



1 supporting the Petitioners.

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

3 of the Respondents.

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4	On behalf of the Petitioners
5	DOUGLAS HALLWARD-DRIEMEIER, ESQ.
6	On behalf of the United States, as amicus
7	curiae, supporting the Petitioners
8	THOMAS C. GOLDSTEIN, ESQ.
9	On behalf of the Respondents
10	REBUTTAL ARGUMENT OF
11	JONATHAN S. FRANKLIN, ESQ.
12	On behalf of the Petitioners
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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Franklin.

ORAL ARGUMENT OF JONATHAN S. FRANKLIN

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 waiver with respect to Iraq existing privileges --  
2 existing provisions of law. But again, to the extent  
3 there is any question about that, Title 1, U.S.C.  
4 section 108 answers that conclusively. That section  
5 provides that even if Congress itself had repealed  
6 section 1083 in its entirety, that would not bring  
7 section 1605(a)(7), which had been repealed by that  
8 section. And that is the plain language of 1 U.S.C.  
9 108. Obviously the President by exercising a blanket  
10 waiver authority can't have a better or more effective  
11 ability to bring back into existence expired statutes  
12 than Congress itself could have done.

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

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

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

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

5 JUSTICE SOUTER: I agree.

6 MR. FRANKLIN: Okay.

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

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

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

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

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

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

25           So this is the classic example of a

1 jurisdictional repeal that applies to all cases.  
2 Congress didn't just repeal a statute, but it gave  
3 another provision that encompassed every pending claim  
4 and allowed every single pending plaintiff to be able to  
5 refile their cases.

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

13 So, for both of those reasons the  
14 alternative ground is also one that warrants reversal.

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

19 MR. FRANKLIN: There is at least two that I  
20 am aware of, two default judgments. They are cited in  
21 our brief. And the effective ability of those default  
22 judgment creditors, as it were, to execute on those  
23 judgments would depend on the application of the new  
24 statutes that Congress enacted about judgment execution.  
25 Those are not at issue in this case. But the answer to

1 your question is yes, there were at least two judgments  
2 that I am aware of that were default judgments where  
3 Iraq had not appeared and did not contest the case.

4 JUSTICE GINSBURG: And you're not claiming  
5 that those could be reopened?

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

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

24 In the final analysis, I think this -- this  
25 is a case that turns ultimately on the President's

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

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

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

23 JUSTICE SCALIA: I also gather that the  
24 ability of the President or the United States to seek  
25 some compensation from Iraq through diplomatic channels

1 on behalf of these plaintiffs is not affected at all by  
2 this outcome, right?

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

16 CHIEF JUSTICE ROBERTS: That is before the  
17 Foreign Sovereign Immunities Act, right?

18 MR. FRANKLIN: That is true, but this case  
19 involve the doctrine of foreign immunity and it embodies  
20 the same concerns of reciprocity that were at issue  
21 then.

22 If I might, I would like to reserve the  
23 remainder of my time for rebuttal.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Hallward-Driemeier.

1                   ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER  
2                               ON BEHALF OF THE UNITED STATES,  
3                                       AS AMICUS CURIAE,  
4                               SUPPORTING THE PETITIONERS  
5                   MR. HALLWARD-DRIEMEIER: Mr. Chief Justice,  
6 and may it please the Court:

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

16                   Even if one were to add the atextual  
17 additional limitation that the Acree court majority  
18 tried to, that it only encompassed statutes that would  
19 stand as an obstacle to the funding of the Iraqi regime  
20 in the aftermath of removing the Hussein government,  
21 still the President's memorandum to Congress makes clear  
22 his determination that the threat of billions of dollars  
23 of judgments against Iraq and the seizure or freezing of  
24 their assets by attachment constituted an immediate  
25 threat to the foreign policy interests of the United

1 States and our critical foreign policy goals in Iraq.

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

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

15 And so, again, it is essential to the  
16 government's foreign policy interests in Iraq that these  
17 judgments, the ability to attach Iraqi assets -- in  
18 fact, at the time, in the summer of 2003, there were  
19 plaintiffs that were running around trying to attach the  
20 very assets, the very bundles of cash, that the United  
21 States Government was attempting to shift to Iraq in  
22 order to pay immediate needs in -- in Iraq in the  
23 immediate aftermath of having removed the Hussein  
24 regime. These critical foreign policy goals would have  
25 been frustrated had the President not been able to make

1 our Foreign Sovereign Immunity Law conform to our  
2 foreign policy.

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

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

22           MR. HALLWARD-DRIEMEIER: No, Your Honor.  
23 The judgment in the Acree case dismissing the claims for  
24 failure to state a claim was because counsel in that  
25 particular suit was unable to identify a source of law

1 for their claim. The D.C. Circuit has correctly held  
2 that Federal law did not at that time provide a cause of  
3 action under 1605(a)(7), and counsel was unable when  
4 pressed at oral argument to identify the source of law.

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

11 JUSTICE GINSBURG: Where the wrong occurred  
12 would have been Iraq.

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

23 So plaintiffs have successfully obtained  
24 judgments in suits brought under 1605(a)(7). And there  
25 were billions of dollars in claims that were asserted

1 against Iraq. And -- and, as I said, plaintiffs were  
2 actively going and trying to seek the actual money that  
3 the United States was trying to transfer over to Iraq to  
4 pay immediate costs of the reconstruction.

