

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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

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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Yalowitz.

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

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

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

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

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

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

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

18 I welcome the Court's questions.

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

22 MR. YALOWITZ: So --

23 JUSTICE THOMAS: -- for personal
24 jurisdiction?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Tait.

2 JUSTICE BARRETT: Well, why --

3 JUSTICE SOTOMAYOR: Could I --

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

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

18 JUSTICE BARRETT: So it would be that
19 the Fourteenth Amendment -- you're -- so it's
20 not -- I guess maybe I misunderstood you.
21 You're not saying that Congress would be
22 overcoming some background principle that would
23 otherwise be applicable to the jurisdiction of
24 the United States. You're simply saying that
25 there would be no statute authorizing service of

1 process --

2 MR. YALOWITZ: Correct.

3 JUSTICE BARRETT: -- in that
4 hypothetical?

5 MR. YALOWITZ: Correct.

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

13 If there is, as you're advocating, no
14 Fifth Amendment due process constraint on
15 government, then Congress could, at its own
16 whim, say you committed an act in New York, it
17 violated a federal statute, get tried in
18 California, get tried in Alaska, get tried in
19 Hawaii. You might say political factors could
20 constrain that.

21 But haven't we said when we've
22 analyzed the Fourteenth Amendment that there are
23 two components? One is the interstate interests
24 of constraining the states from expanding their
25 jurisdiction. But we've also said there's a

1 second component, which is fairness, and it
2 doesn't seem -- and we've not limited that to
3 the interstate concerns.

4 Why would we take it out of the Fifth
5 Amendment altogether?

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

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

19 However, when it comes to U.S.
20 citizens, Congress and the courts are nationwide
21 actors anyway, and so, for example --

22 JUSTICE SOTOMAYOR: Yeah, but if I
23 live in New York and I have never left New York,
24 which is highly unlikely, but -- or I'm in
25 Idaho -- in Idaho or somewhere else on a farm

1 and never left it, and all I did was something
2 there that happened to violate a federal law, I
3 might have a problem with being haled to Hawaii
4 or Alaska.

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

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

18 I -- I -- I -- we're not advocating a
19 rule that would eliminate a reasonableness --

20 JUSTICE SOTOMAYOR: Some sort of
21 fairness requirement.

22 MR. YALOWITZ: -- or fairness --
23 right.

24 JUSTICE SOTOMAYOR: You're just saying
25 that, here, it's met?

1 MR. YALOWITZ: Correct.

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

12 And I would think that would apply
13 even in the international context.

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

19 JUSTICE JACKSON: Right.

20 MR. YALOWITZ: No -- nobody said, oh,
21 it's -- it's too difficult for us to go from
22 65th Street down to --

23 JUSTICE JACKSON: No, I understand on
24 the facts of this case. But -- but, to the
25 extent that we are trying to assess what the

1 Fifth Amendment requires in terms of personal
2 jurisdiction, isn't there some idea, in addition
3 to what the Fourteenth Amendment says about
4 federalism, which you say doesn't apply in the
5 Fifth Amendment context, is there still some
6 notion of a personal jurisdiction limitation in
7 the Fifth Amendment that is rooted in these
8 principles of liberty?

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

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

20 MR. YALOWITZ: Sure. So we would say
21 that the statute has to provide fair warning and
22 that it has to reasonably advance a legitimate
23 government interest in the context of our
24 federal system.

25 JUSTICE GORSUCH: What is that --

1 JUSTICE ALITO: What -- what's an --
2 an example of an illegitimate government
3 interest that is unreasonably advanced?

4 MR. YALOWITZ: Well, I think that my
5 Paris, Texas, example --

6 JUSTICE ALITO: Wait. What is it
7 again? What is your Paris, Texas, example
8 again?

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

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

20 MR. YALOWITZ: Hmm. Well, it would
21 be -- that -- that would be a more difficult
22 case than ours because it's hard to see what the
23 federal law is.

24 JUSTICE ALITO: No, I understand it's
25 more difficult than yours.

1 MR. YALOWITZ: Right.

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

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

10 JUSTICE ALITO: Providing compensation
11 for Americans who were tortiously injured, no
12 matter where the tort occurs.

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

19 JUSTICE GORSUCH: Mr. Yalowitz, I'm --
20 I'm struggling to see any of this in your brief.
21 I had understood your argument in your brief to
22 say that under the Fifth Amendment, due process
23 just requires service, a judge, and -- and an
24 opportunity to be heard.

25 And -- and now you're saying that

1 there's some sort of balancing test or
2 reasonableness requirement, and -- and -- and
3 I -- I just didn't see that in your brief. I
4 saw hints of that in the government's but not
5 yours.

6 MR. YALOWITZ: So you --

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

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

18 JUSTICE GORSUCH: Yeah, you say
19 substantive due process, precedence required, no
20 more than what I've just described. That's --
21 that's page 22 of your brief.

22 MR. YALOWITZ: Right. Right. So
23 it --

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

1 MR. YALOWITZ: I -- I -- I would say
2 that for those members of the Court who believe
3 that there is a -- there is a --

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

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

15 We think that -- we think that --

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

21 MR. YALOWITZ: I don't disagree with
22 that. I -- I understand -- I understand the
23 point you're making and I don't disagree with
24 it.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas, anything further?

3 Justice Alito?

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

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

11 JUSTICE SOTOMAYOR: So all of our
12 cases have spoken about some form -- some
13 version of fairness?

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

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

20 MR. YALOWITZ: No, but I would
21 think --

22 JUSTICE SOTOMAYOR: -- but Justice
23 Gorsuch was limiting -- saying that there is
24 no -- that there is no substantive due process
25 component to due process.

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

8 JUSTICE SOTOMAYOR: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

14 MR. YALOWITZ: Non-arbitrary.

15 JUSTICE KAGAN: Would that -- is that
16 different from a fundamental fairness test?

17 MR. YALOWITZ: I -- I -- I -- I
18 understand it better. I -- I find fundamental
19 fairness to be squishier.

20 JUSTICE KAGAN: Squishier?

21 MR. YALOWITZ: Yeah.

22 JUSTICE KAGAN: But we -- we -- we
23 have used that squishy concept when it comes to
24 the Fourteenth Amendment. Yes?

25 MR. YALOWITZ: Indeed.

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

6 So why wouldn't we say the same thing
7 here?

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

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

20 JUSTICE KAGAN: Okay. I mean, I guess
21 I am a little bit -- maybe I'm just not
22 understanding the test, but I do -- do want to
23 understand it, so let me press you a little bit
24 more.

25 MR. YALOWITZ: Sure.

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

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

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

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

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

24 MR. YALOWITZ: Well, that -- that's
25 true in a -- in a commercial case. But, here,

1 we're talking about intentional torts, so the --
2 the analysis is a little bit different with an
3 intentional tort because you're not really
4 availing yourself of anything by -- by blowing
5 up a -- a bomb.

