

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 THE PERMANENT MISSION OF :

4 INDIA TO THE UNITED :

5 NATIONS, ET AL., :

6 Petitioners :

7 v. : No. 06-134

8 CITY OF NEW YORK, NEW :

9 YORK. :

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11 Washington, D.C.

12 Tuesday, April 24, 2007

13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:02 a.m.

17 APPEARANCES:

18 JOHN J.P. HOWLEY, ESQ., New York, N.Y.; on behalf of
19 Petitioners.

20 SRI SRINIVASAN, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of the United States, as amicus curiae,
23 supporting Petitioners.

24 MICHAEL A. CARDOZO, ESQ., New York, N.Y.; on behalf of
25 Respondent.

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P R O C E E D I N G S

[10:02 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in case 06-134, The Permanent Mission of India to the United Nations, et al. versus The City of New York.

Mr. Howley.

ORAL ARGUMENT OF JOHN J.P. HOWLEY,
ON BEHALF OF PETITIONERS

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

These are tax enforcement lawsuits. If jurisdiction existed, the only issue a court would decide is whether a tax is owed. This type of case did not fall within any real property exception to sovereign immunity before Congress passed the Foreign Sovereign Immunities Act and section 1605(a)(4) of that Act did not create a new exception where none had otherwise existed. Congress chose --

JUSTICE SCALIA: Of course you could say the same thing if the mission here sold its property to someone and someone was claiming the right to possess the property by reason of the sale. And you could come up and say this is simply, simply a case deciding the, the ultimate issue of whether the sale occurred or not.

1 MR. HOWLEY: Uh --

2 JUSTICE SCALIA: But it would clearly come
3 within the property right exception, wouldn't it? You
4 -- you don't go one step back to look at the transaction
5 that created the -- the right in real property assuming
6 the right in real property exists.

7 MR. HOWLEY: Actually, Justice Scalia, I
8 believe that if you had a dispute over what happened
9 with the sale of property that it would fall within the
10 based-upon-commercial-activities exception in
11 1605(a)(2).

12 JUSTICE SCALIA: Let's assume that -- let's
13 assume that exception didn't exist.

14 MR. HOWLEY: If that --

15 JUSTICE SCALIA: And you had nothing but the
16 real estate exception. You would come in and say this
17 ultimately relates to not who owns the real estate but
18 whether there was a proper contract or not. And I --
19 frankly we wouldn't accept that.

20 MR. HOWLEY: No. And I think that's a very
21 different case from what we have here because in that
22 case the issue for the Court to decide is which of the
23 parties has the right, has the title in the real
24 property. That is not in issue here. The City of New
25 York does not seek title in this property. Their action

1 is to declare the validity of a tax lien and the issue
2 in an action to declare the validity of a tax lien is
3 whether the tax is owed and whether it has been paid.
4 That is the issue that's presented to the Court.

5 JUSTICE GINSBURG: But what New York is
6 seeking is an interest in land and a lien is an interest
7 in the land. It runs with the land, doesn't it?

8 MR. HOWLEY: I -- I -- yes. I acknowledge
9 that there are some similarities between a lien and a
10 right in property. For example, that it runs with the
11 land. But there are dissimilarities that are far more
12 numerous and far more significant. Unlike rights and
13 property, a lien does not give the lien holder any right
14 to own, access, possess, cross over, collect rents from,
15 exclude or any other right in the property.

16 JUSTICE SCALIA: Can't he force a sale of
17 the property to collect the lien?

18 MR. HOWLEY: This action does not.

19 JUSTICE SCALIA: I understand that this
20 action does not because of the sovereign immunity. But
21 -- but we are talking about what the nature of a lien
22 is. In an ordinary case cannot a lien holder force a
23 sale of the property so that he can get out the money
24 represented by his lien?

25 MR. HOWLEY: Yes. If the lien holder

1 commences an action to foreclose on the property, then a
2 consequence of that could be the sale of the property.

3 JUSTICE SCALIA: Well, how can he commence
4 an action to foreclose on the property unless he in any
5 ordinary sense of the term has an interest in the
6 property?

7 MR. HOWLEY: I do not dispute that a lien
8 holder has an interest, a security interest in the
9 property. But Congress did not write in section
10 1605(a)(4) "all interests that are in issue in
11 property." Congress in fact had the European Convention
12 in front of it which said "rights, interests and
13 obligations in property." Congress chose language from
14 the European Convention elsewhere but did not choose
15 that language here. Congress said only rights in
16 property.

17 JUSTICE SCALIA: You're distinguishing
18 between rights in property and interests in property? I
19 would think that every right in property is an interest
20 in property and vice versa.

21 MR. HOWLEY: No. I do not believe so,
22 Justice Scalia. There -- there -- there has to be a
23 reason why Congress chose language verbatim from the
24 European Convention in other sections of the statute
25 such as the counterclaim exception, but in this

1 exception said we are not taking interest and
2 obligations from the European Convention, we are only
3 saying rights. And this Court --

4 JUSTICE GINSBURG: The counterclaim sounds
5 to me very much like it comes straight out of the
6 Federal Rules, not out of any convention. It's the same
7 transaction and occurrence, right?

8 MR. HOWLEY: Yes. Yes. The -- the
9 counterclaim exception --

10 JUSTICE GINSBURG: Well, that's exactly what
11 it says in the Federal Rules about compulsory --

12 MR. HOWLEY: Yes, but Congress said -- in
13 the House report Congress refers to the European
14 Convention as the source for the counterclaim exception
15 in the Foreign Sovereign Immunities Act; so Congress
16 said we are taking this from the European Convention.
17 This -- this language also --

18 JUSTICE SCALIA: Congress didn't really say
19 it. I mean a committee said it to be precise.

20 MR. HOWLEY: Yes, that's absolutely correct,
21 Justice.

22 JUSTICE SCALIA: Good.

23 JUSTICE BREYER: What was your distinction
24 between a mortgage and a tax lien?

25 MR. HOWLEY: I don't think there is a

1 distinguished -- a distinction between a mortgage and a
2 tax lien.

3 JUSTICE KENNEDY: Well --

4 JUSTICE BREYER: So you think they can't
5 enforce mortgage under this? That is to say the bank
6 can't; it's not an interest in property in mortgage?

7 MR. HOWLEY: No. But Congress -- Congress
8 passed another exception here, 1605(a)(2) that said
9 actions based upon commercial activity provide an
10 exception to sovereign immunity and these exceptions
11 have to be read together. They have to be read --

12 JUSTICE BREYER: Yes, but that's -- that's
13 where it's hard for me because a purchase money
14 mortgage, you sell the real estate. Ordinary secured
15 interest in mortgage is secured interest by a lender is
16 normally viewed as an interest in property, I think. I
17 mean is there, is there any law anywhere that says that
18 isn't an interest in property?

19 MR. HOWLEY: Well, actually there is. In
20 the, in -- when the United States waived immunity from
21 suit concerning real property it limited its waivers to
22 liens and mortgages and not rights in property. And so
23 there has been distinctions made between mortgage liens
24 and liens on the one hand and rights in property on the
25 other.

1 JUSTICE KENNEDY: Well, on that point, in
2 some jurisdictions -- and perhaps you can tell me about
3 New York -- I had thought -- and correct me if I'm
4 wrong -- that tax liens have a superior status to other
5 liens in that they are an -- an interest or an estate in
6 the property as opposed to an attachment.

