action 17:15 48:14	ambiguity 53:2	appropriately 14:19	assert 10:15 asserted 28:2	authority 14:22 30:13
Acts 3:15	amended 13:7 25:22	arbitrary 11:13 11:20 35:9	asserting 30:6	availability 9:18 17:7
add 37:7	amendment 7:17	43:9 55:11	assertion 29:9 55:10 56:1	available 9:6 15:11 21:17
addition 11:24	amicus 1:22 2:6 22:24	arbitrary 47:22 47:25	assertions 29:3	56:10
adds 44:11	amount 4:4 6:12 27:17 30:3	34:17,23,23,25	asset 14:23 23:16 25:13,20	avoidance 17:17
adjudicated 53:20	38:18	35:7	28:10,11 29:10	avoiding 17:11
adjudicating 29:6	amounts 4:9 5:11 53:8,21	arbitrator 34:25 35:3 43:20	34:24 56:9	await 10:6
adjustment 17:14	ample 8:4	argument 1:15 2:2,10 3:4,8	assets 15:16,16 16:8 17:1 23:7	award 4:2,20 6:8 10:6 11:13
adopt 38:6 51:14	analysis 16:12	15:14 22:22	24:20,24 25:19	11:20 30:18,22
adopted 39:7		26:18 27:5,6	26:5,8,10 27:8	30:25 31:6
advance 55:19		32:11 33:3	28:24 33:24,24 34:7,9	34:17,23,23,25
			Assistant 1:20	
			assume 8:19,20	

35:2,8,9 43:9 55:12 awarded 27:17 awards 3:20 4:24 aware 13:24 14:12 a.m 1:16 3:2 A/15 12:7 31:23 A/21 12:7	22:17,20 55:6 55:7,9 begs 56:8 behalf 1:18,22 1:24 2:4,6,9,12 3:9 22:23 32:12 55:8 belied 55:14 believe 10:7 21:15 25:4 27:3,22 29:1 29:15 believes 19:11 belongs 49:7 beneficial 15:2,3 benefit 10:8 32:22 benefits 10:10 best 33:13 45:23 54:4 better 41:22 beyond 32:19 48:23 49:17 57:2 bill 10:1 bit 11:11 22:15 blanketed 5:20 blocked 14:23 23:17 24:24 25:3,13,21 26:5 35:18 blocking 13:2,17 25:22 26:7 46:22 51:1,6 51:11 blue 3:16 56:4 boils 18:1 bought 22:2 34:13 breach 10:8,19 12:10,15 35:8 42:12 46:3 breached 51:4 breakout 55:19 Brewster 12:1 Breyer 18:22,25 19:2,10,15,21	19:24 20:5,7 20:10,15,17,23 21:2,7,12,22 22:8,9,14 28:19 35:15,24 36:5 37:1,7,24 38:14,20,22,23 39:1,11,22,23 40:3,13,16,22 41:7 47:2,8,19 48:4,7,9,17 49:20 brief 3:16 6:6,7 27:25 33:7,18 52:5 56:4 briefs 26:19 bring 40:7 broad 29:9 56:2 57:4 broader 4:22 15:15 48:16 broadly 27:10 32:18 brought 40:21 42:11 builds 28:22 burden 54:3 buys 35:22 B/61 3:25 6:9 7:14 16:3 29:20 33:16 B/66 16:1	CARTER 1:24 2:8 32:11 case 3:4,25 6:8 7:12,14 9:24 10:9 11:9 13:6 13:23 16:1,3 17:24 18:22 19:3 22:15 29:16,20 31:17 36:16 40:3,5 41:17 42:2 49:14,14 50:8 50:13,19 51:5 51:23 53:5 54:10,19 56:2 57:11,12 cases 7:20,21,25 10:21 12:7 14:11 17:10 20:11 47:15 48:18,20 50:10 54:18 causes 17:15 central 25:10 certain 10:11 17:19 39:6 certainly 7:17 7:24 8:3 12:19 16:14 22:17 24:5,15 40:9 53:4,19 54:22 certiorari 50:24 cetera 45:21 challenging 11:19 Chamber 11:13 55:11 character 4:21 characterizes 29:17 characterizing 19:8 check 22:1,2 Chief 3:3,10 4:7 4:13,25 13:23 15:13 16:4,6 22:19,25 24:8	24:16 25:25 28:18 29:8 32:7,13 33:23 34:2,15 44:4,7 44:17,21,24 45:4,12 46:8 46:17 50:15,23 52:1,6,19,23 55:4 56:6 57:10 Circuit 8:13 10:25 13:22,25 16:17 24:11 45:25 Circuit's 13:7 51:4 circumstance 30:21 circumstances 12:23 21:19 38:13 39:9 42:22 46:4 54:1 cite 52:2 cited 40:1 claim 4:3 5:8 9:17 10:15 13:11 15:3,4 16:20 23:23 27:4 28:2,8,12 28:15 30:1,2,4 33:25 34:8 38:12 39:18 42:6,11 claimants 14:4 claims 3:19 4:1 4:11,18,19 5:7 5:13,16 7:1,2,6 7:22 8:1 17:4 23:5 28:24 33:9,16 35:12 37:13 41:17 45:8 46:13,18 46:24 49:1,3,6 50:18 51:24 54:14,14 56:22 57:1	
B					
back 10:11 13:11 15:7 24:11 33:6 34:12 38:13,16 45:8,20 49:21 49:22 51:16 54:13 balance 22:18 bank 4:8,10 5:3 5:11 22:3,4,12 35:21 36:15,18 39:17 based 10:7 18:14 bases 11:22 basic 33:4 basis 15:14 23:18 33:4 35:7 44:1 54:25 bear 9:10 Bederman 1:18 2:3,11 3:7,8,10 4:12 5:5 6:3 7:9,13,24 8:3 8:11,19,23 9:14 10:5 11:1 11:6 13:3 14:6 14:10 15:11,17 16:5,9 17:25 18:3,6,25 19:7 19:14,20,23,25 20:6,9,14,16 20:20,25 21:6 21:11 22:7,9					
		C			
		C 2:1 3:1 calculating 10:17 California 16:16 Canada 28:7,14 28:14,21 40:17 43:24 45:1 Canadian 35:2 43:12 Canadians 34:4 candidly 43:5 carefully 6:25 56:4 57:6			