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

16 JUSTICE GINSBURG: Wouldn't any such  
17 settlement have to take into account that Iraqi -- the  
18 Iraqi people themselves were the most numerous and  
19 probably the worst victims of the terror?

20 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I  
21 think that -- that that is one consideration. The  
22 United Nations has established a mechanism for funding  
23 many of the victims of the Hussein regime. And -- and  
24 -- but the United States would have the obligation to  
25 represent the interests of the United States citizens

1 that were injured. But, as -- as Your Honor's question  
2 points out, there are a lot of considerations that go  
3 into the diplomatic or state-to-state resolution of the  
4 claim beyond those that would be available to a court to  
5 consider in just adjudicating the particular plaintiff's  
6 claims. And that is why these have historically been  
7 reserved for diplomatic resolution. So --

8 CHIEF JUSTICE ROBERTS: Well, you don't  
9 doubt, in absence of the waiver, that this is a claim  
10 that could proceed under the Foreign Sovereign Immunity  
11 Act?

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

16 CHIEF JUSTICE ROBERTS: And that claim could  
17 --

18 MR. HALLWARD-DRIEMEIER: -- the abrogation  
19 of immunity.

20 CHIEF JUSTICE ROBERTS: Putting aside the  
21 waiver, that claim could proceed despite the fact that  
22 there has been a change in the governing authority in  
23 Iraq?

24 MR. HALLWARD-DRIEMEIER: That's right. The  
25 -- the general rule that Congress established in

1 1605(a)(7) was that the jurisdiction of the courts would  
2 continue for any claim that arose from acts committed  
3 while the state was designated. But the authority that  
4 the President was given in 1503 was to render those  
5 statutes immediately inapplicable to Iraq. And, of  
6 course, it would not be inapplicable to Iraq to hold  
7 that today a court would have jurisdiction over Iraq and  
8 authority to enter a judgment against Iraq pursuant to  
9 1605(a)(7). It would be application of that statute.

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

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

23 MR. HALLWARD-DRIEMEIER: That is true. And  
24 in 1503, Congress restored to the President in a sense a  
25 very small portion of the authority he had previously

1 exercised before the FSIA's adoption. 1605(a)(7) on its  
2 own terms turns on determinations by the executive.  
3 It's a statute that can be turned on and turned off by  
4 designating or de-designating a country. It has a  
5 particular temporal consequence, the rule that -- that  
6 the Chief Justice alluded to.

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

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Goldstein.

15 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

16 ON BEHALF OF THE RESPONDENTS

17 MR. GOLDSTEIN: Mr. Chief Justice, and may  
18 it please the Court:

19 The Court will want to have available to it  
20 the blue brief for the Petitioners and Joint Appendix  
21 Volume 2, which together reproduce the statutes that are  
22 relevant to this case. And I do want to talk about the  
23 text of the statutes.

24 And the point that I'm going to make from  
25 the text of the statutes is that the Solicitor General

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

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

19 If all it was doing was giving the power to  
20 the President to immediately rescind Iraq's designation  
21 as a terrorist state, if it was a more modest power  
22 rather than effectively writing into 1605(a)(7) "except  
23 for Iraq," if it's just a power about rescindment, then  
24 the rule of 1605(a)(7) that the Solicitor General just  
25 cited to you, that changing somebody's designation

1 doesn't affect their liability, would apply here. So  
2 just put it in terms --

3 JUSTICE SOUTER: Why would -- why would  
4 Congress have wanted to make that distinction?

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

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

17 JUSTICE SCALIA: It's a long section. Which  
18 part of the section --

19 MR. GOLDSTEIN: I am going to take you  
20 straight to the text. I am giving you the overview  
21 right now.

22 So, they were de-designated. It works in  
23 two parts. A is the prohibition. This is how you get  
24 designated. Prohibition. The United States shall  
25 not --

1 JUSTICE SOUTER: Okay. Where are you?

2 MR. GOLDSTEIN: Sorry. I'm at 344, and I'm  
3 in A, prohibition.

4 JUSTICE SOUTER: Okay.

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

16 Now, that designation can be rescinded and  
17 that's usually what happens. But there are important  
18 restrictions on the rescindment that gave rise to the  
19 enactment of section 1503, and they are in C, rescision.  
20 The Congress limited the President's ability to  
21 immediately rescind the designation: "A determination  
22 made by the Secretary of State under subsection A not --  
23 may not be rescinded unless" -- and there are two rules.  
24 It can happen in one of two ways. The first is you get  
25 a new government: "A, there has been a fundamental

1 change in the leadership and policies of the government  
2 concerned." Or number 2, the old government changes its  
3 ways. That's 2A: "The government concerned has not  
4 provided any support for international terrorism during  
5 the preceding 6-month period.

6 So here's the dilemma and, Justice Souter,  
7 this is the complete explanation for why Congress gave  
8 the President the power it did in section 1503.  
9 Remember when the EWSAA is enacted there is a whole  
10 discussion in the first 30 minutes about the new regime.  
11 There was no new regime. There was a discussion about  
12 how the Saddam Hussein regime had been toppled. No, it  
13 hadn't.