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

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

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

23 MR. YALOWITZ: Right. Right. So
24 the -- the -- the sovereign sphere of the State
25 of Nevada ends at the border. So, when -- when

1 the -- the plaintiffs in Walden against Fiore
2 traveled to Georgia, they were not within the
3 protection of Nevada anymore.

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

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

16 Sovereignty of the United States is
17 much broader than the sovereignty of the State
18 of Nevada.

19 JUSTICE KAGAN: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch?

22 JUSTICE GORSUCH: So, if I've got it
23 right, you want us to adopt the fundamental
24 fairness language from our Fourteenth Amendment
25 jurisprudence but give it different content in

1 the Fifth Amendment. Is that fair?

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

4 JUSTICE GORSUCH: No. But, to get
5 your five votes, that's -- you're willing to do
6 that?

7 MR. YALOWITZ: I would be willing --

8 JUSTICE GORSUCH: Yeah.

9 MR. YALOWITZ: -- to do that.

10 JUSTICE GORSUCH: Okay. And if we did
11 that --

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

13 JUSTICE GORSUCH: Yeah. No, I --

14 (Laughter.)

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

19 And -- and this fundamental fairness
20 test, do you have any historical pedigree for
21 it? And -- because it's not what we do in the
22 Fourteenth Amendment. You've conceded that. So
23 where did it come from?

24 MR. YALOWITZ: So --

25 JUSTICE GORSUCH: If I'm not just

1 making it up.

2 MR. YALOWITZ: -- the -- the
3 fundamental fairness test comes from
4 International Shoe.

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

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

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

22 JUSTICE GORSUCH: Do you have any
23 basis in history for that?

24 MR. YALOWITZ: No. I think that if
25 you go back to what -- what the founders were

1 doing, what this Court was doing in the early
2 years, you don't have any --

3 JUSTICE GORSUCH: I mean, back then,
4 it was, yes, there's international law of
5 nations --

6 MR. YALOWITZ: Correct.

7 JUSTICE GORSUCH: -- but Congress can
8 defease that when it chooses. That was the law.

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

14 JUSTICE GORSUCH: But, you know,
15 Justice Story said, if Congress says otherwise,
16 we have to follow that.

17 MR. YALOWITZ: Correct.

18 JUSTICE GORSUCH: And then it becomes
19 a political question between international
20 sovereigns.

21 MR. YALOWITZ: And not just Justice
22 Story. That's -- that is -- that --

23 JUSTICE GORSUCH: Oh, sure.

24 MR. YALOWITZ: I mean, I -- that's
25 all --

1 JUSTICE GORSUCH: He famously said it.

2 MR. YALOWITZ: Right. It's all over
3 the cases.

4 JUSTICE GORSUCH: Yeah. Okay. Now
5 let's say we have to apply our minimum contacts
6 test because you've kind of taken us there a bit
7 or at least close to it. I'm wondering -- I --
8 I understand, you know, there's (A) and (B) in
9 the statute here.

10 MR. YALOWITZ: Right.

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

13 MR. YALOWITZ: Right.

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

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

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

3 JUSTICE GORSUCH: So --

4 MR. YALOWITZ: But Congress gave us
5 both.

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

14 Is that enough for you? Is that
15 enough of a victory for you to pursue this suit?

16 MR. YALOWITZ: We -- that would be a
17 suboptimal solution --

18 JUSTICE GORSUCH: Why?

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

23 JUSTICE GORSUCH: Yeah.

24 MR. YALOWITZ: And the -- the case is
25 old enough to go to law school.

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

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

13 MR. YALOWITZ: If the Court were to
14 apply the statute --

15 JUSTICE GORSUCH: Yes.

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

22 JUSTICE GORSUCH: And so there would
23 be no need to opine on what -- what limits may
24 or may not exist under the Fifth Amendment. We
25 could simply say under our Fourteenth Amendment

1 jurisprudence analogy it would -- it's enough?

2 MR. YALOWITZ: Correct.

3 JUSTICE GORSUCH: And that would
4 satisfy you?

5 MR. YALOWITZ: I -- if the Court --
6 I -- I want to be very clear.

7 JUSTICE GORSUCH: If we applied (B).

8 MR. YALOWITZ: Right. I want to be
9 very clear because --

10 JUSTICE GORSUCH: I want to be clear
11 too.

12 MR. YALOWITZ: Yeah. We -- we've
13 had -- we've had a very long journey.

14 JUSTICE GORSUCH: I do appreciate
15 that.

16 MR. YALOWITZ: And -- and -- and a --
17 a -- a remand back to the panel for further
18 application of --

19 JUSTICE GORSUCH: That's not what
20 I'm --

21 MR. YALOWITZ: Right.

22 JUSTICE GORSUCH: That's not what I'm
23 asking about.

24 MR. YALOWITZ: -- would not be good
25 for us.

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

3 MR. YALOWITZ: The Congress has made
4 it an either/or.

5 JUSTICE GORSUCH: Yeah.

6 MR. YALOWITZ: Right.

7 JUSTICE GORSUCH: Okay. Thank you.

8 MR. YALOWITZ: All right.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

11 JUSTICE KAVANAUGH: I understood your
12 argument in the brief to be arguing in the
13 alternative --

14 MR. YALOWITZ: That's correct.

15 JUSTICE KAVANAUGH: -- and to have
16 a -- what I would say, a broader argument
17 that -- that Congress -- there are no limits on
18 Congress, constitutional limits, other than
19 service of process, et cetera, but there's no
20 extra personal jurisdictional limits on Congress
21 and then that you are arguing even if that were
22 rejected or even if that's not correct, we have
23 a second argument that even under the Fourteenth
24 Amendment precedents, you still win.

25 MR. YALOWITZ: That's correct.

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

3 MR. YALOWITZ: Absolutely not.

4 JUSTICE KAVANAUGH: Okay. Just making
5 sure.

6 Okay. And then what role does
7 international law play? Any? Congress can
8 override that, I --

9 MR. YALOWITZ: Right.

10 JUSTICE KAVANAUGH: -- assume to be
11 your position, but I just want to make sure I
12 have that nailed down.

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

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: So I want to
25 describe one way to understand your argument,

1 and I'd like you to tell me if -- if this is one
2 way to understand your argument.

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

10 Then we have a distinct line of cases
11 that pick up with International Shoe that
12 interpret the Fourteenth Amendment differently.
13 So we have competing lines of precedent.

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

21 MR. YALOWITZ: Right. This is not the
22 case to resolve how the Court should deal with
23 Fourteenth Amendment cases.

24 JUSTICE BARRETT: Well, do we ever
25 have to resolve that question on your view?

1 Could we just let the Fifth Amendment and the
2 Fourteenth Amendment precedent -- because, I
3 mean, as in your view, would we be overruling
4 some of these other cases, these Fifth -- not --
5 not the 14th -- don't -- don't shake your head
6 too soon.