clarification 10:23	concluded 48:23	contract 7:4 17:13,21 35:1 35:4,19 40:11 45:10,13 55:18	27:13,14,22 29:15 32:14,17 42:17 43:5 49:3,11 50:6 50:13 51:22 54:21 55:3 56:14	29:18 30:13,16 30:20,22 32:6 34:2,17 35:1 35:17 40:6,7,9 40:11,17 42:14 42:16,20,23 43:9,12,22 44:2,6 45:13 45:25 46:1 55:13 56:9
clean 51:10	conclusion 5:21	contractor 6:22	courts 11:17 29:5 48:22,24	Cubic's 11:11 11:18
clear 4:14 5:6 6:6 9:8 15:12 43:20 46:1 49:18,21 51:17 52:16 55:17	concrete 39:15	contracts 16:2 18:16	court's 11:12,19 17:3 56:15 57:9	curiae 1:23 2:7 22:24
clearly 5:15 30:21 32:22 33:24 37:4 43:7 49:12,13	concur 22:17	contractual 6:20 43:11	covers 13:17	cut 28:20 47:22
client 54:21	conduct 52:24	contrary 23:8	crafted 57:6	<hr/> D <hr/>
clue 56:18	confess 52:15	convention 11:20	created 54:15	D 3:1
collateral 17:12	Congress 4:15 21:16 32:22 38:2 39:7,10 47:20 48:12,25 49:13 51:18,19 52:2,12,24 53:1 56:14,20 56:24	core 25:10	creates 38:14	damages 47:14
collude 16:25	Congress's 8:24	Corning 17:10	credit 10:2 16:11 26:13 41:25 52:11 55:18	DARIUSH 1:9
collect 19:18	connection 55:13	correct 20:16,25 22:10 48:4,4	credited 10:12 10:16 12:22	DAVID 1:18 2:3 2:11 3:8 55:7
collects 27:2	congressional 9:2 56:3	correctly 25:12	creditor 9:24,24 10:4,14	dead 52:18
colloquy 56:6	Congress's 8:24	correspondence 6:10	creditors 42:1	deal 54:4
collude 16:25	connection 55:13	Council 13:23	critical 23:3 29:25	dealing 31:13 42:7
combat 33:19	consequence 26:1,4 33:12 46:2,11,11	counsel 31:23 32:7 46:5 55:23 56:7,13 56:17 57:3,10	crisis 16:23	deals 6:19
come 10:11 26:4 53:3	consider 29:15	counsel's 55:10	cross 11:2	dealt 49:15
comes 7:17 43:9 50:1,16	consideration 15:22	counterclaim 7:7,11,14 11:21 29:21,23 29:24	crystalline 43:25	decide 14:22 16:7 39:12,14 43:6
command 56:14	consistent 37:12 38:6	counterclaims 7:1,3	Cubic 3:23,25 4:4,5 5:7,25 6:12,19,21 8:9 8:10,12,15,17 8:22 9:5,23 10:2,24 11:7 12:4,21,25 16:2,14 17:2 18:16,17 19:13 20:21 21:24,24 22:1 26:19 28:7,17,21,22	decides 32:17
Commerce 11:13 55:11	consistently 49:15	course 6:15,19 8:11 9:14 13:6 20:1 25:22 27:5 28:11 36:19 54:17	crystal 16:23	decision 24:4,15 24:20
commission 38:24 39:14,19	constituent 25:10	court 1:1,15 3:11 5:18 11:9 11:24 12:1 13:8,9,12,14 14:16,19,21,22 15:19 16:16 18:10 23:1,6 23:18,20 24:3 24:4,5,6,15,20 24:23 25:8,9	crystal 16:23	Declaration 7:3 17:4
compensate 37:9,11	constitutes 7:5 29:19		crystal 16:23	deducted 19:18
compensatory 39:4	construction 3:13 38:1 51:20 52:8,9 52:25 56:3,5		crystal 16:23	defeats 30:1
complete 27:3	construe 50:6		crystal 16:23	defending 51:3
completely 33:3 39:5 43:11 45:10 56:8,11	consular 48:21 49:6		crystal 16:23	defends 23:17
complicated 45:18	contemplated 7:21 56:24		crystal 16:23	defense 1:3 3:4 4:6 6:21 9:17 10:15 11:8,8 11:23 13:15,18 14:17 16:20 20:4 22:16 23:3 25:7,9
compromise 47:22 48:1	context 26:24 49:16,17 51:5 57:2			
Computer 17:10				
conceive 30:17 30:18				
concern 22:10 22:11 39:14				
concerned 49:1				

<p>27:4 defenses 5:13,17 14:18 15:4 define 29:4 definition 48:16 degree 43:17 delivering 19:16 demand 7:15 8:5 demanded 4:2 demonstrated 32:16 denied 26:11 deny 57:5 denying 57:5 Department 1:21 depending 30:11 50:16 deprive 49:18 deprives 51:16 derived 17:12 described 33:15 33:15 designated 25:6 25:11 designation 13:4 13:15 15:1 25:2 designations 13:20 14:2 designed 32:24 determination 16:1 determine 7:23 determined 31:17 detriment 51:15 development 13:6 dictating 53:5 different 17:15 34:16 36:10 43:1,4 47:13 diplomacy 53:19 diplomatic</p>	<p>18:19 diplomatically 54:6 directly 23:8 47:5,13 disadvantage 32:21 disagreement 21:14 discharge 31:16 discussed 33:2 discussion 55:15 disjunctive 4:17 4:21 disposed 11:15 disposition 6:20 11:10,16 13:9 dispute 27:24 28:1 33:20 44:9,25 disputing 35:13 dissent 16:12 dissipated 28:11 district 11:12,19 11:24 12:1 13:12,14 14:19 16:16 49:2 double 17:12 double-recove... 