

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   REPUBLIC OF THE                             :

4   PHILIPPINES,                                :

5                    Petitioner                 :

6                    v.                         :   No. 06-1204

7   JERRY S. PIMENTEL,                         :

8   TEMPORARY ADMINISTRATOR                 :

9   OF THE ESTATE OF MARIANO                 :

10   J. PIMENTEL, ET AL.                        :

11   - - - - - x

12   Washington, D.C.

13   Monday, March 17, 2008

14                    The above-entitled matter came on for oral

15   argument before the Supreme Court of the United States

16   at 10:03 a.m.

17   APPEARANCES:

18   CHARLES A. ROTHFELD, ESQ., Washington, D.C.; on behalf

19     of the Petitioner.

20   EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

21     Department of Justice, Washington, D.C.; on behalf of

22     the United States, as amicus curiae, supporting the

23     Petitioner.

24   ROBERT A. SWIFT, ESQ., Philadelphia, Pa.; on behalf

25     of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 06-1204, Republic of the Philippines v. Pimentel, et al.

Mr. Rothfeld.

ORAL ARGUMENT OF CHARLES A. ROTHFELD

ON BEHALF OF THE PETITIONER

MR. ROTHFELD: Thank you, Mr. Chief Justice, and may it please the Court:

This case concerns a dispute over the ownership of property, the Arelma assets, that the Republic of the Philippines believes were stolen by Ferdinand Marcos while he served as the Republic's president. The ownership of this property should be settled by the courts of the Republic. The Arelma assets were stolen in the Philippines, from the Philippine people, by their former president. The current dispute is between the Republic and certain of its citizens. There is --

JUSTICE KENNEDY: I just didn't hear you. You said that this dispute should be settled by?

MR. ROTHFELD: By the courts of the Republic. The question of ownership of these assets we believe is a matter, as a -- certainly as the first

1 impression -- should be decided in the Republic. As I  
2 say, the assets here were stolen in the Republic, from  
3 the Republic's citizens, by their president. There is  
4 currently a proceeding pending before the Sandiganbayan,  
5 the special Philippine anti-corruption court that has  
6 jurisdiction over matters of this sort, dealing  
7 specifically with the assets that are at issue here.  
8 That --

9 JUSTICE GINSBURG: It's been pending how  
10 long?

11 MR. ROTHFELD: It has been pending -- well,  
12 the Republic initially filed a forfeiture petition in  
13 1991 directed at a range of assets related to former  
14 President Marcos. Ultimately, after the assets were  
15 transferred from Switzerland to be held in escrow in the  
16 Philippines, the Philippine Supreme Court in 2003 issued  
17 a judgment relating to those assets because there was  
18 some doubt as to whether that judgment, some question  
19 about whether that judgment specifically addressed the  
20 Arelma assets that are at issue here, the Republic filed  
21 a motion before the Sandiganbayan in 2004 directed  
22 specifically at the assets. The motion has been pending  
23 since that time.

24 JUSTICE GINSBURG: So it's from 2004 to  
25 2008?

1           MR. ROTHFELD: It has been, Your Honor. The  
2 Republic -- that delay cannot be attributed to the  
3 Republic. The Republic has filed five motions with the  
4 Sandiganbayan urging it to expedite its decision. I can  
5 tell you that it has a -- it is a court with a very  
6 substantial docket. The division of the Sandiganbayan  
7 that is considering this, these assets, considered among  
8 many other cases the corruption trial of former  
9 President Joseph Estrada. So I don't think that the  
10 delay can at this point be deemed --

11           JUSTICE KENNEDY: Well, it gets way ahead of  
12 the analysis and probably way ahead of your argument.  
13 At some point I'd like you to address whether or not one  
14 of the equities the Court can consider is the likelihood  
15 of an earlier decision. Let's assume we project out;  
16 it'll be another 10 years. Does that make a difference?  
17 That may come toward the end of your argument rather than  
18 now, but I'd like it addressed at some point.

19           MR. ROTHFELD: Well, I certainly will, Your  
20 Honor. I think it would make sense logically to  
21 consider the issues that we think -- there really are  
22 two related sets of considerations that should go into  
23 the Court's decision as to whether this suit should be  
24 dismissed, which is our submission. One relates to the  
25 Republic's sovereign immunity. The second relates to

1 kind of a broader set of rule 19 considerations and I  
2 think that your question goes to those.

3 So I'll turn first to the sovereign immunity  
4 question. The Republic asserts ownership of these  
5 assets. Its -- its submission is that President Marcos  
6 misappropriated them while he served as president of  
7 the Republic. If that is true, then under Philippine  
8 law these assets at all times were the property of the  
9 Republic.

10 JUSTICE GINSBURG: Mr. Rothfeld, will you  
11 explain then how it was that the Philippine Government  
12 supported the litigation against Marcos that led to the,  
13 what was it, \$2 billion judgment?

14 MR. ROTHFELD: That's right.

15 JUSTICE GINSBURG: Said that it had no  
16 objection to that suit. In fact, he thought it was a  
17 good thing for the Philippines that that litigation go  
18 forward. But if the government's position is the  
19 judgment would be uncollectible because all of those  
20 assets belonged to the Philippine Government and not to  
21 Marcos's estate, so the -- that whole litigation would  
22 have been an exercise in futility.

23 MR. ROTHFELD: Well, I think not, Justice  
24 Ginsburg, and I think that there is in fact no  
25 inconsistency at all. The Republic's position at that

1 time was that it had no objection to plaintiffs who were  
2 victims of the Marcos regime bringing suit in the United  
3 States and they had no -- the Republic had no objection  
4 to the suit proceeding in this country. Specifically  
5 the issue that was before the court that the Republic  
6 weighed in on was whether the act-of-state doctrine  
7 would preclude adjudication in the United States. The  
8 Republic's interest was in making clear that the acts of  
9 Marcos were not the acts of the Republic, they were not  
10 official acts that the Republic was prepared to defend.