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

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

19 JUSTICE BARRETT: Well, that's not
20 quite the question.

21 I mean, I'm asking: If we say -- you
22 know, Justice Kagan's questions were pointing
23 out that we have treated the Fourteenth
24 Amendment as containing a fairness component.
25 And -- and I don't understand your argument to

1 be in a full-throated way -- your broader
2 argument in a full-throated way to say, yes,
3 there's a fairness component that would lead us
4 to embrace the minimum contacts analysis for
5 purposes of the Fifth Amendment.

6 Is that correct?

7 MR. YALOWITZ: Correct.

8 JUSTICE BARRETT: Okay. So, if that
9 is your argument, you are arguing for the Fifth
10 Amendment to be interpreted differently from the
11 Fourteenth, correct?

12 MR. YALOWITZ: Correct.

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

23 MR. YALOWITZ: I think that -- I think
24 that a decision to that effect would be in
25 tension with those cases, yes.

1 The -- the -- at the time that -- at
2 the time that the Due Process Clause was
3 ratified, there was no --

4 JUSTICE BARRETT: Which Due Process
5 Clause? The Fifth Amendment?

6 MR. YALOWITZ: The 1791.

7 JUSTICE BARRETT: Okay.

8 MR. YALOWITZ: The one we're here
9 about.

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

17 JUSTICE BARRETT: So was Pennoyer
18 wrong to house a territorial understanding of --
19 you know, of personal jurisdiction within the
20 Due Process Clause of the Fourteenth Amendment?

21 MR. YALOWITZ: I -- I don't -- I -- I
22 think that what Pennoyer -- the way I read
23 Pennoyer and the way Professor Sachs reads
24 Pennoyer is that Pennoyer was -- was
25 constitutionalizing kind of a narrower view of

1 due process, which is there has to be a judge
2 with -- with jurisdiction, there has to be
3 opportunity to be heard, the Murray's Lessee
4 view of -- of due process.

5 I -- I think the territorial
6 restriction, the idea that there was a
7 territorial horizontal federalism basis, I think
8 that came into the Court's jurisprudence in the
9 Lochner era.

10 JUSTICE BARRETT: Do you agree with
11 Professor Sachs's amicus brief?

12 MR. YALOWITZ: Oh, yeah.

13 JUSTICE BARRETT: Okay. Thank you
14 very much.

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

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

22 MR. YALOWITZ: It -- it's confirmatory
23 of -- of our views. Judge Sofaer also put in an
24 amicus brief that talked about founding-era
25 evidence.

1 JUSTICE JACKSON: But -- but did
2 you -- did you go to the original sources or are
3 you relying on them for your view as to what the
4 ratification state of affairs was?

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

7 JUSTICE JACKSON: And did you -- you
8 found no evidence? How -- how many sources?
9 What -- what is the scope here of our
10 understanding of what actually happened then?

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

19 That's in the ratifying conventions.
20 That's in Hamilton's Federalist Number 80.

21 The -- the -- it's also clear from --
22 now this is secondary sources, but they're cited
23 in my brief, Bergen Young, for example, and
24 Deirdre Mass's article -- that -- that the
25 founders litigated those cases, those

1 extraterritorial cases.

2 And then the only question is: Well,
3 did the Fifth Amendment change that? Did the
4 Due Process Clause erase that baseline
5 understanding?

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

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

20 MR. YALOWITZ: Right. So two -- I
21 agree with that, and I -- I -- I would say two
22 things about it.

23 First of all, ceded within that
24 jurisprudence is the idea of this horizontal
25 federalism, which, even if you want to say it's

1 the same standard, it's going to be a
2 sovereign-by-sovereign analysis. That's what
3 Justice Kennedy's plurality said in the --

4 JUSTICE JACKSON: How -- how do you
5 explain Insurance Corporation of Ireland then?

6 MR. YALOWITZ: Insurance Corporation
7 of Ireland --

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

13 MR. YALOWITZ: Right.

14 JUSTICE JACKSON: -- waive this if it
15 was all about territorial sovereignty.

16 MR. YALOWITZ: Right. And, as -- as
17 Your Honor pointed out in -- in Mallory, it's
18 a-- it's a -- it's a waivable right. There is a
19 right and it's waivable. Of course.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Kneedler.

24 ORAL ARGUMENT OF EDWIN S. KNEEDLER.

25 ON BEHALF OF THE PETITIONER IN CASE 24-151

1 MR. KNEEDLER: Mr. Chief Justice, and
2 may it please the Court:

3 The act of Congress at issue here is
4 an integral component of the foreign policy and
5 national security policy of the political
6 branches, including the securing of compensation
7 for victims of terrorism.

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

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

21 And the scope -- the scope -- excuse
22 me -- of the resulting submission to United
23 States jurisdiction is very limited. It is not
24 a general jurisdiction. It is narrowly limited
25 to terrorism cases.

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

10 Congress's judgment on these issues,
11 as in all issues of national security and
12 foreign policy, are entitled to great deference.

13 The Act providing for jurisdiction
14 here is eminently fair and does not deprive
15 Respondents of due process. This Court should
16 sustain the statute.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: Mr. Kneedler, just to
19 take a step back, do the PLO and the Palestinian
20 Authority have constitutional rights?

21 MR. KNEEDLER: We have not taken a
22 position on that question. We have assumed that
23 they do. That question is itself of some
24 sensitivity to have the Court determine or a
25 court determine in a judicial proceeding whether

1 a particular entity is like a sovereign, is a
2 sovereign, to what extent is it like a
3 sovereign. We urge the Court not to delve into
4 that. We have not taken a position on that
5 because of the sensitivities in this particular
6 arena.

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

20 JUSTICE THOMAS: Didn't the Justice
21 Department take a different position in the
22 1980s, that the PLO did not have constitutional
23 rights?

24 MR. KNEEDLER: Well, you say a
25 different position. We're not taking a position

1 here. But, in those -- those cases were --

2 JUSTICE THOMAS: Well, it's different
3 from the non-position.

4 (Laughter.)

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

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

19 I think that the due process question
20 of being deemed to be -- have submitted to the
21 courts of the United States may present a
22 different question.

23 CHIEF JUSTICE ROBERTS: Counsel, you
24 articulated your -- your jurisdictional approach
25 in the terms of the particular facts of this

1 case. I mean, could you articulate it more
2 generally how it would apply? In other words,
3 you focus on the facts, and that's perfectly
4 appropriate. But, if we were to articulate the
5 general test and how it would apply, how would
6 you -- how would you articulate that?

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

15 In that circumstance, we have proposed
16 a test that depends on whether the conduct that
17 is jurisdiction-triggering is knowing and
18 voluntary and whether the resulting submission
19 to jurisdiction is fair and not exorbitant.
20 The -- the dissenting opinion from rehearing en
21 banc in the court of appeals also said that
22 there should be a nexus between the United
23 States and -- and the -- and the conduct
24 involved.