7 Is it not true? And I don't -- I'm not
8 talking just about order of priority for creditors. I'm
9 talking about the superiority insofar as being or not
10 being an interest in property.

11 MR. HOWLEY: Well, yes. It is superior to
12 other types of liens.

13 JUSTICE KENNEDY: Yes.

14 MR. HOWLEY: It is an interest, a security
15 interest in the property, but it is not a right in the
16 estate of the property, and it doesn't give any type of
17 the possession and ownership rights that every other
18 right in property gives.

19 JUSTICE KENNEDY: Is there New York law to
20 that effect?

21 MR. HOWLEY: Yes, there is. And we have
22 cited it in our brief. The Respondent has attempted to
23 distinguish it, because a Court of Claims jurisdictional
24 act was passed that deemed a lien an interest in
25 property for purposes of jurisdiction in the New York

1 Court of Claims; but the essential nature of a lien is
2 not, under New York law, a right in the estate.

3 JUSTICE KENNEDY: Because I had -- I had
4 thought that it is an estate in land in at least some
5 jurisdictions. And Justice Breyer was asking about the
6 same thing. In other words, there are liens -- there
7 are liens and liens. There are different kinds of
8 liens.

9 MR. HOWLEY: There appears to be in
10 different jurisdictions, different treatments of liens.

11 CHIEF JUSTICE ROBERTS: Well, that brings up
12 the basic question I have, is this a question of State
13 law or Federal law?

14 MR. HOWLEY: This is a question of Federal
15 law. This Court has held --

16 CHIEF JUSTICE ROBERTS: So even if you have
17 different rules in different States, there is going to
18 be one rule under Federal law under 1605(a)(4)?

19 MR. HOWLEY: Yes, that is correct, Mr. Chief
20 Justice. And this Court held in Saudi Arabia against
21 Nelson and Argentina against Weltover that the exception
22 language -- they are dealing with the commercial
23 activities exception -- must have the meaning that
24 Congress understood the restrictive theory of sovereign
25 immunity to require at the time it passed the statute.

1 And so when defining what a "right in
2 immovable property in issue" means, we have to give that
3 the meaning that the restrictive theory of sovereign
4 immunity required at the time in 1976. And in 1976, no
5 court, here in the United States or anywhere in the
6 world, had held that sovereign immunity was abrogated
7 merely by having a statutory lien on the property.

8 JUSTICE SOUTER: Had the State Department
9 taken a position at that point, at the time the Act was
10 passed?

11 MR. HOWLEY: There is -- not to my
12 knowledge. There is vague language in the testimony in
13 the House report, general language about 1605(a)(4)
14 relating to real property disputes, but there is not
15 precise language about whether liens are or liens are
16 not --

17 JUSTICE GINSBURG: There was nothing vague
18 about the State Department's brief in the Englewood
19 case.

20 MR. HOWLEY: No, there is not, Justice
21 Ginsburg. But they lost in Englewood. They lost and
22 the Englewood Court relied on a D.C. Circuit decision.
23 And I believe that the Solicitor General will say that
24 they have reconsidered their position, they have
25 reconsidered Article 29 of the European Convention,

1 which they relied on heavily in the Englewood brief.

2 JUSTICE GINSBURG: But anyway, at a time
3 closer to the passage of the Act, the State Department
4 was taking the position that a lien was an interest in
5 land.

6 MR. HOWLEY: Yes, that is correct. But they
7 have since decided that that position was wrong.

8 CHIEF JUSTICE ROBERTS: Well, they just may
9 be more sympathetic to India and Mongolia than they were
10 to Libya.

11 JUSTICE SCALIA: That's not beyond the realm
12 of the conceivable, is it?

13 MR. HOWLEY: It's not beyond the realm of
14 the conceivable.

15 JUSTICE BREYER: But I take it there has
16 never been a case in the history of the world you'll
17 tell me where a lender, a bank or anybody who loaned
18 money to build an embassy has ever brought a case
19 against the owner of the embassy, the sovereign, and won
20 under anything like this exception, because they can't
21 sue them.

22 MR. HOWLEY: Not that we're aware of, and
23 not that we've seen --

24 JUSTICE BREYER: Ever. And there is none
25 the other way, where they said you couldn't sue them.

1 MR. HOWLEY: Yes.

2 JUSTICE BREYER: Okay. So why do people
3 lend money to build embassies?

4 MR. HOWLEY: Well, because once you lend
5 money and you engage in commercial activity, if the
6 claim is based upon the commercial activity, Congress
7 had provided a separate section, 1605(a)(2) that
8 protects the American citizen who has lent money to an
9 embassy.

10 JUSTICE BREYER: And how did it work before
11 -- just out of -- before 1605 was passed? How did they
12 used to build, in the 19th century, embassies, if you
13 know?

14 MR. HOWLEY: I don't know about 19th-century
15 embassies. I do know that since the Tate letter, which
16 predates the Foreign Sovereign Immunities Act, there has
17 been a commercial activity exception here in the United
18 States.

19 JUSTICE SCALIA: Why isn't buying land which
20 you're not using for your embassy itself, or for the
21 residence of the ambassador, but buying and occupying
22 that land which subjects yourself to real estate taxes
23 on that land, why isn't that a commercial activity?

24 MR. HOWLEY: Well, this Court held in Saudi
25 Arabia against Nelson that it's not just engaged in,

1 related to commercial activity, but the cause of action,
2 the claim has to be based upon commercial activity.

3 JUSTICE SCALIA: So the Indian Embassy could
4 own real estate throughout New York City, which it
5 wouldn't have to pay taxes on? Or if it didn't, nothing
6 could be done about it?

7 MR. HOWLEY: It depends on the use they put
8 that property to.

9 JUSTICE SCALIA: Why? No. You're saying --
10 you're saying it's not a commercial activity. I mean --

11 MR. HOWLEY: The mere ownership of the land
12 is not --

13 JUSTICE SCALIA: It depends upon the use,
14 and the use in this case is not -- is not the embassy
15 itself or the residence of the ambassador. I mean, they
16 could use a piece of property for anything.

17 MR. HOWLEY: As long as it's not commercial
18 activity, it would not be taxed and --

19 JUSTICE SCALIA: But the buying and
20 occupying of it is commercial activity.

21 MR. HOWLEY: Well, the buying of it, if the
22 claim is based upon the buying of the property, under
23 Saudi Arabia against Nelson, then the commercial
24 activities exception would apply. But the mere
25 ownership of the property is not commercial activity.

1 JUSTICE KENNEDY: Why isn't it commercial
2 activity for New York to say, we provide garbage
3 services, electric services, et cetera?

4 MR. HOWLEY: Well, separate and apart from the
5 jurisdictional issue, the Vienna Conventions do say that
6 if there are fees for services provided, such as garbage
7 collection, water, those types of services, then there
8 is no immunity from the fees for those services. And
9 those fees should be paid. The separate issue of
10 whether that's commercial activity, it may be. It
11 doesn't matter whether the city provides a service such
12 as water, or a private entity provides a service such as
13 water. That may be commercial activity.

14 JUSTICE KENNEDY: But it makes a distinction
15 between fees and New York taxes. Suppose New York
16 doesn't have fees. They say, we just do this out of our
17 property tax.