11 The Republic did not then and does not now  
12 have any objection to citizens of the Republic  
13 proceeding in the courts of the United States against  
14 the estate of Marcos. The question here is whether or  
15 not these assets are in the estate of Marcos. The  
16 Republic's submission is that these assets belong to the  
17 Republic, that they have never been part of the Marcos  
18 estate, and that therefore these are sort of ships  
19 passing in the night, that there can be proceedings  
20 against the estate in this country or elsewhere.

21 JUSTICE SCALIA: Is there anything else in  
22 the estate?

23 MR. ROTHFELD: There is litigation going on  
24 in the Philippines now before the Sandiganbayan as to  
25 what is in the estate, and I think that one of the

1 problems, of course, is that, as is true of many corrupt  
2 regimes that have misappropriated State assets,  
3 unraveling it is enormously complicated. There were  
4 dummy corporations, there were shell corporations, which  
5 is one of the reasons that it has taken so long.

6 JUSTICE SOUTER: Well, let me ask a slightly  
7 different question from Justice Scalia's. Is it the  
8 position of the Philippine Government that there are any  
9 assets in the estate that the Philippine Government does  
10 not claim?

11 MR. ROTHFELD: I think that there are some  
12 assets. I will not say that they are very substantial  
13 number of assets. Now, I should say --

14 JUSTICE SOUTER: Enough assets to satisfy  
15 the claims of the individuals who -- who brought suit in  
16 the United States?

17 MR. ROTHFELD: No, there are not and there  
18 may never have been.

19 JUSTICE SOUTER: So the position of the  
20 Philippines, going back to Justice Ginsburg's question,  
21 was we have no objection and in fact I think it was we  
22 support the litigation in the United States, but when it  
23 comes time to collect a judgment we're claiming they  
24 don't get a penny because everything belongs to us. Is  
25 that a fair summary of the Philippines' position?



1                   MR. ROTHFELD: I think that is not an  
2 entirely fair summary, Your Honor. I think -- and  
3 again let me say that there are two separate questions:  
4 One is whether or not, as a matter of principle, the  
5 Philippines objected to its citizens proceeding in the  
6 courts of the United States to condemn the regime of  
7 former President Marcos.

8                   JUSTICE SOUTER: Well, they weren't just  
9 suing to condemn the regime. They weren't asking for a  
10 declaratory judgment. They were asking for a judgment  
11 in money.

12                   MR. ROTHFELD: That is true, Your Honor.  
13 But the submission -- and the question is whether there  
14 is some inconsistency between what the Republic said  
15 then and what it says now. The submission then was not  
16 that the claimants were entitled to recover assets that  
17 belonged to the Republic. The submission was that  
18 whatever ended up in the Marcos estate --

19                   JUSTICE SOUTER: No, but we live in a  
20 practical world and if in fact there were no apparent  
21 assets that might satisfy that judgment that the  
22 Philippine Government did not claim, then their -- then  
23 their support of the -- of the earlier litigation was at  
24 the very least in tension with their -- with their  
25 overall position.

1           MR. ROTHFELD: Well, I think that that --  
2           again, I would respectfully disagree with that. I think  
3           that there was real meaning to the judgment that was  
4           returned here even if there is a dispute as to whether  
5           there are assets in the Marcos estate. There were two  
6           settlements worked out between the Marcos estate and the  
7           claimants, with the blessing of the Republic, that would  
8           have paid a very substantial amount out of assets  
9           recovered from the Marcos -- that were associated with  
10          Marcos, recovered by the Republic, and the Republic sort  
11          of blessed payment of those to the claimants here.  
12          Ultimately that was vetoed by the Sandiganbayan as  
13          inconsistent with Philippine law. But I think that the  
14          executive branch --

15                 JUSTICE SOUTER: Then why doesn't the  
16          Republic take the position that, because that was vetoed  
17          for reasons apart from the Republic's discretion, that  
18          the current assets would be an appropriate source of  
19          payment?

20                 MR. ROTHFELD: There have been a number of  
21          efforts in the Philippine Congress, and there is now  
22          pending bills in the Philippine Congress, to compensate  
23          the claimants in amounts equivalent to those  
24          settlements. So I think that that is something that  
25          could happen, but I think it's important to step back

1 and say, what is the issue before this Court here? And  
2 I think all of these considerations are simply divorced  
3 from the rule 19 issues.

4 JUSTICE GINSBURG: There's one other point  
5 of Philippine law that's unclear from the briefs. The  
6 Respondents say they had no right to intervene in the  
7 proceeding that's going on before the corruption court  
8 and your brief suggests that there is a right to  
9 intervene. What is it? Can they become part of that  
10 litigation or will they not be heard by the corruption  
11 court?

12 MR. ROTHFELD: Well, we quoted the relevant  
13 portion of Philippine law, which is equivalent to our  
14 permissive intervention, which would have permitted the  
15 claimants to seek to intervene in the proceeding of the  
16 Sandiganbayan. In fact --

17 JUSTICE GINSBURG: Seek to intervene, but no  
18 right to intervene?

19 MR. ROTHFELD: It is not a matter of right;  
20 it is permissive intervention.

21 I think it's important to bear in mind the  
22 status of the claimants, though, because they're --  
23 their rights are entirely derivative of the Marcos  
24 estate. They don't claim the Arelma assets, which are  
25 the subject of this here before this Court. If the

1 Marcos estate is held to have no right to those assets,  
2 they have no right at all and they have no right to be  
3 protected here.

4           So I think it's -- it is important to  
5 retreat to the questions that are actually before this  
6 Court now about the meaning of rule 19 and its  
7 application in a situation in which there is an absent  
8 sovereign that has asserted its sovereign immunity. And  
9 --

10           JUSTICE KENNEDY: Could you address that?  
11 That is the issue. Sovereign immunity, is this a  
12 question of where a party is just entitled to plead  
13 inconsistent theories? Was this a special appearance?  
14 Why is it that the Philippines can come into court and  
15 say, "we have sovereign immunity, and therefore the suit  
16 must be dismissed"? Would you just address that basic  
17 point?