25 I think the nexus -- I'm sorry. But,

1 if -- if you're -- if you're not relying on
2 consent, then you have perhaps a different
3 analysis.

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

9 I mean, could you be a little more
10 precise about what exactly we should be looking
11 for or --

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

20 So, in that part of what I was saying,
21 in that part of our argument, we were saying
22 that the circumstances here can be analyzed
23 under the Fourteenth Amendment standards. It's
24 obviously not the Fourteenth Amendment itself,
25 and the United States is different from states.

1 But, with respect to consent, the factors that I
2 have identified -- and this statute is written
3 in terms of consent -- are -- would be relevant
4 to consent.

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

10 JUSTICE GORSUCH: Well --

11 MR. KNEEDLER: -- though, in response
12 to just --

13 JUSTICE GORSUCH: -- Mr. Kneedler --

14 MR. KNEEDLER: I'm sorry.

15 JUSTICE GORSUCH: -- are you asking us
16 to apply the Fourteenth Amendment standards, or
17 are you saying the Fifth Amendment is different?

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

20 JUSTICE GORSUCH: And -- and the Fifth
21 Amendment, as Justice Barrett was pointing out,
22 was historically understood to assume the law of
23 nations, general law applies, but Congress
24 can -- can reject that.

25 MR. KNEEDLER: Yes.

1 JUSTICE GORSUCH: And when it does,
2 this Court has to follow it. That was -- that
3 was the historical rule in the Fifth Amendment
4 as I understand it unless I'm mistaken.

5 MR. KNEEDLER: Well, that was the
6 understanding certainly.

7 JUSTICE GORSUCH: Okay.

8 MR. KNEEDLER: Justice Story expressed
9 that. I don't think any of those cases were
10 actually --

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

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

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

21 MR. KNEEDLER: And we think that
22 that --

23 JUSTICE GORSUCH: And, here, we do
24 have that, and -- and Congress has adopted (A)
25 and (B). And is there any -- and you talk about

1 the importance of -- of the sensitivity of
2 foreign relations and that this Court is not
3 well positioned to do that and the -- and the
4 political branches are.

5 And if all that's true, then -- then
6 how do we have this fundamental fairness overlay
7 that you're now discussing in your brief in the
8 Fifth Amendment context?

9 MR. KNEEDLER: Well, again, I was --
10 those -- that -- the articulation of that test
11 was looking at it under -- under the rubric of
12 consent, which --

13 JUSTICE GORSUCH: Under the Fourteenth
14 Amendment rubric? I -- I just want to be clear.
15 We're talking about --

16 MR. KNEEDLER: Yes. But -- but --
17 but --

18 JUSTICE GORSUCH: Okay. I'm talking
19 about the Fifth Amendment.

20 MR. KNEEDLER: No, I understand that.
21 All I meant is that if -- because the statute is
22 written in terms of consent, if the Court chose
23 to analyze it under consent --

24 JUSTICE GORSUCH: I'm -- I'm -- and
25 I'm asking you to put aside the Fourteenth

1 Amendment concepts for now.

2 MR. KNEEDLER: Okay.

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

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

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

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

21 MR. KNEEDLER: Well, I --

22 JUSTICE GORSUCH: -- and defease
23 international law.

24 MR. KNEEDLER: No, all I'm saying is
25 that the Court -- the Court doesn't have to go

1 there, and -- and we think it would be prudent
2 for the Court to wait for an act of Congress
3 to -- because it takes an act of Congress to
4 provide for personal jurisdiction other than
5 following the rules of the state.

6 I think it would be prudent for the
7 Court to look at the particular act of Congress
8 involved, what the rationale for that statute
9 was, and see whether it -- whether it would
10 comport with due process.

11 JUSTICE GORSUCH: My -- my -- my --

12 JUSTICE KAGAN: Mr. --

13 JUSTICE GORSUCH: -- last question.

14 I'm sorry. I'm almost done.

15 If we were just to analyze this under
16 the Fourteenth Amendment precedents, same
17 question I asked your -- your friend earlier.
18 (B) I kind of understand. You have an office,
19 okay?

20 MR. KNEEDLER: Right.

21 JUSTICE GORSUCH: And I get the
22 Mallory analogy. I do. I understand that.
23 Whether it works is another thing.

24 But (A) is a little bit different.
25 It -- it's purely extraterritorial behavior.

1 And that -- that's a little harder to square in
2 my mind with our Fourteenth Amendment
3 jurisprudence.

4 Do we need to decide (A)? Is it
5 enough to say this case survives under (B) even
6 applying our Fourteenth Amendment?

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

10 JUSTICE GORSUCH: But do we need to?
11 I mean, if -- if -- if there's jurisdiction
12 under (B), do we need to say there's also
13 jurisdiction under (A)?

14 MR. KNEEDLER: Well, with respect to
15 the activities, the lower courts have not
16 decided whether the -- whether the activities
17 that -- that are alleged would -- would be
18 protected or not protected, so there would be
19 yet a further remand.

20 And we think the payments -- and I do
21 want to address, I think, a premise of your
22 question. Because the payments occur outside of
23 the United States, there can't be minimum
24 contacts with the United States.

25 But this is a place where we think the

1 Fifth Amendment would differ from the
2 Fourteenth.

3 JUSTICE GORSUCH: Okay. That -- that
4 answers my question if you say it's different
5 than the Fourteenth, so we'd need to do
6 something different.

7 I'm sorry, Justice Kagan.

8 JUSTICE KAGAN: No, no, no, that was
9 helpful.

10 I hear you, Mr. Kneedler, as being
11 reluctant to go to a place where you say that
12 anything Congress says goes. I mean, obviously,
13 you're saying here Congress -- what Congress
14 said goes, but you're reluctant to say anything
15 -- may I continue?

16 CHIEF JUSTICE ROBERTS: Sure.

17 JUSTICE KAGAN: -- you know, anything
18 Congress says goes, there are constitutional
19 constraints.

20 And is that because there would be
21 foreign policy implications that would result
22 from an extremely broad congressional assertion
23 of jurisdiction over foreign nationals?

24 MR. KNEEDLER: There could well be. I
25 mean, I think that would be one of the -- one of

1 the reasons. And Congress proceeded cautiously
2 here. It tried a number of -- of ways to
3 provide for these suits.

4 It could, but -- but one can imagine,
5 especially in -- in these days, if you subjected
6 someone around the globe to general jurisdiction
7 in U.S. courts, the Court might be troubled by
8 that. And this is far from that.

9 JUSTICE KAGAN: Well, the -- the Court
10 might be troubled. I'm -- I'm really asking
11 whether the Solicitor General representing the
12 United States is troubled by that.

13 I could understand an argument which
14 would say that if Congress does something that
15 really stretches very far and wide, it could
16 have foreign policy consequences, it could
17 encourage other nations to retaliate and treat
18 U.S. citizens in the same way, that sort of
19 thing, where the United States might be -- you
20 tell me if you are -- but might be reluctant to
21 have a court rule that says anything Congress
22 says goes in this area.