17:18 doubts 38:2 DOUGLAS 1:20 2:5 22:22 Dr 14:13 20:22 20:23 25:14 38:10 41:14 53:9 drafting 9:11 D.C 1:11,22,24 13:22,24</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 8:1 26:17 31:24 46:5 50:24 earth 39:10</p>	<p>easily 32:19 36:23 47:15 easy 30:18 36:17 economic 34:13 40:4 effect 9:9 14:9 24:22 effected 30:10 30:11 effective 20:2 effort 40:7 efforts 48:20 either 22:3,14 22:15 34:12,12 35:16 37:6 42:2 56:12,25 Elahi 1:9 3:6 9:24 10:4 12:20 14:13 20:23 21:3,5 22:3 25:14,15 25:16 36:1,22 38:10 41:14 53:9 54:18 Elahi's 20:22 electing 3:17 election 14:13 embargo 19:16 embarrassment 49:11 embassies 49:25 emphasize 23:19 emphasized 24:5 encompassing 7:1 ends 21:7 39:10 enforcement 3:18 11:12,19 33:8 enormous 32:17 56:2 enter 45:13,21 entered 35:6 43:23 44:8 entire 32:22</p>	<p>37:22 entirely 8:14 30:2 entities 13:21,21 entitled 5:11 27:2,7 32:4,5 38:11 53:2 55:21 entity 15:1 25:11 equally 10:2 equipment 34:13 equivalent 34:18 erroneous 23:22 24:7,22,23 escrow 34:4,8 espousing 5:18 ESQ 1:18,20,24 2:3,5,8,11 essential 23:19 essentially 11:18 15:25 16:12 39:8 et 45:20 event 15:10 Evidently 9:1 evocatively 56:13 examination 5:15 examine 42:16 examining 10:19 42:20 exchanges 18:19 excuse 28:5 49:9 execute 12:25 14:5 executed 19:5 30:12 execution 26:9 exercise 37:22 exercising 14:22 expansive 16:23 expect 53:24 explain 9:21</p>	<p>41:6 explicated 12:14 export 12:12 32:1 expressing 23:25 extend 39:9 extent 11:21 15:15 41:20</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>facility 28:22 fact 8:9 11:7 12:14 15:2 19:12 21:23 23:17 24:6 26:4 27:3 29:2 29:22 32:16 41:8 44:15 54:7 factual 13:14,22 13:25 failure 12:11 fair 51:17 far 9:11 14:12 35:11 50:8,18 51:8 54:21 favor 10:10 15:10 21:25 38:4 49:16 51:21 52:13 federal 16:16 49:2,11 figure 50:14 file 7:14 29:23 filed 28:12 50:24 filings 18:19 finally 11:10 financial 12:9 54:24 find 5:22 10:9 finding 10:8 55:22 finds 8:18 finger 56:12 first 7:10 33:2 34:22 37:21</p>
--	--	---	--	---

40:6 45:8 48:16 Fisher's 16:12 fist 50:1 fit 47:25 focus 33:10 follows 52:8 Force 15:3 16:3 forced 49:10 Forces 1:5 3:5 13:16,18 forever 26:11 form 55:12 56:14 formal 7:14 forward 11:24 45:17 found 12:10,15 27:19 four 47:16 frankly 35:16 front 33:12 41:17 45:24 49:3,9 frozen 25:23 frustrate 21:19 fundamentally 32:21 funds 3:14,17 21:17 30:14 34:8 51:12 further 25:5 36:6 44:14 55:2 Futura 17:10	9:21 10:22 11:2 12:7,24 14:3,7,11 23:13,24 25:12 25:18 26:12,21 29:22 41:23 53:6,16 54:9 Ginsburg's 56:16 give 34:12,12,13 38:5 44:19,22 45:8,9,10,13 50:16 52:11,21 52:22 given 13:2 38:7 55:18 gives 29:12 go 9:11 24:11 28:21 33:6 45:17 47:23 49:17 53:10 goal 37:10 goes 38:15,16 going 7:19 8:17 15:7 24:11 26:3,4 31:10 31:12 38:9,13 41:15 42:19 44:18,19,21,25 45:1,17 47:14 47:17,21 48:12 53:24 54:19 good 3:10 47:4 government 35:2 43:12 49:7 50:3,24 52:17 53:23,24 governments 6:11 government's 33:18 granted 9:19 17:8 grasp 53:7 gray 6:6,7 grocery 22:5 35:22 36:5,12	36:15,18 39:17 ground 36:3 guess 28:18 31:3 50:7,9 <hr/> H <hr/> Hague 4:1 5:24 Hallward-Dri... 1:20 2:5 22:21 22:22,25 23:15 24:2,14,18 25:15,19 26:6 26:15,23 29:1 29:14 30:15 31:3,9,19 32:4 32:8 hand 31:22 happen 47:11 happened 35:24 47:9 happens 35:25 happy 45:21 hear 3:3 7:9 heart 3:12 Hegna 48:18,20 54:18 held 44:3 help 24:9,9 helpful 24:4,12 hold 30:14 holding 23:6,10 23:18,20,22 24:7,23 Honor 18:6 23:15 26:6,16 26:17 29:14 31:4,20 32:9 hope 54:6 hours 47:16 house 22:2,5 huge 50:4 hurt 26:3 48:13 hypothesizing 17:9 <hr/> I <hr/> ICC 11:13,20	identical 36:16 identified 9:16 16:14,17,19 18:16,20 imagine 35:17 57:2 imagining 15:19 immediately 23:10 immunity 5:20 implicated 4:14 5:13 implicates 42:12 implications 10:19 12:9 import 4:14 important 46:21 46:24 improper 10:13 inasmuch 15:23 inchoate 5:19 include 7:3 includes 4:22 including 36:1 53:9,9 inconsistent 49:1 independent 23:16 indicate 4:21 6:16 10:10 23:20 indicated 4:23 6:5 16:13 17:9 23:10 indicating 55:21 indication 51:17 individuals 18:23 21:1 injuries 54:3 