18 MR. HOWLEY: Well, no, that does not -- on
19 the substantive issue of whether it's immune under the
20 Foreign -- under the Vienna Conventions, a tax is
21 immune. They are immune from a tax, but they're not
22 immune for a fee for service. That is how the Vienna
23 Conventions --

24 JUSTICE GINSBURG: But under your theory
25 you'd never get there, because the Vienna Convention

1 deals with the substantive liability -- you're talking
2 about jurisdiction. On your theory, you would never get
3 to the fee for picking up the garbage, because you
4 wouldn't have any jurisdiction.

5 MR. HOWLEY: No, Justice Ginsburg, not at
6 all. That's not my position. Let me make my position
7 clear. If there is a fee for service provided, such as
8 garbage collection, or provision of water, that would
9 fall under the commercial activities exception. But if
10 there is a tax, unless the activity at issue and the
11 cause of action at issue is based upon the commercial
12 activity, there is no jurisdiction. This does not mean
13 --

14 JUSTICE GINSBURG: The commercial activity,
15 it's applied to that same building that you say can't
16 be -- it can't be any suit for taxes.

17 MR. HOWLEY: Yes. There cannot be a suit
18 for taxes.

19 JUSTICE GINSBURG: But there could be --

20 MR. HOWLEY: There could be a suit for
21 specific fees for services rendered. But --

22 JUSTICE GINSBURG: Even -- even if this, the
23 building were only the mission and the representative,
24 the minister to the U.N., even then --

25 MR. HOWLEY: Yes.

1 JUSTICE GINSBURG: -- the water of a
2 municipal service, garbage collection, could be charged?

3 MR. HOWLEY: Yes, Justice Ginsburg, just as
4 if the Indian mission went out to a private water
5 company and said, please supply me with water, the
6 private water company could sue, based on commercial
7 activity, to collect for the water it had provided. It
8 doesn't matter if it's the city.

9 JUSTICE GINSBURG: Well, it's the city. Not
10 a private company, the city itself.

11 MR. HOWLEY: The nature of the activity
12 doesn't change just because it's the city providing the
13 water as opposed to a private entity providing the
14 water. We have to look at the nature of the activity.

15 JUSTICE SCALIA: Of course, this isn't a
16 suit for the taxes. I mean, we are not talking about a
17 suit for the taxes.

18 MR. HOWLEY: We are here --

19 JUSTICE SCALIA: We are talking about a
20 declaration as to the interest in the land.

21 MR. HOWLEY: No. No, Justice Scalia.
22 Absolutely not. Joint Appendix page 78 is the City's
23 amended complaint. And even in their foreclosure claim,
24 even in their foreclosure claim, what they ask is for a
25 judgment of foreclosure directing that the defendants

1 pay the amount of taxes, interest and other charges due.
2 They are not asking for an interest in the property.

3 All this case is about is money. It's not
4 about rights in the property. And there is a very big
5 problem with allowing a claim for money to become a
6 right in property merely by having a local law passed
7 that converts the claim into a lien. The City of New
8 York tomorrow could pass a law that said, if you don't
9 pay your parking tickets, that is automatically
10 converted into a lien on the property. And then while
11 we can't sue you for the parking tickets, we have
12 created a right in your property.

13 JUSTICE GINSBURG: You could easily say
14 there has to be a relationship to the property itself.

15 MR. HOWLEY: Well, that's not -- that's not
16 what the City's position is. The City's position is a
17 lien is an interest in property and falls within the
18 statute. And Congress didn't write in the statute
19 "arising out of," related to. It said, rights in the
20 property are an issue. So if under the City's theory,
21 if they passed a lien law tomorrow converting all
22 parking tickets into liens on property, then their
23 position is they could sue us for parking tickets. And
24 if there are no further questions, I will reserve the
25 rest of my time.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Howley.

3 Mr. Srinivasan.

4 ORAL ARGUMENT OF SRI SRINIVASAN
5 ON BEHALF OF THE UNITED STATES,

6 AS AMICUS CURIAE, SUPPORTING PETITIONERS

7 MR. SRINIVASAN: Thank you, Mr. Chief
8 Justice, and may it please the Court:

9 An action to determine whether property
10 taxes are owed is not a case in which rights in
11 immovable property are an issue, and it's not
12 transformed into such a case by attaching a lien, and
13 recharacterizing the case as one to determine the
14 validity of the lien.

15 And I'd like to begin by picking up, Justice
16 Ginsburg, on the question you just asked, because I
17 think it's very important to emphasize that under
18 Respondent's lien-based theory, that theory has the
19 potential largely to eviscerate the other exceptions in
20 the FSIA in the following sense: Respondent's theory
21 doesn't turn in any way on the nature or source of the
22 debt that's secured by the lien.

23 So under Respondent's view, the fact that
24 this case involves a debt that arises out of property
25 taxes is largely beside the point. The load bearing

1 weight of that theory rests entirely on the supposed
2 effects of the lien on the property. And so for
3 example, you could have a case in which a commercial
4 activity is brought into play, where the plaintiff sues
5 a foreign sovereign for commercial activity that occurs
6 --

7 JUSTICE SCALIA: That's always brought up to
8 answer the problem, well, you know -- let me give you a
9 case in which it obviously is not a commercial activity,
10 but it seems to me that the -- that the lien interest
11 has to be honored. Let's suppose that there is an
12 American who is very friendly to and sympathetic with
13 the Indian Government, and gives them real estate, not a
14 commercial activity, he gives them real estate in which
15 to house the employees in -- in their mission.

16 However, he retains an interest in that real
17 estate. He retains a lien on the real estate, to have
18 money paid to him at some point. He is not willing to
19 give the full amount of the property, but most of it.
20 And he retains a lien. Now, under your theory, that
21 lien would not be enforceable, is that right?

22 MR. SRINIVASAN: Well, the lien wouldn't
23 constitute a right in the property, and that's
24 consistent with what -- the way this Court has always
25 described liens. As we point out at pages 21 and 22 of

1 our brief, the Court has said --

2 JUSTICE SCALIA: Enforceable or not?

3 MR. SRINIVASAN: The lien would not be
4 enforceable against a foreign sovereign, because -- at
5 least with respect to the immovable property exception.

6 JUSTICE SCALIA: That seems very strange to
7 me.

8 MR. SRINIVASAN: And let me be clear about
9 that, it's -- we are only talking about the immovable
10 property exception. And with respect to that exception,
11 this Court has explained that a lien on land constitutes
12 no property or right in the land itself. And it said
13 that on more than one occasion. And I think the reason
14 --

15 CHIEF JUSTICE ROBERTS: I thought that the
16 Department submitted a good brief on this issue, but in
17 1985. What do you do with all the arguments -- I'm
18 looking at page 12 of your brief in the Englewood
19 case -- which you argued that these liens were interests
20 in property? Are those arguments no longer valid?

21 MR. SRINIVASAN: Well, we, of course,
22 reviewed our position in that case, and we have come to
23 the conclusion that it was incorrect. And in the
24 Englewood case, that argument was the third argument in
25 the brief. The first two arguments in the brief were

1 more along the lines of the court of appeals' decision.

2 JUSTICE KENNEDY: Well, what about the
3 argument that it was an interest in property? The brief
4 was very clear that it is an interest in property, and
5 that a tax lien is almost sui generis, in that it is an
6 estate in the property.