14 When the EWSAA had been enacted -- was  
15 enacted, Baghdad had fallen seven days earlier. There  
16 was no new Iraqi government. We would not recognize an  
17 Iraqi government until June of 2004.

18 CHIEF JUSTICE ROBERTS: Well, there may have  
19 not been a new one, but there certainly was not the old  
20 one either.

21 MR. GOLDSTEIN: Yes. But, Mr. Chief  
22 Justice, I'm making a very particular point, and that is  
23 that the President lacked the power under this statute  
24 that I have just cited to you, 620A -- and it is also  
25 the statute that is cited in 1503 -- the President

1 lacked the power at that time because there was no new  
2 government and there wasn't a change in policy in the  
3 old government.

4 JUSTICE KENNEDY: But there's nothing better  
5 settled -- well, perhaps that's broad. It is very well  
6 settled that the President is the one to determine who  
7 is the lawful and legitimate government that he would  
8 deal with.

9 MR. GOLDSTEIN: That's correct.

10 JUSTICE KENNEDY: That's all that was  
11 happening here. And it's not just a question of one  
12 against the other. It's a question of what government  
13 has survived.

14 MR. GOLDSTEIN: Exactly right --

15 JUSTICE KENNEDY: And that is under -- and  
16 under the law something that has always been committed  
17 to the very large discretion of the President.

18 MR. GOLDSTEIN: I couldn't agree with you  
19 more, Justice Kennedy. And here's the relevant point.  
20 In the spring of 2003 when Congress enacted this  
21 statute, we had not recognized a new Iraqi government.  
22 We did that in June of 2004. So my point is, and I  
23 think this is very clear from the history, Congress  
24 enacted section 1503 of the EWSAA because the President  
25 was powerless under the existing state of the law to

1 rescind Iraq's designation as a terrorist state. That's  
2 what --

3 JUSTICE SOUTER: But it was -- the text of  
4 it was not limited to rescinding that designation. I  
5 mean, that's the problem, it seems to me.

6 MR. GOLDSTEIN: Okay. Well, let's go to the  
7 text, if we could. And that is in the blue brief. It's  
8 in the appendix to the blue brief. And it's at 4A. And  
9 it's the second proviso, of course, and it appears seven  
10 lines down.

11 "Provided further, that the President may  
12 make inapplicable" -- that's the language that we are  
13 going to focus on, Justice Souter -- "make inapplicable  
14 with respect to Iraq" -- and then it identifies the  
15 statute -- "section 620A of the Foreign Assistance Act  
16 of 1961 or any provision of law that applies to  
17 countries that have supported terrorism."

18 Now, we are putting aside the debate of  
19 whether section 1605(a)(7) is such a law. We are  
20 assuming it is and you say it, Justice Souter, but he is  
21 given the power to make inapplicable section 1605(a)(7).  
22 He isn't just given the power to rescind the  
23 designation.

24 And the question just -- the term "make  
25 inapplicable" doesn't appear in this context anywhere

1 else in the U.S. Code. We have to figure out what it  
2 means. And the way that laws that apply to countries  
3 that have supported terrorism apply or are rendered  
4 inapplicable, there is a method in the U.S. Code for how  
5 they are made applicable and inapplicable.

6 So, to return to my examples. If you were  
7 to ask the United States or Mr. Franklin -- so this  
8 statutory scheme of laws -- sanctions that apply to  
9 nations that support terrorism applies to Syria, to  
10 Iran, it applies to Sudan. It is inapplicable to Libya,  
11 North Korea, Guinea-Bissau, Britain, France. How is it  
12 that they apply to some and not others? It's through  
13 designation. That's the process for taking something  
14 that applies and make it inapplicable. And I can give  
15 you a lot of other --

16 JUSTICE GINSBURG: But this statute  
17 specifically short-circuits that process. It says the  
18 President may at once make inapplicable. The very  
19 purpose of it is that the normal process is going to  
20 take time, and therefore it's being replaced with an  
21 emergency measure that becomes effective immediately.

22 MR. GOLDSTEIN: Yes, the de-designation  
23 becomes effective immediately. What -- the distinction  
24 that I am drawing is that there is a strong version of  
25 the words "make inapplicable," and there is a more

1 modest version of the words "make inapplicable."

2 Iraq and the United States say that when he  
3 made it inapplicable he in effect essentially wrote it  
4 out of the U.S. Code or wrote in the exception that says  
5 "except for Iraq." We say that "make inapplicable" in  
6 this context is a term of art that deals with  
7 designation and rescindment. And that process is all  
8 that Congress was trying to do, was to allow the  
9 President to immediately --

10 JUSTICE SOUTER: All right. Let's -- let's  
11 assume --

12 MR. GOLDSTEIN: Yes.

13 JUSTICE SOUTER: -- for the sake of argument  
14 that the reasons for -- otherwise the reasons for and  
15 against the point you've just made are evenly balanced.  
16 We are on the fence. Don't we resolve this -- shouldn't  
17 we resolve this in favor of the President's position,  
18 simply because in the absence of the statutes that we're  
19 talking about, starting with the Foreign Sovereign  
20 Immunities Act, the President would have had under the  
21 foreign policy power of Presidents the authority to stop  
22 suits like this dead in the water simply by taking the  
23 position that that should be the result? So that if in  
24 doubt, shouldn't we construe these statutes consistently  
25 with the traditional foreign policy authority of the

1 President, in which case we get off the fence and we go  
2 in the way of the Petitioners rather than your way?

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

7 JUSTICE SOUTER: Well, it's been profoundly  
8 changed if we accept your argument. I mean, at the  
9 moment the question is whether it has been profoundly  
10 changed or not. We've got a statutory mess. And in a  
11 case in which the statutes are seemingly subject to --  
12 to -- to arguments either way, why don't we go with  
13 tradition?