inoperative 24:22 inquiries 13:25 insofar 19:4 instance 10:15 12:14,20 instrument	15:25 Insurance 3:15 integral 29:19 intended 21:16 32:22 51:18 52:12 intensely 13:22 13:25 intent 9:2 56:3 interest 15:19 39:16 54:23,24 interests 9:12 23:4 37:12 interim 47:11 international 3:20 4:19 6:1 11:12 55:11 interpret 6:16 32:18 54:25 interpreting 15:23 intervening 50:25 involve 48:20 Iran 1:6 3:6 4:2 5:1,6 6:8,18 9:22,24 10:1,3 10:10,11,14 12:25 13:19 15:9,10 16:24 19:6,11 20:1 20:13,13 21:7 21:23,24,25 22:16 23:3,9 25:7,9,14,21 27:8,18,19 28:2,12 29:10 29:12,16,25 30:12,19,20,21 31:22 32:2,3 32:20 33:15 34:19 35:4,20 35:21,21 36:3 36:6,20 38:9 38:13,16,18 39:18 40:21,25 41:11,12,15,25
<hr/> G <hr/> G 1:24 2:8 3:1 32:11 Ga 1:18 gather 39:23 general 1:21 16:7 46:13 getting 19:22 51:7 Ginsburg 5:23 6:15 7:7,11				

42:1,9 43:15 43:21 44:3,6,7 44:17 45:13,20 46:13 47:6 48:15,21 49:16 49:24 51:7,12 53:8,11,23,24 54:11 55:18,21 57:1 Iranian 12:12 12:13,19 16:2 22:3 23:7 25:10 41:17 46:18 49:7 Iranians 34:6,7 34:11 50:17 Iranian-Amer... 37:13 Iran's 4:6 6:21 9:25 10:3,14 10:16 11:8,23 14:17 15:3 19:3 20:3 21:3 23:23 27:4,6 27:16,20 28:8 28:15 30:1,2,3 30:8 33:25 52:17 53:11 Iran-United 4:1 Iran-U.S 7:22 23:5 irrespective 47:14 Islamic 1:5 3:5 13:18 issue 3:19 4:10 4:16,18,22 6:17 8:7,22 9:20 11:11 13:3,20 14:15 15:8,8,16 16:2 16:3,8,24 17:22,23,23 20:10,11,14,16 21:11,13,13,15 21:21 23:14 24:1 25:19	27:11,21 28:24 29:4,11,11 30:25 31:5,15 31:20 32:1 33:9,16,18,25 34:9 35:12 36:12,13,19 37:15 38:14 40:2,3,5,19,23 40:24 41:16,21 42:13,17 43:6 44:15 45:7 46:18,21,21 47:5 51:1,25 54:14 issues 11:15 13:14 39:13,14 46:14 51:11 <hr/> J J 1:18 2:3,11 3:8 55:7 January 1:12 jets 35:17 job 24:8,9 joinder 21:13 joint 18:15 33:17 55:16 Judge 11:25 16:12 judgment 3:24 3:25 4:4,5 5:2 5:8,25 6:12,19 8:9,9,10,12,15 8:18,22 9:5,23 10:3,24 11:4,9 11:23 12:4,21 13:1 15:10 16:15 17:2 18:17,24 19:12 19:12,17 20:21 21:3,5,25,25 24:10 26:19 28:16,17 29:18 30:12,14,20,22 31:12,13,14,15 31:16,23 32:6	32:6 39:3,4,5 40:6,7,11,17 40:24 41:2 42:14,16,20,23 43:9 45:25 55:14 56:9 June 10:25 jurisdiction 5:9 5:16 6:25 9:18 15:20,24 16:21 17:3,20 18:13 20:3 33:21 40:9,9,10 jurisprudence 8:1 10:18 20:3 Justice 1:21 3:3 3:10 4:7,13,25 5:23 6:15 7:7 7:11,19 8:2,6,7 8:14,21,23 9:7 9:21 10:22 11:2 12:7,24 13:23 14:3,7 14:11 15:7,13 16:4,6 17:22 18:1,5,22,25 19:2,10,15,21 19:24 20:5,7 20:10,15,17,23 21:2,7,12,22 22:8,9,14,19 22:25 23:13,24 24:8,16 25:12 25:18,25 26:12 26:21 28:18,19 29:8,22 30:10 30:24 31:7,10 32:3,7,13 33:23 34:2,15 35:15,24 36:5 37:1,7,24 38:14,20,22,23 39:1,11,22,23 40:3,13,16,22 41:7,23 42:9 42:24 43:13,16 43:19 44:4,7	44:17,21,24 45:4,12 46:8 46:17 47:2,8 47:19 48:4,7,9 48:17 49:20 50:15,23 52:1 52:6,19,23 53:6,16 54:9 55:4 56:6,16 57:10 <hr/> K keep 34:4 Kennedy 7:19 8:2,7 15:7 30:10,24 42:9 42:24 43:13,16 43:19 key 5:9 16:22 kind 29:8 32:19 37:15 50:12 53:25 kinds 47:9,11,13 know 28:22 30:15,24 43:18 45:18 46:8,22 47:16 48:11,19 49:21 51:8 knowable 39:11 39:12 <hr/> L language 4:15 6:3,10 18:19 26:17 27:9 29:2 32:18 33:6,12 52:11 52:15,18 53:3 56:4 late 13:5 Laughter 37:3 law 49:14,14 leased 49:25 leave 18:9 leaving 36:22 left 55:6 legal 29:13	legally 23:21 24:7 legitimate 21:14 letter 52:18 let's 12:24 28:5 35:17 liability 27:8 48:15 liable 44:3 license 32:1 lien 4:5 10:15 lienholders 38:8 41:9,15,20 50:9 lienor 12:21 lienors 13:13 14:6,7 liens 11:16 14:9 14:18 limited 39:3 limiting 5:10 16:22 line 38:8 41:9 47:22 48:1,20 lined 21:1 litigation 9:3 21:20 27:10 45:24 46:11,25 50:11 51:24 54:24 living 50:20 located 5:19 lodgings 33:14 lodgment 6:8 18:16 logically 11:14 Logistics 13:16 long 11:14 29:9 47:24 longer 23:17,21 24:7 51:3 look 8:10 33:14 34:5 39:13 41:11 44:8,18 45:22 48:9,18 49:6 56:4,19 looking 9:1,2
--	---	---	---	--

lose 39:5	million 3:14	mutual 5:5,6	O	order 5:21 10:12
loss 32:5,5	23:23 30:19	16:18	O 2:1 3:1	13:2,17 20:1