7 MR. SRINIVASAN: I don't --

8 JUSTICE KENNEDY: It survives bona fide --
9 it survives bona fide purchaser without notice?

10 CHIEF JUSTICE ROBERTS: The other reasons
11 you gave, the holder of a lien can bring an action to
12 enjoin waste, holders of liens are entitled to
13 compensation if eminent domain is exercised. All of
14 those reasons are still as valid as they were in 1985.

15 MR. SRINIVASAN: Well, let me try to take up
16 some of those in order. First, with respect to the
17 question of whether holders of a lien are entitled to
18 compensation in eminent domain, we don't take issue with
19 the proposition that a lien is property. A lien is
20 property, but the question under the statute is whether
21 a lien confers a right in the underlying immovable
22 property. And so in an eminent domain proceeding it may
23 well be that just compensation is owed to a lien holder
24 because, to the extent that the eminent domain
25 proceeding takes that lien, there's compensation owed

1 for that property. But that doesn't --

2 JUSTICE SCALIA: What property is it a right
3 in if not the immovable property?

4 MR. SRINIVASAN: Well, it's --

5 JUSTICE SCALIA: And it follows that
6 immovable property and when the immovable property
7 disappears the lien disappears. You know, if it's blown
8 away or flooded, it's now in the Atlantic; the lien is
9 gone.

10 MR. SRINIVASAN: Well, I think --

11 JUSTICE SCALIA: But otherwise wherever the
12 property goes the lien follows it. How can you say that
13 that's not an interest in the property?

14 MR. SRINIVASAN: Well, I don't think it's a
15 right in property, Justice Scalia. The lien is a
16 species of property, of intangible personal property, in
17 the same sense that a cause of action would be, because
18 after all what a lien is is essentially at bottom a
19 claim.

20 CHIEF JUSTICE ROBERTS: Well, how can the --
21 how can the lien holder then bring an action to enjoin
22 waste of the immovable property?

23 MR. SRINIVASAN: Well, a lien holder can
24 bring an action to enjoin waste, but it's important to
25 understand what interest the lien holder is protecting

1 in that situation. An action for waste by a lien holder
2 is to protect the security interest. It's different
3 from an action for waste by someone who holds a right in
4 the property. And New York law appears to recognize
5 this because New York I think has two species of waste
6 actions, one brought by a security interest holder and
7 one brought by the holder of property rights. There's a
8 case, Travelers Insurance, in which the Second Circuit
9 reviews New York law in this matter -- it's at 14 F.3d
10 114 -- and describes how there's two species of waste
11 actions depending on which sort of plaintiff you have in
12 issue. And that recognizes that the interest, if you
13 will, that a lien holder has in the property, is
14 different from a right in the property.

15 JUSTICE BREYER: What about paragraph 3 just
16 after paragraph 2 in the complaint? Paragraph 3 asks
17 the Court to bar and forever foreclose the defendants
18 from all right, interest, claim, et cetera in the
19 parcel. Well, what about that? What they're asking, I
20 just heard it. So what's the answer to that? They seem
21 to be saying, we have the right to the parcel, you the
22 defendant have no right to the parcel.

23 MR. SRINIVASAN: Well, I don't -- you'd have
24 to ask Respondent's counsel exactly what they mean by
25 that.

1 JUSTICE BREYER: Well, I did in part, so he
2 can answer.

3 MR. SRINIVASAN: For the following reason,
4 because Respondents have repeatedly indicated in this
5 case -- at the court of appeals and in this Court --
6 that they can't foreclose on the property and so they've
7 abandoned any claim for foreclosure. And a foreclosure
8 action wouldn't result in the properties being deeded to
9 Respondents. It would be put up for sale and a third
10 party would purchase it. So I'm not -- I can't tell you
11 exactly what that paragraph means.

12 JUSTICE GINSBURG: In a very practical way,
13 you're expressing that right means title means
14 ownership. But the title is certainly impaired by this
15 lien. India could not turn around and sell it to anyone
16 without doing something to discharge the lien, right?

17 MR. SRINIVASAN: Well --

18 JUSTICE GINSBURG: So the title is certainly
19 clouded by this lien.

20 MR. SRINIVASAN: Well, I think liens
21 generally constitute clouds on title, but the fact that
22 something's a cloud on title doesn't make it a right in
23 the property. And I could give you one other example.

24 JUSTICE SCALIA: It doesn't have to be a
25 right in the property. If you look at it from the

1 owner's point of view, it is a cloud on the owner's
2 title in the property. It affects the owner's title.
3 Even if you assert that it doesn't give any title to the
4 lien holder, it impairs the title of the property owner.
5 And that's all that's required, as I read the title, in
6 which rights in immovable property are an issue, and
7 here the question is whether the -- the mission's right
8 to the property is -- is impaired by this lien.

9 MR. SRINIVASAN: No, I think our arguments
10 apply equally both to the lien holder and to the
11 property owner, Justice Scalia, in the following sense,
12 that with respect to both of them a lien -- the lien
13 doesn't affect rights of possession, it doesn't affect
14 the right to exclude others, which this Court has
15 characterized as the most fundamental of property
16 rights. It doesn't affect the right to receive income
17 from the property.

18 JUSTICE SCALIA: It affects the right to
19 convey the property free and clear, which is an enormous
20 right that goes along with the real estate.

21 MR. SRINIVASAN: Well, it has a practical
22 consequence on conveyance because it, as Justice
23 Ginsburg said, amounts to a cloud on title. But there
24 are other instruments that result in a cloud on title
25 but that wouldn't be considered rights in property. One

1 example would be a contract, a purchase option contract
2 to purchase property. The holder of a purchase option
3 wouldn't be considered to have a right in the property
4 unless and until the option was exercised. At least
5 that's the general rule, even though the purchase
6 contract in a sense constitutes a cloud on the title in
7 the same way that a lien might constitute a lien on the
8 title.

9 JUSTICE GINSBURG: How long did the United
10 States take the opposite position and when did it
11 change?

12 MR. SRINIVASAN: I'm sorry?

13 JUSTICE GINSBURG: How long did the United
14 States adhere to the position that's reflected in the
15 Englewood brief and when did it change?

16 MR. SRINIVASAN: Well, I'm not aware that we
17 took the position before the Englewood brief, so I think
18 that would be 1985. And I don't think we've had
19 occasion to revisit that position until this case.

20 And let me point out with respect to the
21 Englewood brief, the first two points made in that brief
22 were along the lines of the court of appeals' reasoning
23 in this case, which was to the effect that a statute
24 that refers to a right in immovable property encompasses
25 obligations arising out of immovable property. And

1 Respondent doesn't attempt to defend that position, but
2 that's the predicate on which our Englewood brief
3 rested. And so we think there's good cause for us to
4 revisit our position from that case.

5 Now, with respect to the question of whether
6 a lien establishes rights in property, which is now the
7 focus of Respondent's argument, I would point out that
8 in other areas of the law the Court has looked to
9 questions concerning whether there is a right to exclude
10 others, whether there is a right to obtain income from
11 the property, whether there is a right to assert
12 possession of the property. That's, for example, the
13 types of considerations this Court takes into account in
14 the tax area in assessing whether a Federal tax lien can
15 attach to property by virtue of the fact that there is a
16 right to property at stake. And we think the same sorts
17 of considerations should inform the Court's assessment
18 of the immovable property exception in this case.

19 JUSTICE SCALIA: What about an easement?
20 That doesn't involve any of those things. You can't
21 exclude people and so forth.