23 MR. KNEEDLER: Yeah, there would --
24 there could well be problems with other
25 countries' reactions to that and -- and

1 retaliation perhaps.

2 I do want to complete the thought, if
3 I -- if I could, about why the Fifth Amendment
4 would be different --

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

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

14 But the -- but the point I wanted to
15 make, which -- which I think could be part of
16 the test if you're not looking at -- at consent,
17 is that I don't think minimum contacts would be
18 the right way to look at it.

19 It would be, I think, at most, a nexus
20 of some sort to the United States, which is what
21 Judge Massie in the -- in -- in his dissenting
22 opinion in the court of appeals said.

23 And, here, you have a nexus. It -- it
24 doesn't have to be territorial contacts because,
25 as -- as plaintiffs' counsel pointed out, the

1 United States has sovereign authority to extend
2 laws and judicial jurisdiction beyond the
3 borders of the United States.

4 Here, the conduct abroad plainly has a
5 nexus to the United States. The payments prong
6 concerns acts of terrorism that injure United
7 States persons --

8 JUSTICE KAGAN: Thank you.

9 MR. KNEEDLER: -- abroad.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Kneedler.

12 It might help me get a handle on the
13 positions of the respective parties if you could
14 tell me in what significant respects the
15 position of the United States differs from that
16 of Petitioner.

17 MR. KNEEDLER: I -- I don't think
18 the -- I don't think the position really --

19 CHIEF JUSTICE ROBERTS: Not
20 necessarily the judgment. The analytic
21 approach.

22 MR. KNEEDLER: I -- I think the
23 analytical approach that I've described is -- is
24 consistent -- entirely consistent with what
25 plaintiffs have argued. They are making a

1 broader argument sort of categorically and
2 affirmatively at this time.

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

9 But -- but, here, we don't -- we -- we
10 think this fits comfortably into even Fourth
11 Amend -- Fourteenth Amendment principles, but,
12 certainly, the Fifth Amendment principles with
13 respect to Congress's ability in this area to --
14 to provide for jurisdiction.

15 CHIEF JUSTICE ROBERTS: Thank you.

16 Justice Thomas?

17 JUSTICE THOMAS: Mr. Kneedler, the
18 Chamber of Commerce amicus brief indicates that
19 the Justice Department has had a consistent view
20 that these organizations did not have
21 constitutional rights.

22 Do you think the brief is accurate?
23 And, if it is accurate, is this now a change of
24 positions?

25 MR. KNEEDLER: Again, I -- the -- the

1 cases that -- from -- from back in that era
2 concerned, I think -- I think all of them
3 concerned the First Amendment and Congress's
4 ability to deal with the PIO and -- or
5 information office and the -- and the PLO with
6 respect to their domestic activities.

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

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

20 CHIEF JUSTICE ROBERTS: Justice Alito?

21 JUSTICE ALITO: Mr. Kneedler, I
22 understand that you're trying to wend your way
23 through some sensitive territory, but I could
24 use some help about the problems that I see
25 along the course that you are recommending.

1 You start with the argument that we
2 could say that this -- that there is
3 jurisdiction -- there would be jurisdiction
4 under the Fourteenth Amendment's case law
5 because of consent.

6 What -- what are -- what limit do you
7 see on the ability of a state to impose a -- a
8 regime of constructive intent?

9 I mean, suppose that a state said that
10 anyone who commits a tort against one of our
11 citizens is deemed to have consented to our
12 jurisdiction, regardless of where the tort
13 occurs. Would that be consistent with our
14 Fourteenth Amendment case law?

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

18 I didn't mean literally the Fourteenth
19 Amendment standards as if the United States was
20 a state. I -- I meant that the Fourteenth
21 Amendment principles as applied to the United
22 States rather than a state.

23 And so, with -- with respect to a -- a
24 state, there may be issues, as -- as you
25 suggested in -- in Mallory, with respect to the

1 ability of a state to condition subjection to
2 jurisdiction on the basis of doing business in
3 the state.

4 But Congress has a much broader
5 authority with respect to -- under the Commerce
6 Clause, for -- for example, to condition
7 someone's participation in our economy than a --
8 than a -- an individual state does.

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

15 MR. KNEEDLER: No. What our -- what
16 our -- our brief said or tried to say is you can
17 look at Fourteenth Amendment principles, not the
18 literal application of them, Fourteenth
19 Amendment principles with respect to consent,
20 apply those to the somewhat distinct situation
21 of the United States under -- under the Fifth
22 Amendment, where the -- where Congress is not
23 limited in the way a state is in conditioning
24 access to the economy or to other aspects of
25 United States interests in the way that a state

1 is.

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

9 MR. KNEEDLER: Yes.

10 JUSTICE ALITO: -- by the lower court?
11 So we would have to do that in the first
12 instance?

13 MR. KNEEDLER: Or -- or remand to the
14 court of appeals.

15 JUSTICE ALITO: Or remand.

16 MR. KNEEDLER: Yeah. It -- it -- it's
17 really activities. There are no offices, aside
18 from the U.N. office, although there are
19 allegations that that office is being used or
20 has been used for activities extending beyond
21 the role at the U.N.

22 JUSTICE ALITO: And so then, if we
23 say -- if we look to the 19th Century cases, the
24 statements that Judge -- that Justice Story
25 made, you don't want us really to say -- you

1 don't want us to adopt that fully, that --
2 well -- well, we'll presume that Congress is --
3 that Congress is respecting international law,
4 but, if it says it's not, if it's authorizing
5 jurisdiction where that would be contrary to
6 principles of international law, that's fine.

7 You really don't want us to say
8 anything goes. But, if we don't say anything
9 goes, then we have to say: What doesn't go? Or
10 we have to explain why this would meet -- why
11 the facts here would meet whatever standard
12 is -- is required.

13 How do we do that without -- you don't
14 want us to say anything goes, but that means we
15 have to say what the test is. And then what is
16 the test?

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

22 JUSTICE ALITO: Well, let me just
23 rephrase it. At one point, you said you -- I
24 thought you just said a few minutes ago you'd be
25 pleased with a decision that says Congress can

1 do whatever it wants. But I understood your
2 argument to mean that you really --

3 MR. KNEEDLER: I -- I --

4 JUSTICE ALITO: -- you didn't -- you
5 really don't want that because --

6 MR. KNEEDLER: -- I did not mean to
7 say that.

8 JUSTICE ALITO: Okay.

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

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

21 MR. KNEEDLER: Well --

22 JUSTICE ALITO: And that gets more
23 difficult.

24 MR. KNEEDLER: Yeah. Well, again,
25 there may not be one test. We laid out a test

1 for consent. There may be a -- a different --
2 probably would be a different test where consent
3 is not the basis of the jurisdiction but
4 something akin to minimum contacts, which I
5 think would be a nexus to the United States
6 because the United States has interests abroad.