lot 47:4 54:15	35:19 44:3	mutually 16:25	objection 7:18	26:7 30:13
loud 46:1	53:10	35:4 43:22	objections 11:11	31:21 39:12
lower 27:14 57:9	mind 9:10 48:10	mystery 11:6	objects 20:1	43:24 46:12,22
	49:13		obligation 31:17	49:11,18 51:1
M	minimum 35:11	N	obligations 6:18	51:6,11
main 15:7	Ministry 1:3 3:4	N 2:1,1 3:1	12:16 28:3	orders 25:22
making 8:5	4:6 6:21 10:14	named 13:16	31:25 42:12	organic 15:25
14:20 51:9	11:8,23 13:15	narrowly 47:25	43:1,4 50:20	organizations
maneuvering	13:17 14:17	50:6	obtain 5:2	14:1
33:19	20:3 22:16	National 13:23	obviously 6:17	original 45:15
Manhattan 22:2	25:7,9	natural 22:10	10:5 32:21	51:5
materials 18:14	minutes 32:15	24:6 33:12	37:22 45:25	originally 12:1
matter 1:14 3:12	33:2 55:6	nature 27:23	46:14 57:8	40:20
4:25 7:5 8:25	modulated 18:7	28:1	occur 4:4	ought 35:10
11:10 12:2,5	moment 7:8	nearly 52:15	occurred 13:6	38:3 43:5
53:3,19,20	18:11 19:1	necessary 5:21	16:15	52:21
57:13	35:16 41:5	14:21 33:20	occurrence 7:5	outer 29:16
matters 6:1,24	Monday 1:12	need 9:10 25:5	17:21	outset 46:25
26:22	monetization	48:15	October 13:4	overarching
ma'am 11:1	43:8	needs 29:15	25:2	32:16
mean 9:7 13:3	money 9:6 10:1	never 23:7 24:1	odd 11:11	owe 19:6 27:19
15:17 17:25	19:19 20:5,12	38:12,15 41:15	offset 6:9 7:23	30:7 34:17
24:6 26:8,10	21:8,8,10,23	new 11:20 13:12	17:19 18:18	35:20 36:8
28:19,24 31:4	27:2 29:12,12	22:13 23:16	27:3,18 29:21	46:2
31:14 34:7	30:7 35:18,20	28:22 31:12,12	30:6	owed 21:23
41:23 42:19	35:21 36:2,3,7	43:23 46:22	offsets 56:23	44:10 45:14
43:3 45:24	36:8,13,14,14	nickel 46:2	offsetting 8:1	46:5
46:15,15,20	36:14,18 38:12	Ninth 8:13	oh 49:9	Owens 17:10
50:12 51:1	38:15,17,17	10:24 13:7	Okay 8:21 32:3	owes 10:1 19:19
53:13	39:20 41:13,14	16:17 24:11	37:18	21:9 30:19,21
meaning 38:5	41:15,16 42:1	45:25 51:3	once 50:16	36:3 38:18
meaningful	42:2 44:22	normalize 53:23	one-of-a-kind	owing 34:5
49:19	45:1,2,13,14	note 6:6	54:10	owned 22:16
means 17:22,23	49:21,22 51:25	notice 4:16 7:16	ongoing 27:11	owner 15:2,3
21:21 25:13	53:11,22	noting 17:2	50:11	owns 36:12
31:7,15 41:21	moneys 50:3	notion 17:18	opaque 21:12	
42:16	months 13:7	33:10 56:25	open 12:5	P
memorial 6:4	moot 23:14	notwithstandi...	opinion 13:7,24	P 3:1
mentioned 8:8	24:10,10,17	14:24	24:12 43:20,25	page 2:2 3:16
10:23 14:3,4	morning 3:11	novation 55:12	57:9	27:16 29:17,17
merits 27:15	move 11:10	55:23	opportunity	55:16
29:7	44:14	nuanced 18:12	51:16	pages 6:6,7
military 6:21	moved 46:6,15	number 10:20	oral 1:14 2:2 3:8	paid 9:25 44:11
23:7 33:24	multimillion-...	35:14	22:22 26:18	50:4 53:8,11
34:12	23:12		32:11	pair 51:10

panel 55:17,20	Petitioner's 9:15	49:22	privity 17:13	37:23
panel's 55:15	13:10 18:7	position 5:6,18	problem 38:25	provided 34:19
paragraph 17:5	27:5 31:23	6:14,23 9:3,9	45:19 52:24	provides 3:15
parse 21:20	33:7 52:5	9:15,15 10:13	54:12	48:2,7 51:23
part 25:10 29:19	Phillips 1:24 2:8	12:19 13:10	problems 51:23	provision 4:17
29:25 35:9	32:10,11,13	14:24 18:7,8	proceed 38:10	5:20 7:18
40:10 56:5	34:1,10,21	19:3,9 21:3,4	proceeding 8:15	16:24 21:16
particular 13:21	35:23 36:4,25	21:20,23 23:8	27:24 31:8,12	33:13 38:1,3
14:1 16:8	37:4,21,25	23:25 24:17,18	31:18 33:17	39:2,7 52:1,2
22:12 23:5	38:19,22,25	24:25 25:7	50:25	56:5
38:3 53:5	39:22,25 40:15	26:3,16 27:16	proceedings	provisions 54:20
parties 5:12	40:18 41:7	27:20 29:6	16:15 17:13	57:7
16:19 21:14	42:4,18 43:3	38:6,6 52:17	25:5 27:23	proviso 14:15
29:3,7 35:5,7	43:15,18 44:6	54:4,5	28:1 42:25	public 3:14
35:13 39:25	44:13,20,23	positions 11:3	46:12	punitive 39:5
43:23	45:4,16 46:10	27:15	proceeds 9:23	purpose 37:22
party 3:16 46:16	46:20 47:7,18	positive 41:11	13:1 28:13,14	52:14
50:9	48:2,5,8,17	possibility 41:9	28:20,23 34:4	pursue 56:22
passing 47:20	50:22 52:4,10	possible 47:21	process 8:16	put 11:23 22:2
pay 35:20 37:18	52:20 53:1,6	possibly 4:23	56:25	29:6 38:3
39:20 48:11	53:13,18 54:12	potentially	prong 4:22 17:6	39:19 51:20