18           MR. ROTHFELD: Well, I think that that's --  
19 sovereign immunity and dismissal under rule 19 are two  
20 different but closely related and essential aspects of  
21 the relief of the Republic. As a matter of its  
22 sovereign immunity, all agree at this point that it  
23 cannot be forced to appear in this proceeding.

24           But that relief is of little good to the  
25 Republic if the assets are then going to be awarded by a

1 U.S. court to someone else and they are dissipated and  
2 they're gone forever. And so it's necessary to protect  
3 its interest, its sovereign immunity, to make it -- to  
4 effectuate it -- that the action be dismissed under rule  
5 19. And I think that it is something which this Court  
6 has recognized that when there is a sovereign that  
7 cannot be brought into the litigation and the  
8 sovereign's interests are going to be substantially  
9 undermined, the sovereign is an indispensable party and  
10 dismissal is essentially automatic. That's what should  
11 have happened here. That's the first mistake that the  
12 district court made.

13 CHIEF JUSTICE ROBERTS: Why couldn't -- why  
14 couldn't the Philippines, not having been a party in  
15 this action, pursued whoever did get the assets from  
16 this action --

17 MR. ROTHFELD: Well --

18 CHIEF JUSTICE ROBERTS: -- in normal  
19 litigation, if they objected to the resolution?

20 MR. ROTHFELD: Well, let me amend your  
21 question in one respect. They were a party and of  
22 course as in their -- in their capacity as a party, they  
23 sought dismissal under rule 19 as well as dismissal of  
24 themselves on sovereign immunity grounds. But to answer  
25 specifically --

1 CHIEF JUSTICE ROBERTS: I guess if they  
2 weren't there for the adjudication on the merits.

3 MR. ROTHFELD: They were not there for the  
4 adjudication of the merits, that's right, because they  
5 had asserted their sovereign immunity.

6 I think that there -- everyone agrees, the  
7 Ninth Circuit itself acknowledged, that once the assets  
8 here are disbursed to Respondent and to the plaintiff  
9 class, as a practical matter they will be beyond  
10 recapture. There is a class of almost 10,000 people.  
11 And when the assets are gone, to reclaim them, even if  
12 the Sandiganbayan rules next week that Arelma is now and  
13 always has been the property of the Republic, it will be  
14 as a practical matter impossible to get them back.

15 One suggestion which is made by Respondent  
16 and by some of its amici is that, because the Republic  
17 is not bound here, it could bring an action against the  
18 former stakeholder of these assets, Merrill Lynch.  
19 That, I think, is also clearly an inadequate remedy for  
20 the Republic. There is no guarantee that it would be  
21 able to proceed in such a proceeding sort of  
22 unencumbered by the judgment here. And if what we are  
23 looking for under rule 19 -- again, there are sort of  
24 two components to this: There is the sovereign immunity  
25 component, which we think is essentially a per se rule

1 requiring dismissal in circumstances here.

2           If we get beyond that and we say, under rule  
3 19 what are the interests that we want to advance, the  
4 principal interest of rule 19 is that everything gets  
5 accommodated in a single proceeding, that the dispute  
6 gets resolved by the whole, as the Court has described  
7 it, and the only way to accomplish that is dismissal of  
8 this suit. If this action is dismissed, the court's  
9 judgment that the Republic is an indispensable party in  
10 litigation relating to Arelma will be binding on all the  
11 participants to this litigation. That will mean that if  
12 anybody sues the former stakeholder Merrill Lynch in the  
13 future, that action will be dismissed unless or until  
14 the Republic chooses.

15           JUSTICE ALITO: Would you agree that the  
16 Republic is ultimately not going to be able to collect  
17 these funds unless it sues in the United States and  
18 waives its immunity in that suit? And is that -- is  
19 that relevant to the question of whether it should have  
20 been forced to proceed in this action?

21           MR. ROTHFELD: Well, I don't think it's  
22 directly relevant, but I think that if one looks at the  
23 bigger picture, it is true -- if the Republic -- if this  
24 action is dismissed, the Sandiganbayan rules, and let's  
25 say that it rules for the Republic, the Republic becomes

1 the owner of Arelma. It is then in a position to go to  
2 Merrill Lynch and say: This is our account; give it to  
3 us. If Merrill Lynch declines to do that, it is true  
4 the Republic will have to seek judicial action in the  
5 United States, but at that point it will be seeking to  
6 enforce a judgment of the Sandiganbayan. It -- the  
7 proceeding there will be an enforcement action. And  
8 having -- it being armed with that judgment and having  
9 the Philippine courts, which should be the ones that  
10 resolve this as a matter of first instance, it will be  
11 an entirely different kind of proceeding. And in that  
12 proceeding, unlike this one -- as I said, the other side  
13 says: Well, you know, not to worry here, because you  
14 could sue Merrill Lynch. But that's inconsistent with  
15 the purpose of rule 19, which is to say --

16 CHIEF JUSTICE ROBERTS: Well, is it -- is it  
17 fair to the private claimants here in the United States  
18 to say, wait until the Philippine court renders a  
19 judgment in favor of the Philippines, and then they can  
20 come in and enforce the judgment against Merrill Lynch  
21 or whoever is holding the assets?

22 MR. ROTHFELD: Well, I think if the  
23 Sandiganbayan rules for the Republic, the assets are the  
24 Republic's assets. The Republic can seek --

25 CHIEF JUSTICE ROBERTS: Well, under the



1 determination of the Philippine court. But the court  
2 here could determine that they're the private claimants'  
3 assets, as it did.

4 MR. ROTHFELD: Well, it did without the  
5 participation of the Philippines.

6 CHIEF JUSTICE ROBERTS: Well, you just told  
7 me that the Philippines court may judge the opposite  
8 without the participation of the private claimants.

9 MR. ROTHFELD: Well, but the -- but again,  
10 Your Honor, it's important to remember the private  
11 claimants here have no claim to the Arelma assets. Their  
12 interest is entirely derivative of the Marcos estate.  
13 The estate --

14 CHIEF JUSTICE ROBERTS: That seems to me to  
15 be an argument on the merits, rather than with respect  
16 to which case should proceed first.