14 MR. GOLDSTEIN: Okay. Well, I do want to  
15 come to whether we are in equipoise in just a second. I  
16 do think the fact that Congress changed the model so  
17 that we don't use, in effect, the Tape Memorandum model.

18 Second, remember, Justice Souter, that this  
19 isn't a return to that model. What used to happen  
20 before the FSIA is the President would come into court  
21 and say I think that this nation has immunity and the  
22 court would decide on the basis of that case by case.  
23 But it was the President making the determination, case  
24 by case. This is something unknown. This is very  
25 different, if I could just explain how on their --

1 JUSTICE SOUTER: Yes, but the President,  
2 quite apart from the immunity designation, the President  
3 had the authority to compromise suits.

4 MR. GOLDSTEIN: Well, fine, and if that is  
5 espousal power continues to exist, then the President  
6 can attempt to exercise it.

7 JUSTICE SOUTER: I don't know whether it  
8 continues to exist or not for the sake of this argument,  
9 and I'm not -- I'm not making that point for the sake of  
10 this argument. I'm simply saying that if it is  
11 otherwise unclear, given that that power was  
12 traditionally enjoyed by the President, why do we not  
13 construe the -- or resolve the equipoise if it gets to  
14 that point, in the President's favor rather than your  
15 favor?

16 MR. GOLDSTEIN: Okay. So the -- two  
17 reasons, the first is this is not an attempt at  
18 espousal, unlike Dames & Moore and cases like that.  
19 Remember the President hasn't set up some sort of  
20 mechanism for resolving these claims. He is simply  
21 saying that they are --

22 JUSTICE SOUTER: Well, he hasn't set it up  
23 because he thinks he has got the authority under this  
24 statute or had the authority under this statute.

25 MR. GOLDSTEIN: Justice Souter, it wouldn't

1 work like that. If the President were engaging in an  
2 act of espousal then he would have set up some mechanism  
3 for resolving the claims.

4 JUSTICE SOUTER: Oh, I -- I quite agree with  
5 that.

6 MR. GOLDSTEIN: So can I --

7 JUSTICE SOUTER: So I suppose the first step  
8 in that direction is to stop the suit that's going on  
9 now.

10 MR. GOLDSTEIN: Well, the President  
11 purported to do that nine -- excuse me, five or six  
12 years ago and if he were going to set up a mechanism, I  
13 think he would have.

14 But can I just then just come to the premise  
15 of whether we are --

16 JUSTICE GINSBURG: But why -- why shouldn't  
17 we treat this -- yes, the Foreign Sovereign Immunities  
18 Act said Congress is setting the rules. But why doesn't  
19 this emergency measure effectively restore to the  
20 President under these special circumstances the power  
21 that he once had? Congress ceding back to the  
22 President back to the President for the purposes of  
23 dealing with Iraq, the authority -- the control  
24 authority he once had?

25 MR. GOLDSTEIN: Okay. So let's -- if I

1 could accept the premise that -- and not try to combat  
2 the premise of what we would do in the case of  
3 equipoise, let me turn to the question of what statute  
4 really means and why we shouldn't be in equipoise. The  
5 Court generally has not assumed that emergency  
6 appropriations measures issues, particular their  
7 provisos, changed the jurisdiction of the Federal  
8 courts, much less give the President the power to change  
9 the jurisdiction of the Federal courts. And it has in  
10 related context taken language like "any provision" and  
11 said well, we are looking for a clear statement of law  
12 by Congress to make sure it has confronted this  
13 situation.

14           When it attempts to -- when the argument on  
15 the other side is that the Congress has passed a law  
16 that shifts the balance of power between Congress and  
17 the legislature and the executive in cases like  
18 Atascadero, in cases like Raygor, Will, these are all  
19 cases that had said statutes that said "any," and the  
20 Court said well, because this a -- a relatively strange  
21 thing to provide in the proviso to an appropriations  
22 measure, for example, we would ask that there be a clear  
23 statement. So that would be one reason that we are not  
24 in equipoise.

25           JUSTICE ALITO: But as a practical matter,

1 isn't this closely associated with appropriations and  
2 with foreign aid? The issue is billions of dollars were  
3 going to be needed to reconstruct Iraq in -- in the wake  
4 of the war and the money could be provided directly by  
5 the United States through foreign assistance, which is  
6 part of the thrust of -- of this provision, certainly.  
7 And the argument is that this is closely related to it,  
8 because it freed up other money that would be used for  
9 reconstruction. So why is there anything odd about this  
10 being in an appropriations provision?