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

13 JUSTICE ALITO: Okay. Well --

14 MR. KNEEDLER: -- of jurisdiction.

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

22 MR. KNEEDLER: There -- there may well
23 not be because this is conduct -- the payments
24 prong is -- is conduct occurring outside the
25 United States, so, if minimum contacts is

1 thought of in terms of a territorial connection,
2 we don't think that that applies to the United
3 States.

4 JUSTICE ALITO: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor?

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

9 Justice Story did not -- did not have
10 a case in front of him involve -- establishing
11 personal jurisdiction over a person who had no
12 connection to the United States whatsoever,
13 correct?

14 MR. KNEEDLER: Right. Yes.

15 JUSTICE SOTOMAYOR: That was not at
16 issue there.

17 MR. KNEEDLER: Those -- those --

18 JUSTICE SOTOMAYOR: It's interesting
19 that he and other commentators spent so much
20 time making these broad statements when Congress
21 consistently -- that's what Professor Sachs
22 pointed to -- for over a hundred years, pretty
23 much stayed within International Shoe's
24 limitations. No? In all the Acts that it
25 created?

1 MR. KNEEDLER: Well, it -- it -- yeah,
2 I mean, it created nationwide service of process
3 or even worldwide service of process like under
4 the --

5 JUSTICE SOTOMAYOR: Yes.

6 MR. KNEEDLER: -- antitrust laws.

7 It -- it has proceeded, but it -- but
8 it has regulated some things outside the United
9 States that affect --

10 JUSTICE SOTOMAYOR: Absolutely.

11 MR. KNEEDLER: -- its interests.

12 JUSTICE SOTOMAYOR: But -- but the
13 absolute statement, it never did?

14 MR. KNEEDLER: No, it's never -- it's
15 never -- it's never gone to that extent.

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

21 If I can't see this as consistent with
22 the Fourteenth Amendment, then those circuits
23 who have said that the Fourteenth and the
24 Fifteenth, like the Second, are identical are
25 wrong? The Second Circuit was wrong in that --

1 MR. KNEEDLER: Yes. We --

2 JUSTICE SOTOMAYOR: -- assumption?

3 MR. KNEEDLER: -- we think it was
4 clearly wrong, yes.

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

14 MR. KNEEDLER: Well, I think the Court
15 can assume that. I -- you know, again, if
16 Congress passes a statute --

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

19 MR. KNEEDLER: Well, I --

20 JUSTICE SOTOMAYOR: Well, you know --

21 MR. KNEEDLER: No, I -- no, I think
22 the Court could assume that there's a nexus
23 requirement. If Congress passes a statute where
24 there isn't one, then there would be time enough
25 to decide whether that -- whether that's --

1 that's valid.

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

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

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

22 MR. KNEEDLER: Well --

23 JUSTICE SOTOMAYOR: Meaning I thought
24 any activity, whether it was behalf -- I think
25 Justice Gorsuch got to this at one point. (B)

1 could be read whether they have U.N. immunity or
2 not is irrelevant. The U.S. could choose if it
3 wanted, couldn't it, to say we won't respect
4 U.N. immunity with respect to this person,
5 correct?

6 MR. KNEEDLER: And -- yeah, first of
7 all, there's no personal immunity here.
8 There -- the U.N. --

9 JUSTICE SOTOMAYOR: It --

10 MR. KNEEDLER: -- agreement provides
11 for access to the U.N. --

12 JUSTICE SOTOMAYOR: Right.

13 MR. KNEEDLER: -- by observers like
14 the -- like the PLO and PA. But --

15 JUSTICE SOTOMAYOR: But no -- nothing
16 says that the U.S. has to give them -- that that
17 activity of having access --

18 MR. KNEEDLER: The -- the headquarters
19 agreement --

20 JUSTICE SOTOMAYOR: Right.

21 MR. KNEEDLER: -- does but not -- but
22 Congress -- I mean, that -- the United States
23 acceded to that. So --

24 JUSTICE SOTOMAYOR: It acceded to
25 that, but it didn't have to.

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

3 JUSTICE SOTOMAYOR: No.

4 MR. KNEEDLER: -- might draw away from
5 it.

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

10 MR. KNEEDLER: I -- I -- I think
11 the -- the Court could hold that. I mean,
12 there -- and -- and process was served in the
13 United States --

14 JUSTICE SOTOMAYOR: Well, exactly.

15 MR. KNEEDLER: -- as -- as well. But
16 the only office is the office -- the
17 U.N.-related office. The allegations are
18 that --

19 JUSTICE SOTOMAYOR: But that's
20 irrelevant to --

21 MR. KNEEDLER: -- that that office was
22 abused --

23 JUSTICE SOTOMAYOR: That's irrelevant
24 to the point we're discussing, which is, if the
25 statute is written so that any presence for any

1 reason in the United States subjects them to
2 jurisdiction here for purposes of service?

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

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

14 MR. KNEEDLER: Yeah, the -- the
15 statute exempts from triggering activities
16 activities at the office that are -- that are --

17 JUSTICE SOTOMAYOR: I don't --

18 MR. KNEEDLER: -- connected to the
19 U.N.

20 JUSTICE SOTOMAYOR: I don't think
21 that's what they -- I'll let plaintiffs -- I'll
22 let Petitioners' counsel address that.

23 All right. Thank you, counsel.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?
25 Justice Gorsuch?

1 Justice Kavanaugh?

2 JUSTICE KAVANAUGH: I just want to
3 make sure I understand. The -- this is a
4 national security and foreign policy case, as
5 you started with, right?

6 MR. KNEEDLER: Yes.

7 JUSTICE KAVANAUGH: And Congress and
8 the President have agreed, acting pursuant to
9 the national security and foreign policy
10 principles set forth in the Constitution, on
11 what the proper role here is, correct?

12 MR. KNEEDLER: That is correct, yes.

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

18 MR. KNEEDLER: Right. And Article
19 III, Congress -- or I guess Article I, Congress
20 establishing the lower courts.

21 JUSTICE KAVANAUGH: So it seems like,
22 you know, it's Youngstown category 1 situation,
23 where the President and Congress have acted
24 together. Now there is still a role for
25 judicial review to -- to make sure they're not

1 crossing some other constitutional line, but,
2 usually, that's a very sensitive judgment for a
3 federal court to make.

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

12 MR. KNEEDLER: Right. That's --
13 that's absolutely correct. And even to the
14 extent there is a fairness element here,
15 Congress is in a position to weigh what --

16 JUSTICE KAVANAUGH: But Congress and
17 the President --

18 MR. KNEEDLER: Congress and the
19 President --

20 JUSTICE KAVANAUGH: I mean, I think --
21 I think you're going to agree with what I'm
22 about to say, but Congress and the President are
23 the ones who make fairness judgments when we're
24 talking about the national security and foreign
25 policy --

1 MR. KNEEDLER: Yeah.

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

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

20 JUSTICE KAVANAUGH: And that's why you
21 see bipartisan amicus briefs from the House of
22 Representatives, bipartisan amicus briefs from
23 the Senate.