17 MR. ROTHFELD: Well, it goes, I think, to  
18 the question of whether their claim is one which is  
19 entitled to be heard in the United States. The question  
20 is, when the Sandiganbayan decides this case as between  
21 the two claimants that actually claim ownership of  
22 Arelma, as opposed to derivative rights as to one or the  
23 other of the claimants, that is the way in which it  
24 makes sense to proceed: Have the Sandiganbayan decide  
25 as between these two claimants, the Republic and the

1 estate. Once that's done, all else follows from that.

2 CHIEF JUSTICE ROBERTS: Would the private  
3 claimants be able to undermine the added force of the  
4 judgment in the Philippines, assuming a proceeding is  
5 brought here, on the ground that they were not allowed  
6 to participate in the proceeding in the Philippines?

7 MR. ROTHFELD: Well, I think -- I would say  
8 probably not, Your Honor, because again their interests  
9 are entirely derivative of the Marcos estate. And so I  
10 think they may be thought to be in privity with the  
11 estate, and therefore, they would not have a sort of  
12 separate right to challenge that. But I think that we  
13 should not anticipate what the future litigation will  
14 look like in the United States.

15 JUSTICE GINSBURG: In privity with the  
16 estate? You're suggesting that the plaintiffs would be  
17 connected to the Marcos family that wants to get these  
18 assets?

19 MR. ROTHFELD: No, I do not suggest any  
20 connection between them. My only suggestion is that,  
21 because their interest is entirely derivative of the  
22 estate, the estate has an interest in defending its  
23 interest there, and therefore somebody is there  
24 litigating the question. If there are no --

25 JUSTICE SCALIA: How much of an interest

1 does the estate have if it is all going to be claimed by  
2 -- by these private plaintiffs?

3 MR. ROTHFELD: Well, the estate has a -- as  
4 I say, these assets have been moved around or hidden. I  
5 think the estate may well have an interest in keeping  
6 them intact and saying that it does have an interest.

7 But if I may reserve the remainder of my  
8 time, Your Honor.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 Mr. Rothfeld.

11 Mr. Kneedler.

12 ORAL ARGUMENT OF EDWIN S. KNEEDLER  
13 ON BEHALF OF THE UNITED STATES,  
14 AS AMICUS CURIAE,  
15 SUPPORTING THE PETITIONER

16 MR. KNEEDLER: Mr. Chief Justice, and  
17 may it please the Court:

18 When a sovereign government cannot be made a  
19 party to a case because of its immunity from suit, that  
20 fact must be given great weight in determining whether  
21 the suit nonetheless may proceed. That is true whether  
22 the absent sovereign is the United States, one of the 50  
23 States, an Indian tribe or, as here, a foreign state.

24 JUSTICE GINSBURG: When you say "great  
25 weight," Mr. Kneedler, then you are not agreeing with

1 Mr. Rothfeld, who says it's automatic?

2 MR. KNEEDLER: We believe it would be  
3 dispositive in most cases, we think, only if the  
4 sovereign's interests would be adequately protected by  
5 the judgment or in the rare case that we've identified  
6 in our brief where the sovereign's interests are  
7 adequately protected by another sovereign, in the case  
8 of an Indian tribe being protected by the United States.

9 But other than that, or where the United  
10 States is in a case against a State, the United States  
11 being the national sovereign, there could be special  
12 circumstances, but we think as a whole, the -- as a  
13 general rule, sovereign immunity controls. And that's  
14 because sovereign immunity represents a fundamental  
15 policy judgment either rooted in the Constitution for  
16 the United States or the States, or judgments of the  
17 legislative branches that the sovereign should not be  
18 required to appear in court.

19 A contrary rule allowing the suit to proceed  
20 would effectively undermine that rule of immunity and  
21 allow the sovereign's interest to be tried behind its  
22 back.

23 JUSTICE KENNEDY: But suppose a case -- and  
24 you have to do a lot of supposing -- suppose that the  
25 Philippine Government was simply not amenable to the

1 process of the court, not because of foreign immunity,  
2 but just because it was outside the geographic area  
3 where process ran. It just can't be made a party.  
4 Exactly the same analysis as here?

5 MR. KNEEDLER: I think that's probably  
6 correct if the Foreign Sovereign Immunities Act governs  
7 the service of process under the Act, and if the --

8 JUSTICE KENNEDY: I understand, but in my  
9 hypothetical case it's just as if somebody is at the  
10 North Pole and you can't serve them.

11 MR. KNEEDLER: Right. But if the sovereign  
12 -- if the foreign sovereign can't be sued, I think it's  
13 all the more -- I mean can't even be reached, it may be  
14 all the more reason why that interest should be given  
15 weight.

16 We think the sovereign interest in this case  
17 is particularly compelling for reasons that have already  
18 been stated. The Government of the Philippines claims  
19 that it owns these assets. By contrast, the Respondents  
20 are unsecured judgment creditors. The Government of the  
21 Philippines claims it owns these case -- these assets  
22 under a special Philippine statute dating to 1955 that  
23 declares ill-gotten gains gained toward -- during time  
24 in office, forfeit to the government, and it has a strong  
25 interest in having that dispute resolved in its own

1 courts.

2 As we explain in our brief, the United  
3 States strongly supports that position and that interest  
4 of the United States is strongly supported by the fact  
5 that it is a party to a mutual legal assistance treaty  
6 with the Philippines. Such treaties are common in this  
7 country. There is a comparable treaty between the  
8 Philippines and the Swiss Government which led to the  
9 repatriation from Switzerland to the Philippines of a  
10 large --

11 CHIEF JUSTICE ROBERTS: Mr. Kneedler,  
12 getting back to your previous point, why isn't the  
13 Philippine National -- why don't -- why doesn't the  
14 Philippine National Bank adequately represent the  
15 interest of the Republic? Under Philippine law, as I  
16 understand, any recovery by the bank in this case would  
17 be the property of the Philippines.