11 MR. GOLDSTEIN: Because this -- well,  
12 because what Congress was doing was confronting an  
13 emergency. There is not a breath, in either the  
14 President's transmittal of the statute, the legislative  
15 history of the statute, or anything else that says that  
16 Congress was dealing with the sort of medium to  
17 long-term health of the Iraqi population or the Iraqi  
18 government or the Iraqi economy. It didn't -- one thing  
19 you would have expected if that was Congress's intent is  
20 that Congress would have dealt with Iraq's debts, Saddam  
21 Hussein's debts, and would you also suspect that this  
22 wouldn't sunset, which is the eighth proviso that hasn't  
23 been discussed never much.

24 JUSTICE SCALIA: Why -- why does it say then  
25 any other provision of law? You know, Congress could

1 have explained its more narrow purpose in a few words.

2 MR. GOLDSTEIN: Well --

3 JUSTICE SOUTER: And I mean, just to add to  
4 that --

5 MR. GOLDSTEIN: Yes.

6 JUSTICE SOUTER: It said under 620A of  
7 Foreign Assistance or any other provision of law.  
8 Clearly they are going beyond, it seems to me, the --  
9 the premise which your argument rests on, the argument  
10 that you've just made.

11 MR. GOLDSTEIN: Oh, Justice Souter, I don't  
12 think that that -- let me, if I could take the  
13 two points in turn. In cases like Atascadero, Will,  
14 Raygor, it's the same language; it's "any." And the  
15 Court has said we require a plain statement when  
16 Congress is going to do something that would change the  
17 balance in the relationship between the branches of the  
18 government or between the Federal and State governments.

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

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

1           MR. GOLDSTEIN: I actually do disagree and  
2 believe you can logically look at the statute -- in the  
3 sense that the word "any" means "every," that is true.  
4 But if you look at what Congress was trying to  
5 accomplish, it was much more focused on questions of the  
6 immediate economic impact of the need to begin  
7 reconstruction in Iraq right away.

8           JUSTICE STEVENS: Mr. Goldstein, could I ask  
9 this question? You are reading into it the exception,  
10 of the words "any other provision of law." And I can  
11 understand your argument one of two ways, and I want to  
12 be sure which. Are you saying it means any other  
13 provision of the law, except those that affect the  
14 jurisdiction of courts? Or are you saying any other  
15 provisions of law that relate to foreign assistance?

16           MR. GOLDSTEIN: I am saying that except for  
17 those that relate to jurisdiction, because that is the  
18 kind of thing that you would expect Congress to deal  
19 with correctly.

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

24           JUSTICE BREYER: Can you -- I would like to  
25 follow up on Justice Stevens's question. Think of three

1 categories, A is the category which you could see that  
2 other questions of law apply to. B, is this case, and  
3 C, is the other -- other things -- other things that it  
4 might apply to, but in your opinion it would be absurd  
5 to apply them to that. All right, what's in category C?

6 MR. GOLDSTEIN: If it's anything, it would  
7 be the export of military hardware. In the immediate  
8 wake of the fall of Baghdad, when there is no new  
9 government, right? There is no replacement regime. If  
10 you read "any" to mean literally "every" then you could  
11 ship munitions, nuclear materials and the like when  
12 there is no state there and it's silly to think that  
13 Congress intended that. Its reasons for enacting the  
14 statute had to be --

15 JUSTICE BREYER: Wait, wait. After Saddam  
16 Hussein falls --

17 MR. GOLDSTEIN: Yes.

18 JUSTICE BREYER: -- and we have a new  
19 government --

20 MR. GOLDSTEIN: We don't have a new  
21 government.

22 JUSTICE SCALIA: Oh --

23 JUSTICE BREYER: Yo mean some period of  
24 days, or something?

25 JUSTICE SCALIA: Who's paying for these

1 shipments? I mean, is that a real problem when there is  
2 nobody over there to pay for them? You are worried  
3 about -- about armaments producers shipping -- shipping  
4 goods when there is nobody who has ordered them and is  
5 going to pay for them? I mean, that's absurd.

6 MR. GOLDSTEIN: Well, it's not -- it's not  
7 entirely clear there is still a government in Iraq.

8 JUSTICE BREYER: All right, is there any one  
9 other than that?

10 MR. GOLDSTEIN: No.

11 JUSTICE BREYER: No. Okay.

12 MR. GOLDSTEIN: I think -- I think --

13 JUSTICE BREYER: So basically, basically  
14 your reading --

15 MR. GOLDSTEIN: Yes.

16 JUSTICE BREYER: -- is the word "any other"  
17 does apply to any other.

18 MR. GOLDSTEIN: Yes.

19 JUSTICE BREYER: Except your case.

20 MR. GOLDSTEIN: Yes.

21 JUSTICE BREYER: And possibly this thing for  
22 a couple of days.

23 MR. GOLDSTEIN: Yes.

24 JUSTICE BREYER: Well, that isn't exactly an  
25 absurd result then, to say "any other" really means any

1 other including this case.