53:22	55:5	46:23,24 49:2	proper 37:12	52:3 54:4
payment 51:12	phrase 55:24	precedent 8:4	properties 17:1	puts 35:21
payments 53:25	piece 40:22,23	precedents 10:7	43:24 44:15	p.m 57:12
55:19	53:6	precisely 34:22	48:21,23,24	
pending 11:13	pipeline 50:11	predecessor	49:23	Q
pending 11:4	place 44:9 45:14	56:20	property 3:18	question 3:23
46:9	48:18 51:6	prejudice 27:15	3:23 4:23 5:19	7:20 12:8
penny 46:4	57:5	prejudging 29:6	9:16,18 12:12	14:16 18:14
people 21:9 22:4	planes 19:16	present 26:7	12:13 16:13,19	20:18 24:1
32:21 36:1,22	44:18	presented 14:19	17:7 22:12	28:19 36:11,13
40:25 42:1	played 46:25	20:18 56:2	25:3 27:11,24	36:20 37:5
48:5	54:17	presumably	27:25 29:4	38:15,20,21,23
percent 39:3,4	please 3:11 23:1	28:21	31:5,5,8 33:8	39:19 41:8,24
perfectly 45:21	32:14	pretty 8:22	33:10,16,18,21	43:4 45:16
performance	pled 34:11	54:17	35:12 39:15,15	51:14 56:8,15
55:22	plenary 14:22	prevent 51:7	40:2,3,19,23	56:17
person 20:8,12	pocketed 10:3	prevented 19:16	40:23 43:6	questions 14:25
38:16 39:20	point 12:6 20:8	previous 32:15	45:7 47:5,9	46:23 55:2
persons 20:24	25:1 27:11	previously	49:6,10 50:1	queue 21:1
Petitioner 1:7	37:9 40:18	29:22	54:13,15	quickest 41:19
1:19 2:4,12 3:9	43:17,19 49:15	principle 5:10	protect 9:3,12	quotations 40:2
5:18,22 13:19	50:15 56:18	16:22	56:21	quote 28:4 29:19
14:25 18:3	points 37:11	prior 31:1,14,14	protection 3:14	56:9,22
25:3,8,23 26:9	55:10	31:15 46:22	26:2 48:3	quoted 26:17
26:11 27:1	policy 53:4	48:21	56:19	quoting 5:25
55:8 57:4	portion 46:14	private 6:19	provide 32:25	

R				
R 3:1	18:18	14:23 25:8	resources 39:3	35:23 36:4,25
Raffi 13:13	recoveries 32:25	remark 6:16	respect 3:18	37:1,7,21 41:7
14:12	recovery 17:12	remedial 57:4	4:10 10:6	42:4 44:17,22
raise 50:17	redress 37:23	remedies 32:25	17:14 19:3	46:20 47:7
raised 41:24	51:17	remedy 28:4,6,9	24:24 35:3	48:3,8,12,12
range 33:19	reduced 28:16	28:13 29:19	38:12 43:22	50:22 56:21
reach 5:21 24:1	32:6	49:19	respectful 15:22	rights 3:17,24
reaches 29:16	reduces 30:3	remember	respective 11:4	39:6,8 53:14
read 19:11	reduction 27:7	34:22 43:8	27:15	53:21 56:22
35:16 36:23,23	referring 13:5	remitted 4:6	respond 31:19	risk 3:15 32:17
37:5 43:19	refers 4:17	remotely 42:21	Respondent	37:17 56:2
56:7	reformulated	51:7	1:25 2:9 3:13	road 44:14
reading 16:23	45:10	remove 9:6	3:24 9:5 13:10	Roberts 3:3 4:7
33:5	regard 43:25	removed 35:11	23:17 24:19	4:25 13:24
realistically	50:8 54:20	rendered 16:10	25:1,15 26:10	15:13 16:4,6
50:10	regarded 35:10	rendering 24:22	27:22 28:9	22:19 24:8,16
reality 38:7	rejected 34:25	renders 11:9	32:12 55:10	25:25 28:18
41:13 45:24	40:8	52:18	Respondents	29:8 32:7
54:20	related 5:8 9:17	renounced 3:24	6:23	33:23 34:2,15
really 30:25	16:20 17:19,22	repatriate 25:21	Respondent's	44:4,7,17,21
41:21 46:7	17:23	25:24	4:5 55:23 56:7	44:24 45:12
48:14	relates 33:11	repatriated 26:9	56:13,17 57:3	46:8,17 50:15
reason 15:8	relations 53:23	repatriation	responding	52:1,6,19,23
23:16 49:17	relationship	12:12	42:10	55:4 57:10
reasonable 50:2	6:20 47:1	repeat 16:9	response 16:5	Rubin 13:13
REBUTTAL	relatively 30:17	repeatedly	55:10 56:16	14:11
2:10 55:7	51:10	27:25	result 51:18	rule 7:17,18
recall 35:2	released 4:5	reply 28:8	53:5	17:18 37:17
receive 3:17	relevance 41:12	representations	retribution	51:15,20
received 3:13	relevant 5:16,17	16:18	53:25	ruled 15:21
27:18 30:20	18:9 19:17	represents 45:7	retroactivity	49:15
receives 4:2 6:8	relied 8:5	Republic 1:6 3:5	15:5	rules 7:16,22
27:8	relief 9:19,22	13:19	return 12:6 39:2	ruling 11:25
recognize 52:17	17:7 27:18	require 19:5	39:5 48:13	12:17 21:17
53:24	relies 28:9	required 42:7	49:8	55:22
recognized	relinquish 3:17	50:5	reversal 22:24	running 37:12
31:24	39:6,8	resell 43:24	57:8	S
recognizes 5:1	relinquished	reserve 22:18	reversed 8:16	S 2:1 3:1
recognizing	13:11 24:19	reserves 56:8,15	review 6:25	sale 28:7,13,14
31:1	25:16 27:13	Resistance	33:14 42:22	28:21 43:10