18 MR. KNEEDLER: Because the Philippines --  
19 excuse me. The Philippine National Bank is an escrow  
20 agent. It would have a conflict of interest in  
21 representing the interests of the Government of the  
22 Philippines with respect to its prior claim to the  
23 assets as against the Marcos estate. PNB is holding  
24 these assets in escrow pending the outcome of the very  
25 litigation we are talking about in the Philippines.

1 CHIEF JUSTICE ROBERTS: Well, they are --  
2 they're certainly subject to Philippine law, and I  
3 understand that there's no dispute that under Philippine  
4 law the assets would be taken from the Philippine  
5 National Bank for the benefit of the government.

6 MR. KNEEDLER: That's true, but the  
7 interests of the Philippine Government in obtaining --  
8 in having its interest confirmed that it owns these  
9 assets as of the time of the wrongdoing going back to  
10 1972, that interest would not be advanced by PNB because  
11 PNB is holding them in escrow depending -- pending the  
12 outcome of that very dispute between the Marcoses and  
13 the Philippine Government and couldn't be expected to  
14 advance in this case the Government of the Philippines'  
15 interest or claim of ownership to those assets.

16 One other international agreement I wanted  
17 to mention was the Convention Against Corruption, to  
18 which the United States is a party. And also there is a  
19 statute passed by Congress, 2467, that provides for  
20 forfeiture in the United States of assets that are  
21 deemed to be forfeited pursuant to a foreign proceeding.  
22 So international agreements --

23 JUSTICE GINSBURG: Doesn't that depend on  
24 there being a foreign judgment, which we don't have in  
25 this case?

1           MR. KNEEDLER: We -- we don't have it yet,  
2 but that -- that reflects the important interest of  
3 having our courts stay their hands pending the outcome  
4 of the proceedings in the Philippines in which that  
5 would be determined.

6           JUSTICE GINSBURG: Isn't it also a  
7 requirement that in that proceeding in the foreign  
8 nation that all claimants would have an opportunity to  
9 be heard, which is not true here?

10           MR. KNEEDLER: Well, what -- what the  
11 statute requires is that the foreign proceedings be in  
12 accordance with due process and that parties claiming an  
13 -- an interest in the property be entitled to be  
14 present. Again, the claimants here do not claim an  
15 interest in the property as an owner.

16           They are unsecured judgment creditors of the  
17 -- of the Marcos estate, and it -- it might be useful to  
18 think about what is true in the reverse situation, in  
19 a forfeiture proceeding brought by the United States  
20 in U.S. courts against a criminal defendant, for  
21 example. An unsecured creditor of the -- of the  
22 defendant claiming the assets is typically found not  
23 even to have standing to intervene. But if it does  
24 intervene, it would not have a claim superior to that of  
25 the United States because it wouldn't be a bona fide



1 purchaser of the assets, and it wouldn't be without  
2 knowledge of the illegal conduct.

3 JUSTICE STEVENS: Mr. Kneedler, may I ask  
4 you this question: Would the case be different if they  
5 were secured creditors rather than judgment creditors?

6 MR. KNEEDLER: In -- in U.S. courts a  
7 secured creditor would get past the standing stage, but  
8 would not -- would not get past the bona fide purchaser  
9 for value without knowledge of the wrongdoing.

10 In this case it has been clear since 1986,  
11 for example, that the Government of the Philippines has  
12 -- has been seeking the repatriation of Arelma and its  
13 assets.

14 JUSTICE SOUTER: Well, it's been doing it on  
15 a fairly sporadic basis. If I remember the facts  
16 correctly, first it got a stay with respect to the  
17 disposition of assets, and then the stay expired and the  
18 government didn't do anything about it, and then the  
19 government didn't come into action again until this  
20 particular claim was raised.

21 MR. KNEEDLER: Well, I think it --

22 JUSTICE SOUTER: Maybe -- let me put the --  
23 sort of my response in the form of a question. In  
24 drawing or refusing to draw the conclusion of  
25 "indispensable party," do you claim that a court may or

1 may not consider the equitable or inequitable behavior  
2 of the government?

3 MR. KNEEDLER: Well, I -- perhaps in an  
4 extreme case, but I -- first of all, I think the courts  
5 of the United States should be very reluctant to deem a  
6 foreign government's conduct inequitable in the sense  
7 that you're describing it. And I think, for the reasons  
8 Mr. Rothfeld said, repatriating these assets is an  
9 extremely complicated thing. But the Philippines  
10 Government sought these assets in -- beginning in 1986,  
11 obtained a freeze order in 1986, again in 1990. It got  
12 a final determination by the district attorney in  
13 Switzerland in 1995, confirmed by the Federal Court of  
14 Switzerland in 1997, that the assets could be returned.  
15 These assets, the shares, the Arelma shares, however,  
16 were not actually returned until 2000 by the Swiss  
17 Government.

18 JUSTICE GINSBURG: Is there any explanation  
19 why the freeze that was imposed by a U.S. court in 1987  
20 was simply allowed to lapse?

21 MR. KNEEDLER: That was a preliminary  
22 injunction and I'm not sure what happened after that.  
23 But I did want -- the proceedings in Switzerland, I did  
24 want to make clear, because there was a suggestion that  
25 the Philippine Government was duplicitous by encouraging

1 this suit and at the same time seeking the assets. But  
2 as I just pointed out, it has been clear since 1986 and  
3 through a whole series of proceedings in Switzerland and  
4 in the Philippines that the Government of the  
5 Philippines has been claiming all of the Marcos assets,  
6 specifically including the Arelma assets --

7 JUSTICE SOUTER: Well, maybe they have been  
8 --

9 MR. KNEEDLER: -- from the very beginning.

10 JUSTICE SOUTER: Well, maybe they have been  
11 have been candid about their claims, but they -- in  
12 real-world practical terms, the claim to these assets  
13 and the representation at the same time that it's  
14 appropriate for these people to proceed in the United  
15 States for a money judgment, are at least in some  
16 tension with each other, aren't they?