2 MR. GOLDSTEIN: Well, Justice Breyer, in --  
3 the same point was made in cases like Atascadero and  
4 Raygor. "Any" means "every" except for the States. In  
5 that example.

6 But can I just make quite clear, we have two  
7 lines of argument. And I think it's important to  
8 recognize that. We have the debate over what any other  
9 means and does that include section 1605(a)(7). That's  
10 what we have been discussing here, and the idea that any  
11 means every, and Congress spoke broadly and so that's  
12 what we have.

13 But we have the other incredibly important  
14 arguments of what it means to make a sanction  
15 inapplicable. Which is separate and independent of that  
16 point, and the question of whether the statutes sunset  
17 as the Acree court did. And I want to return First to  
18 those point of what it is to make inapplicable a statute  
19 that applies to nations that have supported terrorism.  
20 And I want to return to the statutory text and explain  
21 why our more modest reading of "make inapplicable" is  
22 the right one.

23 So the statutory text again is at 4a. Here  
24 are, I think, the strong statutory indications that we  
25 are right, that what Congress was trying to do was to

1 allow the President to immediately de-designate Iraq as  
2 a terrorist state. First, there is a direct parallel  
3 between the language "a statute that applies to  
4 countries that have supported terrorism" and the  
5 directive that the President can make it inapplicable.  
6 That tells you, look at how it is that these statutes  
7 apply in the first place, and the linguistic term of art  
8 is to do the reverse. Take something that applies and  
9 make it inapplicable.

10           And something that applies to an -- statutes  
11 apply to countries that have supported terrorism under  
12 American law only in one way, through designation. And  
13 what happens is that the President was allowed to  
14 rescind it.

15           The second textual reason for our more  
16 modest reading of make inapplicable is reference to  
17 section 620A of the Foreign Assistance Act. So we know  
18 one thing: even if we debate and disagree, Justice  
19 Breyer, about what any means in this context, we know  
20 the Congress told the President he could immediately  
21 make inapplicable section 620A.

22           JUSTICE SOUTER: Why did -- why did he need  
23 the statute to do that? In other words if the President  
24 had the power to designate in the first place, normally  
25 that assumes the power to -- to rescind the designation.

1           MR. GOLDSTEIN: That's exactly right, but  
2 that's the point. When I took you to the text of 620A,  
3 which was at 344 of the joint appendix volume 2,  
4 Justice Souter, he didn't have the power to do it right  
5 away. Remember, Baghdad falls; there is no new  
6 government; and the old government hasn't changed its  
7 ways. So he lacks the power to remove the designation.  
8 And I can prove that to you. It wasn't until there was  
9 a new government that the President actually did  
10 formally rescind the designation pursuant to the Foreign  
11 Assistance Act. It wasn't until 2004. After --

12           CHIEF JUSTICE ROBERTS: But that's -- that's  
13 just a belt-and-suspenders act. I mean, he -- he has  
14 the authority here, and he -- although it may look  
15 difficult, he has to envision there may be people who  
16 challenge that -- his interpretation of the law. So  
17 there's the other provision that will make it  
18 inapplicable under that as well.

19           MR. GOLDSTEIN: I -- I disagree, but we will  
20 accept that. Mr. Chief Justice, my point isn't, hey,  
21 look, he himself acknowledged that he needed to exercise  
22 his de-designation power. My point is different, and  
23 that is the fact that he didn't do this under the  
24 Foreign Assistance Act until 2004 is a strong indication  
25 that he couldn't do it before. If he could have done it

1 before, he would have.

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

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

10 JUSTICE SOUTER: I -- I don't know, either.  
11 I mean, I can't -- I can't read minds, but there is an  
12 interpretation that is quite possible consistent with  
13 the text of this statute, that he thought that by acting  
14 under 1503, he had done everything that he needed to do.  
15 Why he had at some subsequent time said, well, you know,  
16 I'll -- I'll use belt as well as suspenders, I don't  
17 know. But it would be consistent with the assumption  
18 that he had the authority here.

19 MR. GOLDSTEIN: Well, it -- I agree it would  
20 be consistent with the assumption that he had the  
21 authority here. That's -- I'm not trying to negative  
22 that. What I'm trying to say is that the authority  
23 under 620A -- the fact that he exercised it in 2004 is a  
24 strong indication that that's -- it's not the only  
25 possible reading, but it's a strong indication that

1 that's when he thought he got the power. The --

2 JUSTICE GINSBURG: But, Mr. Goldstein,  
3 before you finish your argument, I'd like to know what  
4 you think about the claim for relief. The D.C. Circuit  
5 said this is a mere jurisdictional provision, and it  
6 doesn't provide a private right of action; the new  
7 statute does, but that doesn't apply to Iraq. So, what  
8 was the source of the claim -- what is the source of  
9 these plaintiffs' claim for relief?

10 MR. GOLDSTEIN: The Solicitor General has it  
11 right. Post-Acree, these claims -- these types of  
12 claims were pleaded principally as State-law claims, and  
13 that has been recognized as providing a substantive  
14 cause of action.