22 MR. SRINIVASAN: Well, an easement I think
23 would qualify as a right in property because at least
24 your standard easement would provide a right of access
25 to the property by a thoroughfare. And so both sides

1 would be affected in their use of the property in that
2 sense.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Cardozo.

5 ORAL ARGUMENT OF MICHAEL A. CARDOZO

6 ON BEHALF OF THE RESPONDENT

7 MR. CARDOZO: Mr. Chief Justice, and may it
8 please the Court:

9 There are three reasons this case puts in
10 issue rights in immovable property: First, the plain
11 language of the statute; second, the statute's purpose
12 and legislative history; and third, international
13 practice as it existed in 1976.

14 JUSTICE SCALIA: Mr. Cardozo, before you go
15 any further, I had been under the impression from your
16 brief that you're not trying to enforce anything
17 against, against India or against the mission. You just
18 said you wanted a declaratory judgment that the lien is
19 a valid lien. But -- but here it is in your complaint
20 you're asking for foreclosure. Which -- which is it?

21 MR. CARDOZO: Justice Scalia, we know that
22 section 1610 would preclude us from actually
23 foreclosing. We're not allowed to do that. There's no
24 question about that.

25 JUSTICE SCALIA: You just asked for it to

1 scare them? Was that it?

2 MR. CARDOZO: No. We do want, as the
3 discussion preceding me highlighted, we do want to get
4 in and take what we think is, as a practical matter, is
5 our property. But we can't. We understand that. So
6 what we're -- what we're saying in our complaint in
7 paragraph 3, as Justice Breyer pointed out, is we would
8 like to bar them from holding title. But as we quickly
9 conceded as soon as we filed the action, we can't
10 foreclose because of the provisions of section 1610.
11 But it doesn't mean that the fact that we can't
12 foreclose doesn't mean that we don't have a right in
13 property. Let me give you a very good illustration. If
14 there is a possessory dispute, someone, an embassy,
15 rented premises and agreed that if they didn't pay the
16 rent they would lose their ability to continue to occupy
17 the premises and they failed to pay rent, that's a title
18 dispute. The person who rented the property would bring
19 a suit saying: I have a right to get back into my
20 property and there is clearly a right in property in
21 section 1605. I can't believe that Congress said, that
22 Congress intended to say, well, you can bring an action
23 for nonpayment of rent and seek possession except for
24 1610, that's okay. There's jurisdiction in an action
25 for rent, but if you want possession of property because

1 you haven't paid your taxes, and of course you still
2 can't foreclose, there's no jurisdiction. That doesn't
3 make any sense.

4 JUSTICE SCALIA: Well, but they'll say as
5 was their response to a lot of hypotheticals, the
6 commercial act exception covers that.

7 MR. CARDOZO: Your Honor, it may or may not
8 cover the commercial act exception. And going back to a
9 question that Justice Breyer asked, there are
10 questions -- there are cases, not in the United States,
11 but -- and we're citing some of them in footnote 24 in
12 the red brief -- that when someone, not the commercial
13 property exception, someone lent money to -- to build an
14 embassy and they defaulted on the mortgage, the German
15 court said jurisdiction. It's not a question of
16 enforcement, but jurisdiction.

17 The reason for this is if you first look at
18 the language of the statute, the language of the statute
19 doesn't say only certain kinds of rights. It says all
20 rights in property if they're in issue.

21 We believe that we have a right in the
22 Indian and Mongolia premises. We --

23 JUSTICE BREYER: The problem that actually
24 is bothering me with your side of the case which I find
25 difficult is, suppose I accept this principle that you

1 have. All right, it seems to me anything at all can be
2 reduced to a lien, any judgment, at least certainly
3 slip-and-fall cases and you didn't keep the ice up in
4 front and I want \$4 million damages plus \$300 million in
5 punitives and where it is I have a lien against the
6 embassy here. And I can't think of a distinction once I
7 go down your road. I mean, he at least has an absolute
8 distinction which I can see, but once I go down your
9 road where is the stopping place? What's the principle?

10 MR. CARDOZO: Let me try, Justice Breyer.
11 First of all, if there was a judgment on that
12 hypothetical tort action that you just mentioned, if
13 there were a judgment you wouldn't have gotten the
14 judgment in the first place unless you had originally
15 come within --

16 JUSTICE BREYER: I'm imagining a city or
17 Belarus or someplace, you know -- what they do is they
18 say slip and fall on ice -- you know, you get a lien
19 against the property prior to -- okay. I mean, it's
20 easy to imagine that kind of thing.

21 MR. ROBERTS: Yes.

22 JUSTICE BREYER: And in a range of subject
23 matters. So I'm looking to what the stopping place is
24 once I start down your road.

25 MR. ROBERTS: And the stopping place I think

1 is a federalism concept and a due process concept,
2 because as this Court has held in a number of cases,
3 there's a real due process question if liens are created
4 with no concern about the effect on the defendant. You
5 have to take a look at the interest of the so-called
6 plaintiff and you have to find whether there is a
7 relationship between the lien and the underlying claim.
8 Now I'm not --

9 JUSTICE SCALIA: Why didn't you just say --
10 you know, if you're worried about the malevolence of
11 countries to make all sorts of stuff liens, I guess if
12 they're malevolent enough they can make all sorts of
13 stuff easements, which, which the other side says is
14 undoubtedly a property interest. So they could say
15 that, you know, if you're held liable the court can give
16 you an easement over the property of -- of the defendant
17 worth so much money. And that would undoubtedly be
18 enforceable.

19 MR. CARDOZO: Justice Scalia, they did say
20 that and certainly if an easement is a right in
21 property, either because of the hypothetical you just
22 gave or a traditional easement, there is nothing
23 different with a tax lien. In fact, a tax lien is a
24 much greater interest.

25 JUSTICE BREYER: I still have my question

1 because I'm not worried about malevolence, is that I
2 don't carry around in my head all of the possible things
3 that might be liens against property. And so maybe my
4 imagination is wrong, but I want to know are you are
5 arguing that every lien against the property is in fact
6 a right in property which allows a lawsuit, or are you
7 arguing that there is some distinction between some and
8 the other? And I noticed that the restatements and
9 others are trying to distinguish between whether the
10 lien in question grows out of the property or it doesn't
11 grow out of the property, which I find possibly hard to
12 work with and so I want to know how you see it.

13 MR. CARDOZO: And what I see, Justice
14 Breyer, is when you take a look at the cases in this
15 Court such as Connecticut against Doebr and the other
16 cases which put limits, the constitutional limits on
17 liens, of course if a State passed a statute that runs
18 afoul of the various due process concerns that this
19 Court has articulated, that is certainly one check that
20 we have.

21 JUSTICE GINSBURG: Well, let's take the
22 parking ticket that your colleague raised, that New York
23 could make a parking ticket a lien, unpaid parking
24 tickets a lien on all -- all property.

25 MR. CARDOZO: Justice Ginsburg, I think that

1 would be a hard question, but if it does not run afoul
2 of the constitutional concerns that I just articulated
3 and it was a lien applicable not just of course to
4 foreign sovereigns, but to any unpaid parking ticket --

5 JUSTICE GINSBURG: Yes, yes.

6 MR. CARDOZO: -- I think that then that
7 would come within the immovable property exception.

8 JUSTICE SOUTER: So the only thing they
9 would have to do I suppose -- you've mentioned the due
10 process point -- would perhaps give a hearing before the
11 lien was declared and that would be enough?