recompensed	relinquishment	13:23	revise 24:12	sales 43:22
54:8	14:13,14 38:11	resolution 11:7	revolution 34:20	55:18
recoup 53:8	39:1 50:4	53:20	right 7:13 19:2	salvage 55:20
recouped 6:9	rem 27:24	resolve 36:11	20:15,19,24	satisfied 31:13
recouping 53:10	remain 8:12	54:6	22:6 24:20	satisfy 30:13
recoupment	remains 12:4	resolved 8:25	25:16,20,21,23	saves 29:12
	remand 13:11	11:17 54:19	26:16 35:15,22	

<p>saying 19:10 21:16 26:24 34:17 35:8 39:2 40:25 41:2,11 says 30:19 36:6 38:2 39:10 41:1,16 44:13 44:17 49:6 52:7 54:21 scale 38:4 51:21 52:3,13 56:12 scenario 4:12 scheme 32:23,24 33:1 screaming 46:1 second 17:6 24:1 48:15 51:14 secondary 35:8 Secretary 13:4 25:6 section 9:1 38:5 52:7 56:10,20 see 22:14 28:5 44:11 45:23 47:16 52:8,19 52:23 55:24 seek 28:6,6,10 seeking 17:14 seeks 28:4 seize 47:24 48:20 seized 49:24 self-serving 29:13 sell 34:3 44:25 49:10 sells 28:23 send 45:20 sense 11:15 21:13,15 42:20 50:6 55:23 sentence 16:7 separate 8:15 17:23 35:1,6 43:11 44:2 45:10</p>	<p>sequence 46:6 series 40:1 serves 35:9 Services 17:11 set 4:3,9,22 5:1 5:3,11 6:9 38:13 setoff 7:15,16 8:5 10:17 12:23 15:9,12 17:12,15 18:18 19:5 20:2,13 34:6 42:10,25 43:2,2 setoffs 10:11 56:25 sets 13:13 Settlement 7:3 17:4 shifts 54:2 ship 44:10,18 show 49:8 shunted 33:4 side 31:8,11 sides 11:4 significant 37:22 simpler 35:25 simply 9:5 11:22 31:15 37:9,16 41:21 50:3 56:14 single 50:19 51:15 singular 50:12 sir 20:9 situation 12:22 17:11 29:11 34:16 36:17,21 49:5 54:13 situations 53:13 slightest 22:15 slightly 18:7 sold 35:17 Solicitor 1:21 somebody 28:23 somewhat 42:13</p>	<p>47:25 soon 11:9 sorry 7:9 18:6 21:12 sort 32:16 46:13 sought 22:4 29:19 sounds 16:25 source 9:6 Souter 8:6,14,21 8:23 9:7 17:22 18:1,5 31:7,10 32:3 Southern 16:16 sovereign 17:14 speak 6:13 9:14 10:17 12:17 18:10 speaking 7:25 19:8 20:21 56:1 specific 37:25 39:15,18 40:1 55:21 specifically 35:3 40:7 51:20 spoke 19:1 stage 5:24 51:9 54:23 stages 50:25 start 8:8 state 25:6,10 28:8 stated 7:8 statement 28:8 28:12 30:8,8 States 1:1,15,22 2:6 3:19 4:1,2 4:3,18,19 5:7 5:10,23 6:4,5 6:13,14,18 7:14 8:4 9:3,9 9:13,15 10:2 10:20 12:10,13 12:15 13:2 16:24 18:8,8 18:10 19:8,19</p>	<p>21:9,19 22:23 23:2,4,4,6,9,11 24:5,25 26:13 26:17,18 27:1 27:2,7,14,17 27:19 28:3,13 28:16 29:23,25 30:1,2,4,19,20 31:22,25 32:20 33:9,15,22 36:7,10,21 37:13 38:18 40:10 41:24 42:2,4,6,11,15 46:22 49:3,8 49:16,24 50:1 50:20 51:4,24 53:8,10,14,17 54:1,5,7,23 56:21,23 State's 13:4 status 20:21 26:7 statute 4:21 9:11 27:9 29:2 32:18 33:7 37:6 42:7 47:20 52:14 55:1 56:18,20 57:7 statutory 3:13 4:15,17 32:23 38:1 52:7,9,25 56:5 stayed 46:10,17 step 35:11 stop 51:11 store 22:5 35:22 36:5,12,15,18 39:17 straightforward 8:25 strong 37:17 strongest 37:8 stuff 45:1 49:25 subject 3:20 4:20,24 7:5,16</p>	<p>14:15 25:3 27:12 28:15 30:22,25 31:6 submission 13:8 14:20 submitted 57:11 57:13 subparts 33:20 subrogated 53:14 56:22 subrogation 53:15 subsequent 41:8 substantial 43:16,17 49:22 substantive 14:18 15:4 16:1 substitute 15:16 subtract 21:8 36:7,9 41:1,3 subtracted 38:17 successful 12:21 successfully 54:11 sued 54:11 sufficient 5:4 suggest 10:12,14 12:18 38:1 53:2 57:3 suggested 26:14 suggestion 15:15 suggests 9:10 support 1:4 3:5 11:22 13:18 23:3,11,22 50:24 57:8 SUPPORTING 22:24 suppose 9:22 19:25 35:20,24 36:6 supposed 27:14 Supreme 1:1,15 sure 47:18 49:22</p>
---	--	--	---	---