15 JUSTICE GINSBURG: Which -- which State law?

16 MR. GOLDSTEIN: The State law generally of  
17 the home State of the plaintiffs.

18 JUSTICE GINSBURG: So that -- by that  
19 reasoning, people all over the world could sue the  
20 United States in their courts alleging that the United  
21 States has engaged in cruel and inhuman treatment with  
22 respect to their nationals. The same theory would apply  
23 -- use the law of the state where the national comes  
24 from. So, it could be Iraq, could be Belgium, could be  
25 Yemen -- any place. So -- but the claim you are saying

1 exists would be a kind of universal one, if it's -- the  
2 United States could use it, any other place in the world  
3 could, too.

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

9 JUSTICE GINSBURG: No. Looking to their own  
10 law.

11 MR. GOLDSTEIN: Yes, I understand,  
12 Justice Ginsburg. Section -- for example, section  
13 1605A, the statute that's created by the 2008 NDAA,  
14 creates an affirmative U.S. cause of action. There is  
15 always going to be an underlying domestic cause of  
16 action that underlies the FSIA, whether it's State law  
17 or instead it's Federal law. That is a -- a debate  
18 about whether the FSIA is a good statute or not, but  
19 it's one that Congress has resolved --

20 JUSTICE SCALIA: Well, no. I mean, it's  
21 also a debate as to whether the call on that question  
22 should be a Federal one or a State one, whether -- there  
23 are all sorts of conditions attached to the -- the suits  
24 that are allowed under 620A. And you are saying that,  
25 even without those conditions, any State -- Oklahoma --

1 can decide Americans can -- can sue foreign countries.

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

6 JUSTICE SCALIA: I know, but we have been  
7 talking about it --

8 MR. GOLDSTEIN: Sure --

9 JUSTICE SCALIA: -- for a couple of minutes,  
10 so we --

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

13 JUSTICE SCALIA: I didn't start this.

14 (Laughter.)

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

16 MR. GOLDSTEIN: All right.

17 JUSTICE GINSBURG: You can go back to your  
18 jurisdiction argument.

19 MR. GOLDSTEIN: Okay. Maybe I can finish  
20 it. The -- the -- I had said that I also wanted to  
21 continue with the text, on the question of what it is to  
22 "make inapplicable." I pointed out how it is that all  
23 of these statutes are applied and made inapplicable. I  
24 also want to draw the contrast between the two operative  
25 powers that are given to the President. At the

1 beginning, the statute says the President may suspend  
2 the application of any provision of the Iraq Sanctions  
3 Act, which is the kind of power that they are talking  
4 about, essentially to lift the statute; whereas, the  
5 term of art, we think, "make inapplicable" in the  
6 context of these statutes is the narrow power to  
7 de-designate the state as a state sponsor of terror.

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

9 CHIEF JUSTICE ROBERTS: If I could just  
10 pause --

11 MR. GOLDSTEIN: Yes.

12 CHIEF JUSTICE ROBERTS: -- for a moment.

13 The -- the President in exercising this  
14 waiver purported to act not only under the statute but  
15 under the Constitution as well. So if we were to accept  
16 your argument, we would have to decide whether or not he  
17 had the power under the Constitution.

18 MR. GOLDSTEIN: I don't think the question  
19 is presented here. It could have been an argument that  
20 was made, but I don't believe it's presented by this  
21 case.

22 CHIEF JUSTICE ROBERTS: Well, it's not  
23 presented because your friends on the other side think  
24 the -- on a narrower ground, that the statute applies.  
25 But if we agree with you and disagree with that, it

1 seems to me that he has an argument -- the President has  
2 the argument that he has this authority under the  
3 Constitution.

4 MR. GOLDSTEIN: I agree he has that  
5 argument; he just hasn't made it in -- in this case --  
6 in his -- in the Iraq's -- Iraq hasn't made it in the  
7 cert petition, I should say, in the question on this  
8 Court -- on which this Court granted certiorari.

9 I think to decide the debate, Justice  
10 Souter, of whether we're in equipoise here and the  
11 debate about whether or not the power was grand or  
12 instead more modest, we have to resolve the -- the  
13 question of what it is that Congress intended to do in  
14 this proviso to this emergency appropriations measure.  
15 Was it confronting a very specific moment in time at  
16 which Baghdad had just fallen and we needed to get  
17 emergency -- emergency aid to Iraq? Or was it, instead,  
18 fundamentally changing our policy, making Iraq an ally  
19 despite the fact that there wasn't even an Iraqi  
20 government there? Was he given -- was Congress giving  
21 the power to the President to immunize Iraq permanently  
22 from liability under the FSIA, which doesn't even exist  
23 with respect to our closest allies, Britain and France?  
24 That is a significant over-reading of what --

25 JUSTICE SOUTER: Why -- why do you say

1 "permanently"?

2 MR. GOLDSTEIN: Because --

3 JUSTICE SOUTER: Just under -- just under  
4 this statute, if he makes inapplicable, he can rescind  
5 the action that made it inapplicable.

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

9 JUSTICE SOUTER: Well -- no, but during the  
10 period in which the statute is applicable, I don't know  
11 of any reason why he cannot change his designation of  
12 inapplicability. So that the argument of a permanent  
13 change in the foreign policy of the United States or the  
14 -- or the powers relating to the foreign policy of the  
15 United States doesn't seem to me a legitimate argument.