17 MR. KNEEDLER: I do not believe so. If we  
18 thought about an analogy in the United States, if the  
19 United States filed a brief in this Court saying that a  
20 former government official could be sued, did not have  
21 qualified immunity and could be sued in his personal  
22 capacity, or didn't -- or could be sued individually and  
23 the Westfall Act did not protect him, that would in no  
24 way make -- be a representation by the United States  
25 that a judgment against that officer could be satisfied

1 out of assets of the United States, including assets  
2 that the United States might be seeking to recover  
3 from -- from the defendant.

4 And we think the Philippine Government is in  
5 essentially the same position. And a finding of  
6 liability in this case -- the judgment does constitute a  
7 finding of liability so that with respect to -- it would  
8 give these Respondents here the ability to go to  
9 Philippine court, to file a claim in the probate  
10 proceedings in the Philippines as these Respondents have  
11 done. So the judgment, even without being satisfied,  
12 serves the Respondents' interests to a great extent.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 Mr. Kneedler.

15 Mr. Swift.

16 ORAL ARGUMENT OF ROBERT A. SWIFT

17 ON BEHALF OF THE RESPONDENTS

18 MR. SWIFT: Mr. Chief Justice, and may it  
19 please the Court:

20 I would like to address as a first point the  
21 issue you raise, which is perhaps seminal to you, and  
22 that is whether there is an adequate alternative remedy  
23 to the human rights victims, either in the United States  
24 or in the Philippines. Our answer is, unequivocally,  
25 there is no remedy.

1           Let me talk about the Philippines first.  
2 Any forfeiture proceeding in the Philippines is in rem.  
3 Its supreme court has so declared. These assets are in  
4 the United States. There cannot be two jurisdictions  
5 that share in rem assets.

6           JUSTICE SOUTER: Well, doesn't the -- maybe  
7 this makes no difference, but doesn't the Philippine  
8 National Bank have the -- whatever they call them, the  
9 share certificates or stock certificates that represent  
10 the Arelma assets at this point?

11           MR. SWIFT: That's right. Switzerland  
12 confiscated those certificates from a Swiss financier  
13 and transferred them to the Philippines.

14           JUSTICE SOUTER: Okay. Couldn't they --  
15 couldn't they bring an in rem in the Philippines based  
16 on the presence in the Philippines of those two  
17 certificates?

18           MR. SWIFT: They can, and that's in fact  
19 what is occurring.

20           JUSTICE SOUTER: Okay.

21           MR. SWIFT: However, it's also apparent from  
22 the facts in this case that those certificates were  
23 never the property of the Philippine Government, never,  
24 ever. There is absolute clear evidence in this record,  
25 in the joint appendix on that, which makes the whole

1 issue --

2 JUSTICE BREYER: I thought the issue in the  
3 Philippines is the question of whether the money that  
4 went into the stock certificates eventually belonged to  
5 the people of the Philippines from the beginning or  
6 belonged to Marcos personally?

7 MR. SWIFT: Well, that's --

8 JUSTICE BREYER: Are you saying that  
9 there is no possibility whatsoever that a Philippine  
10 court could say that this money initially belonged to  
11 the people of the Philippines?

12 MR. SWIFT: They could not say that in a  
13 forfeiture proceeding because it doesn't --

14 JUSTICE BREYER: I'm saying whether they  
15 could say it -- I don't care what the name of the  
16 proceeding is. I'm saying could they decide that?

17 MR. SWIFT: If it was -- absolutely.

18 JUSTICE BREYER: All right. Now, if they  
19 decide that, why should your clients, terribly treated  
20 as they were, get the money ahead of the victims in the  
21 Philippines, who also were terribly treated?

22 MR. SWIFT: Because the judgment in the  
23 Philippines would not be in rem, Mr. Justice Breyer.

24 JUSTICE BREYER: I thought Justice Souter  
25 just answered that. He said that the stock certificates

1 might be held to belong to the people of the  
2 Philippines, in which case the stock certificates  
3 represent stock in a company that has a claim against  
4 Merrill Lynch, and so they will say, this certificate  
5 belongs to the people of the Philippines; the people of  
6 the Philippines would like you, Merrill Lynch, to pay  
7 back the money that the company gave them initially.  
8 And Merrill Lynch I imagine would pay it. Now that I  
9 think is as I understand it. Now, is there something  
10 wrong with my understanding?

11 MR. SWIFT: I think your understanding is  
12 correct in that regard; however, the law, both in the  
13 Philippines and in the United States, draws a clear  
14 distinction between the ownership of stock and a  
15 corporation's ownership of assets. Certainly Dole v.  
16 Patrickson stands for that proposition.

17 The -- a judgment rendered as to the  
18 certificates in the Philippines or even as to the assets  
19 would not be in rem. So if that judgment came over to  
20 the United States to be enforced, they would stand in  
21 the same position as any other judgment creditor, not a  
22 judgment creditor with a claim to specific assets, but a  
23 judgment creditor as to a specific amount of money.

24 Let me answer another question which was  
25 asked --

1 JUSTICE GINSBURG: I would like you to  
2 address -- you seem to put heavy weight on the in rem  
3 characterization. That is a judgment -- there's a thing.  
4 But our law over the years has come to appreciate that  
5 things do not have rights; people have rights in things.  
6 So we have modified the once rigid notion that the suit  
7 is against a thing, to recognize that it's people's  
8 rights in the thing that counts. And your use of that  
9 label seems to forget about all the more recent  
10 understanding.

11 MR. SWIFT: Justice Ginsburg, I believe  
12 interpleader is, statutory interpleader, is an in rem  
13 nature of a proceeding. In fact, it was the best and  
14 most appropriate and the only proceeding in which all  
15 claimants could be -- their claims could be heard. It's  
16 a shame that the Philippine Government didn't come in,  
17 as it did in twelve other cases it brought in the United  
18 States, including two interpleaders, to say: Yes and  
19 this is our evidence. What it suggests is that they had  
20 no evidence to support it, and they want to be in their  
21 own court. Why do they want to be in their own court?  
22 Because it won't be defended by the Marcoses. And the  
23 very rule that they cited in their reply brief -- and by  
24 the way, the reply brief was the first time in all this  
25 litigation they have ever asserted that the human rights



1 victims have a remedy by intervening in the  
2 Sandiganbayan in the Philippines. We don't. The rule  
3 that they quote says, "as to assets in the court."