12 MR. CARDOZO: I think -- I think it
13 certainly would, Justice Souter, if in fact there was a
14 hearing.

15 JUSTICE SOUTER: Well, provided that,
16 provided notice of hearing was offered, the parking
17 ticket lien would be in the same position as this lien,
18 right, in your view?

19 MR. CARDOZO: I think that's right. I
20 think that's right. And so --

21 JUSTICE KENNEDY: And under New York law
22 does property -- do property tax liens have some
23 superior status? Are they distinct under New York law
24 from other liens?

25 MR. CARDOZO: Well, they're -- as tax liens

1 you may get into a priority fight in a bankruptcy
2 context.

3 JUSTICE KENNEDY: Without reference to
4 priority.

5 MR. CARDOZO: I don't believe that they
6 would have any different lien, any different status,
7 although my colleague corrects me and says that yes, tax
8 liens -- tax liens do have in certain circumstances a
9 greater priority. It's hard to think through exactly
10 where that issue would be.

11 JUSTICE KENNEDY: I -- I had thought they
12 had a greater priority in that they even survived
13 purchase from bona fide sellers.

14 MR. CARDOZO: That certainly -- that is
15 certainly true and a property -- excuse me for
16 interrupting -- a tax lien would run forever -- there's
17 no time limit, for example -- whereas a mechanics lien
18 has a statutory time limit on it. If you got into a
19 dispute about those two liens obviously the tax lien
20 would have -- would have priority.

21 JUSTICE STEVENS: May I ask -- may I ask
22 this question? Suppose another jurisdiction had a tax
23 system which was just a little different from New York's
24 and didn't provide for a lien until after a suit had
25 been brought and there had been a failure to pay or had

1 to get a judgment first. On that case, that
2 jurisdiction could not enforce this tax law?

3 MR. CARDOZO: That is correct, Justice
4 Stevens.

5 JUSTICE STEVENS: And don't you think it's
6 sort of a strange way to define a tax immunity, by -- by
7 describing the -- the interest in immovable property?

8 MR. CARDOZO: Well, we start off with the
9 statutory language and the statutory language says
10 "right in property." We are not talking about the
11 abstract right to tax.

12 JUSTICE STEVENS: But the basic issue in
13 final analysis is whether they have to pay their taxes,
14 isn't it?

15 MR. CARDOZO: I'm sorry.

16 JUSTICE STEVENS: The ultimate issue is
17 whether they have to pay their taxes.

18 MR. CARDOZO: The ultimate substantive --
19 underlying substantive issue is that but -- and of
20 course, the State Department even today says these taxes
21 should be paid. But the jurisdictional issue is whether
22 there is a right in property. And so if you just -- if
23 you don't create a lien, if a particular State did not
24 create a lien, that would not give you the right, which
25 is what the statute -- statutory language says.

1 JUSTICE SCALIA: Do you know any States that
2 don't? Isn't it fairly standard for --

3 MR. CARDOZO: I believe -- I believe it is
4 fairly standard, Justice Scalia.

5 JUSTICE SCALIA: Yes.

6 MR. CARDOZO: I -- there may be one out of
7 50 States that, that don't say this. I think --

8 JUSTICE SOUTER: May, may I just ask, for a
9 kind of a footnote sort of question? I mean you
10 referred again to the text. And if we are going to go
11 on a very strict reading of the text as I understand it,
12 you don't have to claim a right in property, you have to
13 have a claim in -- in which someone's rights in
14 immovable property are in issue. So whether the, the --
15 and so long as you create a cloud on the title, however
16 that cloud is classified, it puts in issue the title of
17 the named title holder, so that the debate about the
18 distinction between a lien and easement and so forth is
19 essentially irrelevant as long as it's a cloud on the
20 title. If we are going to be that -- if we are going to
21 be literal, isn't that so?

22 MR. CARDOZO: I -- I agree with that. And
23 here today the right that India and Mongolia claim in
24 their property is in issue, because we say you do not
25 have the full right to your property and if this lien

1 runs long enough, it's going to wipe out the value of
2 their property completely. And all the statute -- the
3 statute doesn't say as the European Convention says "the
4 foreign sovereign's right in property." The statute
5 says either -- in effect, either side's right in
6 property.

7 JUSTICE SOUTER: Yes.

8 MR. CARDOZO: And I think we can also get a
9 great deal of help by looking --

10 JUSTICE SCALIA: The -- the -- the European,
11 the European treaty looks at it from the other side,
12 you're saying. It looks at it from the foreign
13 sovereign's side.

14 MR. CARDOZO: The European Convention
15 phrased differently -- looks at it from both sides,
16 Justice Scalia, which is why they needed the words
17 "obligation." If you look at Article 9 of the European
18 Convention it first talks about the foreign sovereign's
19 right or interest in property, and then it says "or the
20 foreign sovereign's obligations arising out of that
21 property." That's a different phrase than the FSIA which
22 doesn't use the word "foreign sovereign"; it says "its"
23 rights in property have to be an issue. So you didn't
24 need to encompass all the language of the European
25 Convention.

1 JUSTICE SCALIA: Would the obligations
2 arising out of the property in the European Convention
3 include the obligation to pay taxes, property taxes?

4 MR. CARDOZO: It would include a controversy
5 over that absolutely. And let -- let me talk about the
6 international practice because we should take a look at
7 international practice to -- to guide us.

8 What was the practice in 1976? Well, first
9 of all we know that the restatement second and comment
10 in paragraph 68 says disputes over rights or interest in
11 property. And the restatement third, which was
12 concededly a few years after the 1976 adoption of the
13 statute, makes it perfectly clear. It says it
14 explicitly. But where did the restatement --

15 JUSTICE SCALIA: This says what explicitly?

16 MR. CARDOZO: Says that there is
17 jurisdiction over tax liens. Section 455 of -- of
18 restatement third.

19 CHIEF JUSTICE ROBERTS: Over tax liens or
20 claims?

21 MR. CARDOZO: Over tax claims. Excuse me,
22 Chief -- Mr. Chief Justice.

23 CHIEF JUSTICE ROBERTS: And you don't go
24 that far.

25 MR. CARDOZO: That -- we don't have to go

1 that far because we believe we, as a -- we have a right
2 in property arising from the lien. Now let's look at
3 the foreign cases before we get to the European
4 Convention and we cite a number of them in footnote 24.
5 There is, for example, the case I referred to in
6 response to Justice Breyer, a suit over a mortgage. A
7 suit over a mortgage. It's not the commercial
8 exception; a suit over a mortgage.

9 There is a case in England in 1975 which
10 analyzes broadly what's the meaning of this real
11 property exception. And that case in England which we
12 cite says a security interest, a suit over security
13 interest for a mortgage, there is jurisdiction within
14 the immovable property exception.

15 There is a large number of cases. You look
16 at the Harvard Review of 1932, the status of the law at
17 that time, extensive review of all the relevant cases,
18 says the same thing. Then that brings us to the
19 European Convention which was adopted shortly before the
20 FSIA and which the State Department told Congress was
21 consistent with the FSIA.