57:2 sweep 32:19 system 33:19 40:4,5,14,17 40:20,21 43:7 43:8 Systems 11:8	34:5 41:17 thing 47:3 50:7 56:17 things 45:20 47:9,11,21 think 4:14,20 5:9 8:24 9:7 10:13 11:21 13:5 14:24 15:5,22 16:10 16:21 17:1 18:12,25 20:18 21:15 24:3 30:17 31:4 32:15 34:10 36:17 42:18,21 43:3,5,13 46:1 46:12 47:3,15 48:17 49:20 52:10,12 53:1 53:4,18,20 55:14 56:3,11 thinking 15:18 thought 11:14 15:14 19:15 20:20 41:10 three 13:7 35:25 47:16 thrust 57:4 thumb 38:4 51:20 52:3 tie 52:22 time 14:21 22:18 tip 52:12 title 52:7 today 13:19 23:2 54:21 told 5:24 total 52:18 totally 39:11,12 tough 8:22 Trading 17:10 Trafficking 26:2 transaction 7:4 17:21 31:2 transformations 47:12	TRIA 3:15 9:1 13:11 14:13 25:4 38:5 57:4 TRIA's 16:23 tribunal 3:20,21 4:1,20 5:7,14 5:17,24 6:1,5 6:11,14,17 7:8 7:12,16,22 8:4 8:7,17 9:4,16 9:19 10:17 12:8,10,15,18 12:19 15:9,21 15:23 16:14,18 16:20 17:8,9 17:16,20 18:17 18:20,21 21:17 23:5,9 25:20 26:3,20 27:6 27:10,12,21,23 28:2,16,25 29:3,5,7 30:12 30:16,18,23 31:5,21,21,24 33:11,11,16 34:6 35:13 36:11,19 37:14 37:17 38:9 40:8,19 41:4 41:13,18 42:10 42:21 44:16 46:13,19,24 47:13 49:4,6,9 50:18 51:24 54:14,14 57:1 tribunals 24:10 tribunal's 5:9,16 6:25 7:25 10:6 10:7,18 15:20 16:21 18:13 20:2 55:15 true 42:15 truth 46:20 try 40:15 45:17 trying 4:15 15:18 21:2 40:13,16 48:18	turns 45:23 46:25 twice 37:18 two 6:11,24 13:12 16:7 18:23 21:4 22:4 34:21 36:1,2,21 38:7 40:25 43:1,4 45:8 47:1,20 50:9 52:20 55:6	16:24 18:8,8 18:10 19:8,19 21:9,19 22:23 23:2,4,4,6,9,11 24:5,25 26:13 26:16,18 27:1 27:2,7,14,16 27:19 28:3,13 28:15 29:23,25 30:1,2,4,19,20 31:22,25 32:20 33:9,14,21 36:7,10,20 37:13 38:18 40:10 41:24 42:2,4,6,11,14 46:22 49:3,8 49:16,23 50:1 50:19 51:4,23 53:8,10,14,17 54:1,5,7,23 56:21,23 unknowable 39:9 unquestionably 51:13 unrelated 6:24 29:24 30:5 42:13 43:7 unusual 50:13 urge 55:2 urging 41:25 use 23:10 27:25 30:6 useful 15:18 16:11 U.S 14:24 29:18 41:17 57:1
<hr/> T <hr/> T 2:1,1 table 51:2 take 8:17 13:1 16:11 19:10 21:22 37:16 40:24 44:8 taken 6:23 11:3 22:1 takes 8:7 13:9 51:1 talking 54:16 talks 33:8 technical 33:4 tell 24:11 39:24 44:25 45:19 50:8 54:22 telling 52:24 tempered 57:6 ten 11:5 46:9 term 27:25 terminated 43:23 terms 8:1 10:8 10:18 11:25 48:18 terrorism 3:15 33:1,3 37:10 37:23 49:18 51:21 52:13 53:12 terrorist 51:15 test 16:7 29:13 textual 8:25 Thank 22:19 32:7,8,13 55:4 57:10 that's 46:9 theory 26:13	<hr/> U <hr/> ultimately 10:11 unblocked 23:7 underlying 11:11 12:4 35:4 43:21 52:14 understand 8:24 9:8 11:25 25:12 47:19 48:19 50:23 understanding 14:10 15:19 18:12 19:7 41:5 understood 17:3 undertaking 43:11 undertakings 16:18 undertook 50:20 unfortunate 12:3 46:6 unfortunately 49:10 United 1:1,15,22 2:6 3:19 4:2,3 4:18,19 5:6,10 5:23 6:4,5,13 6:14,17 7:13 8:4 9:3,8,12,15 10:1,19 12:9 12:13,15 13:1	<hr/> V <hr/> v 1:8 vacate 23:20 24:3,15 vacated 24:21 valid 8:9 19:5 23:21 validity 8:11		

12:4 value 28:6 34:13 34:24 35:1,8 36:15 40:4,5 45:9,11 55:20 values 49:23 various 17:1 versa 19:6 versus 3:6 vice 19:6 victim 37:16 38:4 47:23 51:15,21 victims 3:14 26:2 32:25 33:3 37:10,23 48:3,11 49:18 52:13,22 53:9 53:11 54:3,10 56:19 view 27:1 30:2 31:20 36:9,10 51:4 viewed 42:8 violated 28:3 violates 51:7 violation 31:25 44:1 Violence 26:2 vis-a-vis 21:3,4	38:9 40:24 41:10,22 42:8 48:9 51:16 52:11 53:3 54:7 56:12 ways 32:20 33:5 46:5 56:23 weapons 43:7,8 we'll 48:11 we're 30:5 54:16 we've 45:2 wish 23:19 won 19:12 word 33:10 words 7:20 29:9 work 53:17,19 world 5:19 17:1 worried 26:1 34:3 worthy 37:10 wouldn't 4:9 26:12 41:24 written 22:1 27:9 wrong 22:8 39:24 41:6	12 1:12 12:09 57:12 16 28:8 19-3 7:17 1981 40:20 <hr/> 2 <hr/> 2 17:4 2.3 53:9 20 39:3,4 2002(c) 56:20 2007 13:2,4 25:2 2009 1:12 201(c) 4:17 9:1 201(d) 37:25 201(d)(4) 38:5 52:4 22 2:7 25 32:15 33:2 54:16 <hr/> 3 <hr/> 3 2:4 17:5 30 7:18 32 2:9 6:6 <hr/> 4 <hr/> 47 55:16 <hr/> 5 <hr/> 55 2:12 <hr/> 6 <hr/> 65a 33:17 <hr/> 7 <hr/> 79 47:5 <hr/> 8 <hr/> 80 47:5 81 6:6 54:15 83 6:7 85 6:7 29:18 85a 27:16 <hr/> 9 <hr/> 98 10:25		
<hr/> W <hr/> waiver 7:18 walked 35:5 want 15:12 36:5 36:24 37:16 39:24 44:23 47:24 48:14 wanted 40:21 44:20 56:21 Washington 1:11,21,24 wasn't 45:14 way 6:16 10:12 21:20 33:13 34:11 35:13,17 36:23,23 37:6	<hr/> X <hr/> x 1:2,10 10:1 <hr/> Y <hr/> years 11:5 46:9 47:11 54:16 York 11:20 22:13 <hr/> \$ <hr/> \$2 23:23 35:19 \$2.3 3:13 \$2.8 30:19 44:3 <hr/> 0 <hr/> 07-615 1:8 3:4 <hr/> 1 <hr/> 11a 3:16 33:7 52:5,6 56:4 11:07 1:16 3:2			