4 JUSTICE GINSBURG: Did -- did the district  
5 court in Hawaii or the Ninth Circuit ever decide what  
6 the Petitioners tell us is the basic question, that is  
7 do these assets belong to the Philippine Government  
8 under that 1955 statute, or do they belong to the Marcos  
9 estate? It seemed to me that our courts were just  
10 assuming that the assets belonged to the Marcos estate  
11 and that the plaintiffs in the lawsuit were creditors of  
12 the Marcos estate.

13 MR. SWIFT: Your Honor is correct that there  
14 was an underlying belief by the court, that the court  
15 accepted as valid the Republic's claim that it owned the  
16 assets, the assets were stolen. But the evidence in the  
17 case, and the two lower courts specifically found on the  
18 basis of that evidence, that these were Marcos assets;  
19 and this finding was made after the completion of  
20 discovery, after a deposition in -- in France.

21 JUSTICE GINSBURG: But it didn't say, find,  
22 that: And they belong to the Marcos estate and not the  
23 Philippine Government.

24 MR. SWIFT: Not the latter part of your  
25 equation. They did not say that they did not belong to

1 the Philippine Government. By saying they belonged to  
2 Ferdinand Marcos was sufficient, it was sufficient  
3 evidence.

4 JUSTICE BREYER: I didn't see that finding  
5 in the court of appeals decision. I thought the court  
6 of appeals thought that they belonged -- they couldn't  
7 possibly belong to the Philippine Government or the  
8 people there, because there is no way that the  
9 Philippine Government could win in a suit in New York in  
10 trying to recover them. But the Solicitor General has  
11 provided about two or three ways, in which and so -- and  
12 so have the Petitioners -- and that seems to me the  
13 heart of the issue. They have said: No, no, there are  
14 two or three ways in which the Philippine Government  
15 might well -- it might well ask a court for the money  
16 and the court would say, yes, you're entitled to it.

17 So that it seems to me, since that's the  
18 heart of this. What is your response to that?

19 MR. SWIFT: I'd like to go through each way  
20 in which they say they can and convince you that they  
21 can't. First, they could proceed in a forfeiture  
22 proceeding in the Philippines. But of course that  
23 wouldn't be in rem, so they couldn't get to first base  
24 as to the assets. As to the share certificates, yes,  
25 but of course that in effect is a nullity because they

1 never belonged to the Philippine Government. That  
2 aside, we put aside that factual --

3 JUSTICE SOUTER: Wait a minute. I missed  
4 your last step. If it's an in rem proceeding against  
5 the share certificates, what -- what difference does it  
6 make whether they ever belonged to the Philippine  
7 Government?

8 MR. SWIFT: Because ownership of the share  
9 certificates is not a right to the assets, a per se  
10 right. There would have to be some additional rights.  
11 The assets are ones --

12 JUSTICE SOUTER: So you're saying an in rem  
13 proceeding against the certificates simply will not  
14 resolve the issue; that's the -- that's the guts of the  
15 answer.

16 MR. SWIFT: That's correct. The other two,  
17 two types of proceedings, one could be a conversion and  
18 one breach of contract, both of which would be barred by  
19 statute of limitations.

20 JUSTICE BREYER: Yes, well, that isn't what  
21 they say. I think, if I understand it, that they say  
22 that were the share certificates in the hands of the  
23 Philippine Government on the ground, that the money used  
24 to create those had been taken from the Philippine  
25 people unlawfully, if that's what they decide, at that

1 point the owner of the certificates, the government,  
2 would say to Merrill Lynch: We own the company, the  
3 company has the assets; please send us the money. And  
4 Merrill Lynch would do it.

5 But if Merrill Lynch didn't do it, then they  
6 would file the judgment saying, these are our share  
7 certificates, in the New York court and say, will you  
8 please enforce the judgment. Now, there is something  
9 there that I'm not quite getting and that's why I want  
10 you to respond to the line of happenings that I just  
11 suggested.

12 MR. SWIFT: Well, an important fact that you  
13 left out was that in the year 2000, when the Philippine  
14 Government through PNB controlled the Arelma  
15 certificates, a request to Merrill Lynch was made. The  
16 request was refused. So if there was a breach it  
17 occurred in the year 2000. Remember, after the  
18 certificates were transferred from Switzerland to the  
19 Philippines the PNB then created a new board of  
20 directors and they went directly to Merrill Lynch.

21 The whole point of this exercise was, of  
22 course, to circumvent the courts of the United States.  
23 I only learned about the assets in the year 2000 and  
24 then proceeded to try to recover them.

25 JUSTICE SOUTER: But may I ask you this

1 question, though. Merrill Lynch refused in the year  
2 2000, but if the proceeding that Justice Breyer has just  
3 been describing takes place and there is a judgment to  
4 the effect that the share certificates are properly held  
5 or the property of the Philippine Government, and the  
6 Philippine Government now makes -- or then makes a new  
7 request to Merrill Lynch, the fact that they made a  
8 request that was refused in 2000, which may be too late  
9 to sue on, isn't going to prevent them from suing on  
10 their present adjudication that they are the true owners  
11 of the share certificates and want the money.

12 MR. SWIFT: But I believe there is an  
13 important part of the equation that's left out of that  
14 question, and that is the rights of the Philippine  
15 Government as the new shareholder will not be any  
16 greater than those of the prior shareholder. The prior  
17 shareholder made a demand and did not receive the money.

18 JUSTICE SOUTER: Okay. You're saying -- I  
19 think you're saying that the demand would be ineffectual  
20 this time for the same reason it was ineffectual the  
21 last time.

22 MR. SWIFT: Yes, Your Honor.

23 JUSTICE SOUTER: And the suggestion I  
24 thought that Justice Breyer had made and that I made was  
25 this time they can do something further. They can take

1 the judgment and go into a United States court and say:  
2 We've got this judgment, there's no question that these  
3 shares and what they represent are ours; so make Merrill  
4 Lynch give us the money. What prevents them from doing  
5 that?