24 MR. KNEEDLER: Yes.

25 JUSTICE KAVANAUGH: This is not --

1 this is a considered judgment that is across the
2 two branches.

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

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

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

20 JUSTICE KAVANAUGH: And I think you'll
21 probably agree with this too, but it also
22 doesn't strike me as the proper judicial role to
23 seize on international law principles that might
24 be lurking out there somewhere to tell the
25 President and Congress together, acting

1 together, that somehow they've crossed some
2 line.

3 MR. KNEEDLER: No, Congress is
4 perfectly -- and the President are perfectly
5 capable to take into account whatever
6 international law there may be.

7 And it -- it's my understanding,
8 although I haven't looked deeply into this, that
9 international law doesn't place much emphasis on
10 personal jurisdiction the way we do.

11 But it's up to Congress and the
12 President to weigh whatever -- if -- even if
13 it's not international law, what international
14 practice would be or what -- what the reaction
15 of other nations might be in a particular
16 circumstance.

17 But this is narrowly focused on a
18 particular recurring problem that Congress
19 desperately wants to address. This is its third
20 try in doing that.

21 JUSTICE KAVANAUGH: The recurring
22 problem of terrorism?

23 MR. KNEEDLER: Yes.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: Mr. Kneedler, I just
3 want to follow up on Justice Kavanaugh's
4 questions.

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

16 But is that what you said?

17 MR. KNEEDLER: Well, I think there
18 might -- I think there -- I'm -- I'm not in a
19 position to -- to say that categorically, but
20 I -- but I do think there's some reason for
21 cautious there -- caution there.

22 JUSTICE BARRETT: Why? I mean, as you
23 just told Justice Kavanaugh, these judgments
24 about foreign policy considerations are for
25 Congress and the President to make.

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

7 I guess I'm just struggling to see
8 what the foreign policy concern is with our
9 taking the broad theory.

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

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

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

21 JUSTICE BARRETT: So, even if it's
22 true or even if it's the accurate interpretation
23 of the Fifth Amendment, you're saying, shhh?

24 MR. KNEEDLER: I -- I -- no, I don't
25 think I -- I -- I didn't mean to say we're okay

1 with that. I think we would want to examine
2 questions of -- of -- of fairness to see whether
3 that should be an element or not or whether
4 Congress, in fact, has plenary power.

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

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

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: So can I go back to

1 your colloquy with Justice Gorsuch? I didn't
2 read your brief as conceding that historically,
3 the Fifth Amendment imposed no limits.

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

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

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

20 JUSTICE JACKSON: But, to the Chief
21 Justice's point, this then creates some daylight
22 between you and the other Petitioners because
23 they are in fully on this kind of originalist's
24 take on what the Fifth Amendment requires and
25 are encouraging us to -- to adopt that broader

1 theory.

2 MR. KNEEDLER: As one of two
3 alternatives, they make --

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

6 MR. KNEEDLER: Yes. Yeah. Yes. No,
7 yeah.

8 JUSTICE JACKSON: -- but -- but the
9 government is not asking us to do that as one of
10 the things?

11 MR. KNEEDLER: We are not asking you
12 to do that. We are -- but we are also not
13 saying -- we're just not addressing --

14 JUSTICE JACKSON: Yes. Understood.

15 MR. KNEEDLER: -- that question either
16 way.

17 JUSTICE JACKSON: Understood.

18 But going to Justice Kagan's point in
19 response to Justice Barrett, I mean, I -- I
20 would take your point to be that there could be
21 foreign policy implications either way and that
22 to the extent that there are announcements that
23 the Constitution of the United States imposes no
24 limit on Congress or the President with respect
25 to their activities internationally or

1 concerning international citizens, that -- that
2 could -- you could conceive of a world in which
3 that could be problematic?

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

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

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

22 And -- and the concern is that that
23 might open cans of worms that would imperil, for
24 example, you know, what we said in *Bolling*
25 versus *Sharpe*, the idea that the Fourteenth

1 Amendment's Equal Protection Clause is
2 reverse-incorporated through the Fifth
3 Amendment's Due Process Clause.

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

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

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

21 MR. KNEEDLER: Right. Now, with
22 specific reference to personal jurisdiction,
23 this issue should not come up unless Congress
24 first passes a statute providing for personal
25 jurisdiction, and then we would know what the --

1 what Congress found and what the rationales for
2 it are.

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

7 You say that consent -- you agree that
8 consent has to be knowing and voluntary, and you
9 said that both forms of the conduct in this
10 statute are -- both forms of the conduct are
11 knowing and voluntary. But I thought the
12 knowing and voluntary had to go to the assent to
13 jurisdiction.

14 I -- I -- it's not that they continue
15 to do something that they've already done. It's
16 that if they agree to do this, they are
17 consenting to the jurisdiction --

18 MR. KNEEDLER: They -- they are deemed
19 to consent.

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

22 MR. KNEEDLER: Yes. No, no. And
23 that --

24 JUSTICE JACKSON: -- in a situation
25 like this.

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

4 JUSTICE JACKSON: Yeah.

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

12 JUSTICE JACKSON: All right. One
13 final question.

14 MR. KNEEDLER: Yeah.

15 JUSTICE JACKSON: I'm sorry, I'm --
16 I'm mindful of the time.

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

24 Would it be enough for this Court at
25 this time to just say, if we agreed to this,

1 that the Fourteenth and Fifth are not equivalent
2 with respect to what is required, the minimum
3 context -- contacts test, and send it back for
4 an assessment of what the Fifth Amendment
5 requires as it relates to the facts of this
6 case?

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

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Berger.

20 ORAL ARGUMENT OF MITCHELL R. BERGER

21 ON BEHALF OF THE RESPONDENTS

22 MR. BERGER: Mr. Chief Justice, and
23 may it please the Court:

24 The PSJVTA purports to be a
25 constructive consent statute, but it fails the

1 due process test for constructive consent to
2 jurisdiction established in Bauxite. Bauxite
3 requires that the defendant's actions support a
4 presumption of legal submission to the
5 jurisdiction of the court. But, as alleged
6 here, the defendant's actions do not support a
7 presumption of submission to the court's
8 jurisdiction. Among other things, the D.C.
9 Circuit and the Second Circuit previously held
10 that the same types of PA and PLO conduct are
11 constitutionally insufficient to support
12 jurisdiction over them. Continuing to engage in
13 jurisdictionally insufficient conduct is the
14 exact opposite of submitting to the court's
15 jurisdiction.

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

23 Bauxite also holds that jurisdiction
24 cannot be imposed as mere punishment, as it is
25 here, when the alleged actions of the defendants

1 do not support submission.

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

12 First, the PSJVTA itself doesn't
13 permit any conduct at all.

14 Second, the statute gives no notice
15 that its deemed consent condition attaches to
16 any permission granted elsewhere.