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

25 The only thing that makes sense is to read

1 it in its context of being a modest attempt to deal with  
2 an immediate problem. And section 1605(a)(7) says what  
3 happens when you deal with that immediate problem. If  
4 you change the designation of a state -- if they become  
5 an ally, if they change their ways -- they are still  
6 liable for the acts of torture they committed while they  
7 were designated.

8 JUSTICE SCALIA: I think -- I think what  
9 they say is that the designation remains in effect. I  
10 don't think they say that the power to undesignate  
11 disappears.

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

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

15 JUSTICE SOUTER: Let me -- let me ask the  
16 same question with respect to the new statute, the  
17 "capital A" statute.

18 MR. GOLDSTEIN: Yes.

19 JUSTICE SOUTER: Would there be -- and I  
20 just -- I don't know the answer to this. Would there be  
21 authority under the "capital A" statute to undo the  
22 designation?

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

1 JUSTICE SOUTER: Okay. He waived it, but  
2 the question is whether he would have had the authority  
3 to undesignate or -- or to rescind the designation of  
4 inapplicability if he had wished to exercise the  
5 authority under the "capital A" statute.

6 MR. GOLDSTEIN: I have no -- I'm not aware  
7 of any provision of the 2008 NDAA that would have given  
8 the President any such power. They say that on the day  
9 the President exercised his -- his powers that the  
10 Foreign Assistance Act, section 620A, became  
11 inapplicable to Iraq, that sanction, and that that  
12 inapplicability survived the sunset of the statute in  
13 2005. How it would come back -- how it would come back  
14 and continue to apply in Iraq in the case of a regime  
15 change in Iraq, I have no idea at all.

16 JUSTICE GINSBURG: Congress could pass a  
17 law.

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
20 Mr. Franklin, you have 5 minutes remaining.

21 REBUTTAL ARGUMENT OF JONATHAN S. FRANKLIN

22 ON BEHALF OF THE PETITIONERS

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

24 JUSTICE SCALIA: You want to clarify this  
25 last part --

1 MR. FRANKLIN: Yes.

2 JUSTICE SCALIA: -- we have just been  
3 discussing?

4 MR. FRANKLIN: It is not the position of the  
5 Government of Iraq that in the very hypothetical  
6 instance in which something would change that they could  
7 not be redesignated. We believe they could be  
8 redesignated. We believe that is also the position of  
9 the United States. When we say "permanent," we mean as  
10 opposed to just temporary. And I might add it is our  
11 position that --

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

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

17 Just a few other points based on the  
18 argument that just occurred. They are interpreting the  
19 statute apparently now to say that the President only  
20 had the power to rescind the -- the previous  
21 designations, but that's not what the statute says. If  
22 that's what Congress had meant, they would have done  
23 that. They said "make inapplicable." And their entire  
24 case depends on that statute being applicable today  
25 because it serves as the abrogation of Iraq's sovereign

1 immunity, and it serves as the predicate for subject  
2 matter jurisdiction.

3 It cannot be both applicable and having been  
4 made inapplicable.

5 The other point that was mentioned -- and  
6 also I would also say in this regard that our foreign  
7 policy towards Iraq is different than our foreign policy  
8 towards other former state-sponsored terrorism. Libya,  
9 for example, was taken off the list, but there was an  
10 express requirement that Libya answer to the claims that  
11 were before it. And, of course, that was because the --  
12 the government that sponsored that terrorism, the -- the  
13 Khadafi Government, was still in power.

14 Here we had gone into the country with U.S.  
15 military force aided by our allies, and we have ousted  
16 the regime, and we were seeking to support Iraq in its  
17 efforts to rebuild.

18 There was a point about the de-designation  
19 that was done in 2004. The Secretary of State -- and it  
20 is cited on page 25 in the blue brief. The Secretary of  
21 State said in the de-designation that it was largely  
22 symbolic or perhaps a belt and suspenders, but he said  
23 it was largely symbolic in light of the prior EWSAA  
24 determination. However -- and this is relevant to  
25 something else that occurred. The de-designation was

1 also necessary to allow military exports to Iraq because  
2 under the proviso 3 of the EWSAA, military exports were  
3 specifically exempted from the President's authority.

4 That also shows that Congress knew how to  
5 make exceptions to the President's power when it wanted  
6 to.

7 And, finally, I would say that we do agree  
8 with the analysis that Justice Souter has -- has  
9 posited, and that is that this involves a lesser power  
10 than the President could have exercised on his own  
11 authority to -- to completely espouse the claims. It,  
12 therefore, fits entirely within what is normally done in  
13 these kinds of cases.

14 And, Justice Ginsburg, it is also the  
15 position of the Government of Iraq that Iraqi victims  
16 ought to be included in any state-to-state diplomatic  
17 negotiations. But that is a matter for the two  
18 governments to resolve between themselves, and that is  
19 one of the reasons why these kinds of claims have always  
20 been resolved in that manner in the past. They are  
21 reciprocal, bilateral concerns that affect two very  
22 close allies. Those governments ought to be negotiating  
23 and resolving those claims, whatever claims there are on  
24 both sides, between the two of them.

25 If there are no further questions, thank

1 you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

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

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