22 JUSTICE KENNEDY: Is this the Vienna
23 Convention?

24 MR. CARDOZO: Pardon me? No, the European
25 Convention.

1 JUSTICE KENNEDY: European Convention.

2 MR. CARDOZO: Right. And the European
3 Convention in Article 9 as I say has a very broad
4 immovable property exception. I'm not looking just at
5 the language. I'm looking at what does this convention
6 reflect as far as international practice was at the
7 time? And that practice at the time as reflected by the
8 Convention, as reflected by these cases, all say that
9 there is a very broad immovable property exception that
10 should cover this kind of dispute.

11 Now let me make one -- one or two final
12 points. If this --

13 CHIEF JUSTICE ROBERTS: Well, the -- the
14 Convention used language quite different than that was
15 used by Congress. So I'm not quite sure how that
16 international practice reflected in, or arising out of,
17 the Convention is terribly pertinent.

18 MR. CARDOZO: I'm not, Mr. Chief Justice,
19 I'm not talking just about the language. I'm talking
20 about the European -- the international practice as
21 reflected by that Convention because the 1976
22 legislative history of the FSIA says we are trying to
23 conform United States practice into the -- the practice
24 that is followed internationally. And I --

25 CHIEF JUSTICE ROBERTS: And in some cases

1 they used language directly from the Convention and in
2 this case they didn't so it seems to me a particularly
3 ill-advised source for looking to what they were trying
4 to do.

5 MR. CARDOZO: Then I would say where did
6 they get that source from? And that's where I cite
7 the -- first the international cases themselves which
8 reflect as of 1976 the same philosophy reflected by the
9 European Convention. There is no question that the
10 wording is different. I'm not, I'm not disputing that.
11 What I'm saying is that wording conveys an intent from
12 the international point of view to have the broad
13 parameters of an international -- of an immovable
14 property exception and that was consistent with the
15 international cases that had been decided at that time.

16 JUSTICE STEVENS: Did that practice draw a
17 distinction between property occupied by the ambassador
18 himself and property occupied by employees of the
19 embassy?

20 MR. CARDOZO: As a substantive matter,
21 Justice Stevens, the answer to that question is of
22 course yes. Because the Vienna Convention in Article 20
23 -- 23 says that the premises of -- of the mission may
24 not be -- may not be taxed. And then you look at
25 Article 1 to look at what is the meaning of premises of

1 the mission and they talk about where the business of
2 the mission is conducted, or where the ambassador
3 resides.

4 It doesn't talk about the rest of the employees. And
5 since 1952, the State Department -- even before the
6 Vienna Convention and subsequent -- has been advising
7 missions in New York -- it's on their website today --
8 that they must pay taxes on staff housing.

9 JUSTICE SCALIA: Can I ask you what, what do
10 you get out of this case? You've withdrawn your claim
11 for judgment of foreclosure. What are you going to get
12 out of it? Declaratory judgment that they owe the
13 taxes? I'm not sure they have ever contested that they
14 don't owe taxes.

15 MR. CARDOZO: Oh yes, I think if you look --
16 if you look at the Petitioners' brief I think they do
17 contest that they -- that they have to pay the tax. But
18 what we'll get out of this is the following.

19 First of all, start with the fact that the
20 statute says you can bring an action in this
21 jurisdiction even if you can't execute. We have the
22 State Department telling us -- the Solicitor General
23 telling us in their briefs, footnote 17, that countries
24 pay lawful taxes. So if we can get, if we can proceed
25 to judgment and get that foreclosure -- and get that

1 declaration, we believe based upon what the Solicitor
2 General has said they will pay their taxes.

3 JUSTICE SCALIA: Yes, but --

4 MR. CARDOZO: In addition --

5 JUSTICE SCALIA: You say he is wrong about a
6 lot of other stuff.

7 (Laughter.)

8 JUSTICE SCALIA: Why do you believe him
9 about that?

10 MR. CARDOZO: And the reason -- the reason I
11 believe him about that is that Congress has passed a law
12 that says if you don't pay your taxes reflected by a
13 judgment, whatever the amount of that tax is, you're
14 going to lose 110 percent of your foreign aid. And so I
15 believe we are going to get a lot out of that.

16 JUSTICE BREYER: Can I -- can I can ask you
17 to go back for a second to where I'm getting myself into
18 a muddle here.

19 I'm still now being very, very literal. I
20 think you're very literal and you say it says, a case in
21 which is involved rights to property. And you say, but
22 this is a right to property in this case; if I win this
23 case then I have a right to sell that house. Therefore,
24 I have a right in property.

25 Now, if that's the reasoning why doesn't

1 that apply to every case where a State might say if you
2 win this case you can sell his house? I mean, I can
3 easily imagine a tort case, a contract case where a
4 State would say, you win, you can sell their house to
5 collect the judgment.

6 MR. CARDOZO: And --

7 JUSTICE BREYER: So I'm still back in a
8 different route at where I'm having the problem, which
9 is a problem of distinguishing in principle between
10 either your absolute principle, "do it," his absolute
11 principle, "don't do it," or something in the middle.

12 MR. CARDOZO: And I think the something in
13 the middle, Justice Breyer, is if you're talking about a
14 prejudgment lien which I think is your hypothetical.
15 It's --

16 JUSTICE BREYER: The hypothetical was doing
17 away with the prejudgment lien. I would say the exact
18 same words apply with just as much force if there is no
19 prejudgment lien because a suit in which, without a lien
20 the State were to say, you win this tort claim, you can
21 go sell this property to collect the judgment, is a suit
22 in which there is at issue your right to sell his
23 property, just as there is here.

24 MR. CARDOZO: But Justice, Justice Breyer,
25 in that hypothetical, you don't have a right in property

1 until you win the case.

2 JUSTICE BREYER: You do?

3 MR. CARDOZO: We have, we have a -- there is
4 -- in issue today our right to property and I believe
5 that that is a distinction and I believe also -- and of
6 critical importance.

7 JUSTICE SCALIA: Well, wait a minute. But
8 the -- the embassy has rights in it when the case is
9 brought, even before the final judgment. So you know,
10 let's give the devil his due. It would be a case in
11 which rights in immovable property are in issue.

12 MR. CARDOZO: And if --

13 JUSTICE SCALIA: You want to look at it from
14 the embassy side too so --

15 MR. CARDOZO: Yes. And if you want to look
16 at it from the embassy side under my theory, their right
17 -- under my lien their rights are an issue today. And
18 under Justice Breyer's hypothetical if it meets the
19 other due process concerns which I think under that
20 hypothetical would raise a number of interesting ones --

21 JUSTICE SCALIA: Well, that's your big
22 defense. To do that they would have to do it for
23 everybody, they would have to do it for Joe Sixpack as
24 well as for the embassy, right?

25 MR. CARDOZO: That's right. That's right.

1 JUSTICE SOUTER: Is it also the case that
2 the -- that the only instances in which, consistent with
3 the Foreign Sovereign Immunities Act, the State could
4 say you get the house, would be instances of litigation
5 arising out of commercial activity?

6 MR. CARDOZO: Yes. That is -- that is --
7 that is correct. Because it's only in the commercial
8 activities exception can you execute and then only in
9 certain limited circumstances --

10 JUSTICE SOUTER: Yes.

11 MR. CARDOZO: And you can execute unless the
12 premises are not being used for the purposes of the
13 mission.

14 JUSTICE KENNEDY: Now -- now I take it you
15 under New York law and the law of most jurisdictions,
16 the tax lien becomes a lien against the property before
17 any judicial proceedings.