17 And, third, the United States has
18 never identified any permission granted
19 elsewhere to which the deemed consent condition
20 attaches.

21 And also, to address the questions of
22 several of Your Honors, Mallory and Bauxite tell
23 us that federalism plays no role in consent
24 jurisdiction. As a result, Bauxite and Mallory
25 apply equally here under the Fifth and the

1 Fourteenth Amendments and support the court of
2 appeals' decision.

3 I welcome the Court's questions.

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

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

23 JUSTICE THOMAS: So an actual state
24 would not be covered by the Fifth and Fourteenth
25 Amendment, but an organization that is

1 substituting for that is protected by the Fifth
2 and Fourteenth Amendment?

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

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

19 JUSTICE THOMAS: What if other
20 countries recognize Petitioner -- Respondents as
21 a state --

22 MR. BERGER: I think --

23 JUSTICE THOMAS: -- or a sovereign?

24 MR. BERGER: Excuse me. I think this
25 Court's decision in Zivotofsky makes it very

1 clear that there's only one vote that matters on
2 this issue, and it's not the 140-odd other
3 countries that recognize Palestine as sovereign.
4 It's the vote of the President of the United
5 States, who has exclusive authority to recognize
6 a sovereign state.

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

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

20 MR. BERGER: Well --

21 JUSTICE SOTOMAYOR: Meaning there's
22 been a variety of tests proposed. The other
23 side and the government seem to say the Fifth
24 Amendment would look to whether there is a
25 federal interest that -- and -- and jurisdiction

1 reasonably relates to the protection of that
2 interest. I think that's their -- their test.

3 How do you fit that?

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

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

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

23 MR. BERGER: Well, so I -- I guess I'd
24 build a Fifth Amendment test this way. And I'll
25 start with Your Honor's observation, I think, in

1 your concurrence in Daimler, that fundamentally,
2 jurisdiction requires reciprocal fairness. And
3 that's going to be true under the Fifth
4 Amendment and the Fourteenth Amendment equally
5 because both protect liberty interests. And, if
6 it protects a liberty interest, there's no
7 suggestion in any of the previous case law that
8 a liberty interest is worth less under the Fifth
9 Amendment than it is under the Fourteenth
10 Amendment.

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

22 So what is the test? And I would say
23 the test is -- as developed by the court of
24 appeals, is the correct one, which is that you
25 adjust the forum for which a forum connection is

1 required to be the United States as a whole
2 because of the distinct federal interests rather
3 than state interests, but you still apply a
4 minimum contact test because of the reciprocal
5 fairness that underlies the minimum contacts
6 test.

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

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

23 If we purport to have exorbitant
24 jurisdiction for foreigners but not for domestic
25 citizens or residents, then you are really

1 inviting an international comity problem, but
2 there's no reason doctrinally to read into
3 either the Fifth Amendment or the Fourteenth
4 Amendment a different definition of person that
5 would exclude foreigners.

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

14 Nobody likes pirates, right? Pirates
15 have been bad from the founding. Nobody ever
16 thought that even though piracy is a crime
17 against humanity or it's a crime that fits in
18 the define and punish clause, that certainly the
19 United States can define piracy as an offense,
20 but the United States does not try pirates in
21 absentia because there's a delta between what
22 Congress can proscribe as laws and what courts
23 can do in adjudicating individual claims against
24 someone who violates a law with extraterritorial
25 effect.

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

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

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

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

14 JUSTICE GORSUCH: Ancient cases being
15 our precedent.

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

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

22 MR. BERGER: Right.

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

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

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

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

11 JUSTICE GORSUCH: Charming Betsey, you
12 know, as well, right?

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

17 JUSTICE GORSUCH: No one disputes
18 that.

19 MR. BERGER: Right.

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

25 That's -- and as Justice Kavanaugh

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

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

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

23 Well, ancillary is a huge, undefined
24 term, and we don't know what that means. And
25 the reason we know that it means that there's

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

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

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

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

1 differently under the --

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

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

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

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

25 MR. BERGER: Well, I -- I guess a

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

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

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

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

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

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

22 You know, so in the Fourteenth
23 Amendment context, whatever one thinks of
24 International Shoe, we're not writing on a blank
25 slate. We have quite a long line of precedent

1 after that.

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

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

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

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

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

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

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

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

18 Point 2 about the OLC opinions, it
19 says, look, we the executive -- and this really
20 goes to the government's point -- have exclusive
21 control of how this country interacts with the
22 Palestine government. To the extent any statute
23 out there, whether it's the 1987 Anti-Terrorism
24 Act or anything else says we can't do something
25 or what they want us to do imposes a condition

1 contrary to a condition we would impose, we view
2 that as unconstitutional.

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

11 I think perhaps it was Justice --

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

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

1 a number I've heard earlier today, said
2 federalism does not matter for consent
3 jurisdiction.

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

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

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

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

1 one that imposed or deemed consent, then we're
2 in that realm and you win because?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 So it's more than notice. And I think
5 that's why even if you want to give full
6 significance to Piquet -- and I promise I'll
7 shut up and sit down -- what the Court said in
8 Toland, what Justice Story said in Toland, take
9 a look at page 613, it said we have to deal
10 separately with notice and regular -- regular
11 personal appearance in court. So even Justice
12 Story thought there was something more than
13 notice in the form of a summons. And
14 jurisdiction. He likewise referred separately
15 to jurisdiction and process at page 613. They
16 are different things, and they have been
17 different things from the founding.

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

20 MR. BERGER: In --

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

24 MR. BERGER: Well, so --

25 JUSTICE ALITO: What's the unfairness?

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

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

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

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

25 That deals with the reasonableness

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

13 And so we would respectfully request
14 that this Court affirm the judgment of the
15 court.

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

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

1 judicial branch is jurisdiction.

2 JUSTICE ALITO: Well, the question
3 wasn't whether there should be judicial
4 abdication, but whether there should be any
5 degree of deference. So is there any degree of
6 deference owed or none?

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

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

20 JUSTICE ALITO: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you.

22 Justice Thomas, anything further?

23 Justice Alito?

24 Justice Sotomayor?

25 Justice Kagan?

1 Justice Gorsuch, anything further?

2 Justice Kavanaugh?

3 Justice Barrett?

4 Justice Jackson?

5 You may sit down. Thank you.

6 MR. BERGER: Thank you, Mr. Chief

7 Justice.

8 CHIEF JUSTICE ROBERTS: Rebuttal,

9 Mr. Kneedler?

10 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

11 ON BEHALF OF THE PETITIONER IN CASE 24-151

12 MR. KNEEDLER: Several points,

13 Mr. Chief Justice.

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

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

1 could criminalize them, it seems clear that it
2 should be able to count them as a basis for U.S.
3 jurisdiction.

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

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

1 which fighting terrorism has always been a -- a
2 core part.

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

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

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

1 lot. The Court should sustain the act of
2 Congress.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel. The case is submitted.

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

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