18 MR. CARDOZO: That is correct.

19 JUSTICE KENNEDY: Just because they are
20 unpaid. And this is probably a question more for them
21 than for you, but as you understand their position, if
22 you put a lien on the property for unpaid taxes, are
23 they entitled to demand its removal?

24 MR. CARDOZO: Of course they can. And in
25 fact the Republic of Argentina case --

1 JUSTICE KENNEDY: You mean of course they
2 can under their view?

3 MR. CARDOZO: No. They can bring an action
4 to quiet title. They can bring an action --

5 JUSTICE KENNEDY: No. No. No.

6 MR. CARDOZO: I'm sorry.

7 JUSTICE KENNEY: Excuse me. Can they demand
8 that that lien be released --

9 MR. CARDOZO: They can demand it.

10 JUSTICE KENNEDY: No, no.

11 -- because it violates the Foreign Sovereign
12 Immunities Act? Is it their position that you have no
13 right at all even to notice a lien against the property?

14 MR. CARDOZO: Well, I haven't heard their
15 articulation of that position, but they certainly could
16 write --

17 JUSTICE KENNEDY: It would seem to me to
18 follow from what they're saying.

19 MR. CARDOZO: I think it may. I think they
20 certainly have a right to ask us to reconsider and make
21 the various arguments on the merits to us. There are
22 cases preceding the Foreign Sovereign Immunities Act
23 where a country felt the lien was invalid and brought a
24 lawsuit.

25 JUSTICE KENNEDY: My hypothetical is can

1 they demand that the lien be removed solely because of
2 the Foreign Sovereign Immunities Act.

3 MR. CARDOZO: They could demand that, but I
4 don't think the Foreign Sovereign Immunities Act answers
5 the underlying substantive question. You'd have to look
6 at the Vienna Convention as well as New York law to
7 answer that question, because all the Foreign Sovereign
8 Immunities Act is talking about is the jurisdictional
9 issue, not the substantive issue.

10 And let me just point out that if we, if we
11 can't bring this lawsuit to have -- to try to foreclose
12 or at least to have a declaration of our rights, this
13 lawsuit can't be brought anywhere. No place in the
14 world can New York City have a conclusion as to who owns
15 this property. That is absolutely inconsistent with the
16 underlying immovable property exception and the local
17 action rule, which says that land -- that a sovereign
18 has a primeval interest in its land, it has the right to
19 adjudicate its property.

20 JUSTICE KENNEDY: With reference to the
21 offset of foreign aid, could that offset be made under
22 the controlling statutes just based on your lien, or do
23 you have to have a judgment first?

24 MR. CARDOZO: No. The statute talks about a
25 judgment. It can't just be that.

1 So finally, even though we cannot execute on
2 our property -- on the judgment, it has a major impact,
3 this case has a major impact on what we can do. If we
4 can't do it there's no other place for our problems to
5 be resolved. I urge that the decision below be
6 affirmed. Thank you.

7 JUSTICE SOUTER: May I ask you a question in
8 your remaining time. With respect to the statute that
9 authorizes the -- the charge against foreign aid, would
10 that statute have any application except either in a
11 commercial case or a case like yours?

12 MR. CARDOZO: Theoretically it would have an
13 application in a counterclaim situation as well --

14 JUSTICE SOUTER: Okay.

15 MR. CARDOZO: -- Justice Souter. I think
16 those are the three things. Of course, you don't need
17 that statute for the commercial exception because you
18 can execute.

19 JUSTICE SOUTER: That's right. You can go
20 directly.

21 MR. CARDOZO: Right.

22 JUSTICE SOUTER: So in practical terms, with
23 the possible exception of a counterclaim, the foreign
24 aid setoff would simply apply to a case like this, then?

25 MR. CARDOZO: That's right. And Justice

1 Souter, while certainly the Congress that passed those
2 statutes was not the Congress that passed the FSIA,
3 there is, certainly should be an effort to harmonize
4 what the Congress has done.

5 JUSTICE SOUTER: I was going to say, if you
6 deny all the statutes you've got to --

7 MR. CARDOZO: That is obviously the way to
8 reconcile these statutes.

9 JUSTICE SCALIA: What do you do with traffic
10 tickets? They've built up. You know, there's \$100,000
11 owing in traffic tickets by some embassy. How do you
12 get a judgment that that is owing?

13 MR. CARDOZO: You can't get a judgment that
14 that is owing.

15 JUSTICE SCALIA: So you can't use even the
16 foreign aid gimmick to --

17 MR. CARDOZO: Not unless the statute is
18 changed, Justice Scalia, which we have from time to time
19 tried to persuade Congress to do.

20 JUSTICE GINSBURG: Foreign aid --

21 CHIEF JUSTICE ROBERTS: Unless New York law
22 is changed and you pass something saying you get a lien
23 on property if you have delinquent property -- parking
24 tickets.

25 MR. CARDOZO: That is right, and that would

1 get us right back into the --

2 JUSTICE GINSBURG: I thought that the
3 Federal, the 100 percent withholding, relates to taxes?

4 MR. CARDOZO: Yes.

5 JUSTICE GINSBURG: Taxes, not for parking
6 tickets or anything else.

7 MR. CARDOZO: Yes, Justice Ginsburg, it
8 does. It relates to unpaid property, unpaid property
9 taxes. It doesn't apply to unpaid parking tickets.

10 Thank you very much.

11 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

12 Mr. Howley, you have two minutes remaining.

13 REBUTTAL ARGUMENT OF JOHN J.P. HOWLEY

14 ON BEHALF OF THE PETITIONERS

15 MR. HOWLEY: Thank you, Mr. Chief Justice.

16 Article 29 of the European Convention
17 expressly excludes any intent to create an exception for
18 tax claims. That was the international practice at the
19 time. What we have here is a bootstrap and I refer to
20 the Court to its decision in Ministry of Defense of
21 Republic of Iran against Elahi, where this Court said
22 that when you have an action to impose a lien, it is
23 analyzed as an attachment under section 1609-1610 of the
24 Foreign Sovereign Immunities Act. And what the Foreign
25 Sovereign Immunities Act says is you cannot use an

1 attachment to get jurisdiction where jurisdiction
2 otherwise does not exist.

3 JUSTICE KENNEDY: Do you take the position
4 that it's improper even to notice the property with the
5 lien?

6 MR. HOWLEY: Under New York law, yes, and we
7 have Chief Judge Fuld writing for a unanimous --

8 JUSTICE KENNEDY: I mean, let's assume that
9 you owe the taxes.

10 MR. HOWLEY: Well, we say that there's no
11 right to impose the lien because the Vienna Convention
12 and New York law prohibit the taxation of the property
13 and you cannot impose the lien to collect something that
14 you're not entitled to. And this is a dispute that has
15 historically been resolved through diplomacy, not in the
16 courts, because the fact is whatever happens in this
17 case to India and Mongolia is likely to happen to the
18 United States around the world and that's a foreign
19 policy question for the State Department to decide.

20 JUSTICE SCALIA: You mean we'll have to
21 start paying our taxes around the world?

22 MR. HOWLEY: I'm afraid so, Justice Scalia.

23 JUSTICE SCALIA: Is that a real problem for
24 us? I don't think so.

25 MR. HOWLEY: I am afraid so.

1 Thank you very much.

2 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

3 The case is submitted.

4 [Whereupon, at 11:01 a.m., the case in the
5 above-entitled matter was submitted.]

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