6 MR. SWIFT: Nothing prevents them from  
7 making the demand. But when they go into court and ask  
8 for that, first of all, Merrill Lynch can do what it did  
9 here, which is to file an interpleader and say: We want  
10 all the claimants to come forth and make the claim.  
11 Then we have a redo.

12 What we have below is a judgment, a judgment  
13 that we're seeking to enforce and we contend that --

14 JUSTICE KENNEDY: Well, the difference in  
15 the redo is that in the second case that's just been  
16 hypothesized, the Philippine Government is represented.  
17 We are making these assumptions, and the Philippine  
18 Government says: You can make these assumptions, but  
19 they may very well be wrong; we want to be represented  
20 before you make those assumptions.

21 MR. SWIFT: Well, they had that right in the  
22 year 2000 when they chose to exercise their sovereign  
23 immunity. So, what has changed? They would have to  
24 waive their sovereign immunity to go --

25 JUSTICE KENNEDY: Any party that's beyond

1 the process of the court has a right to come in. The  
2 question is what happens if they are not there.

3 MR. SWIFT: Well, they were brought in.  
4 They chose to exit. They then paid for the prosecution  
5 of claims by PNB and Arelma, in effect acting as  
6 surrogates, reflective of a question that was asked  
7 earlier. Then when they were dissatisfied with the  
8 result, they then want to use PNB and Arelma to upset  
9 that pursuant to a rule 19(b) motion.

10 JUSTICE BREYER: There is a huge change.  
11 The change would be that they'd have a judgment of that  
12 special court over there that this company and the  
13 assets understandably belong to us, not to the Marcoses.  
14 And so this time, they go with that judgment to Merrill  
15 Lynch and say: Give us the money.

16 And if they -- if they don't -- if Merrill  
17 Lynch says no -- Merrill Lynch might say yes, but you'll  
18 say, no, it belongs to us, so they might not. And if  
19 they don't, then the Philippines are never going to get  
20 the money, unless they bring the lawsuit. And once they  
21 bring the lawsuit, then you have them, because then you  
22 go right into the court in that lawsuit and intervene  
23 and they have waived all their sovereign immunity, et  
24 cetera, they can't get the money.

25 MR. SWIFT: Then you have a redo of what

1 they started out this proceeding doing --

2 JUSTICE BREYER: With a difference.

3 MR. SWIFT: -- which was judge shopping and  
4 forum shopping. They were -- they were --

5 JUSTICE GINSBURG: But isn't that what --  
6 that's what sovereign immunity means. I mean, they do  
7 have the right to pick their forum. You say I can only  
8 be sued when I consent, so I can consent where I will.

9 The problem with what you're presenting is  
10 it sounds like, yes, you have sovereign immunity, you  
11 don't have to be part of this lawsuit and it can't  
12 affect your rights, but then when it seems that the  
13 eventual judgment, it's a default judgment effectively  
14 against the Philippines, because they can never get  
15 those assets once they're disbursed. So, it's a -- it's  
16 kind of a deceptive immunity, because by asserting the  
17 immunity they are going to lose their opportunity to  
18 claim these assets.

19 MR. SWIFT: Well, what Your Honor is  
20 suggesting is that there should be a per se rule under  
21 rule 19(b). I don't believe it's the role of this Court  
22 to change rule 19(b).

23 JUSTICE GINSBURG: Not necessarily. I'm  
24 focusing on this situation. There could be others.

25 MR. SWIFT: Well, then we have two lower



1 courts that have balanced and weighed all appropriate  
2 factors. There is no suggesting that there are other  
3 factors. They -- I believe that the standard of review  
4 for this Court is whether or not the lower courts  
5 considered the factors and engaged in an appropriate  
6 balancing and weighing --

7 JUSTICE KENNEDY: In making that balancing,  
8 what weight did they give to the sovereign immunity of  
9 the Philippines?

10 MR. SWIFT: Significant weight. The Ninth  
11 Circuit said it was a powerful factor. And then it went  
12 into other factors, some of which Justice Ginsburg  
13 mentioned: The 22-year delay. They have known about  
14 this for a long time.

15 JUSTICE GINSBURG: I thought that the Ninth  
16 Circuit went on a statute of limitations in New York.  
17 It didn't give the sovereign immunity claim, it seems,  
18 in the end of the day any weight, because it says we  
19 don't have to worry about the Philippines being out of  
20 this case because they would have no claim on the  
21 merits.

22 MR. SWIFT: Let me pose a different example  
23 to you, Justice Ginsburg, and that is, what if this were  
24 a bankruptcy proceeding and the foreign sovereign said:  
25 Oh, those assets really belong to us, they were stolen,

1 and we'll decide that in our country.

2 Now, it could be any country of the world.  
3 Would the U.S. court stand for that? Are U.S. courts  
4 supposed to give away and surrender and be ousted of  
5 their own jurisdiction in in rem actions and farm out  
6 decisions to foreign countries? And in our case we're  
7 not even going to be represented, nor will the Marcoses.

8 CHIEF JUSTICE ROBERTS: There might be a  
9 different situation in your hypothetical with respect to  
10 bankruptcy. It is that there's an administrator against  
11 whom the Philippines could proceed, unlike the situation  
12 here, where you have a class, which the prospect of  
13 the Philippines proceeding later is not realistic.

14 MR. SWIFT: Well, I submit that the  
15 underlying principle is a solid one, and that is U.S.  
16 courts do have in rem jurisdiction. We have 28 U.S.C.  
17 1655. It's one of the oldest forms of jurisdiction we  
18 have in this country. And we should not be surrendering  
19 that to a foreign sovereign and farming out for decision  
20 decisions about assets. These assets are not  
21 transitory. They have been here 35 years.

22 JUSTICE STEVENS: Yes, but may I ask a sort  
23 of -- maybe it's too elementary a question, but has any  
24 court ever decided the merits of the question whether  
25 the Marcos estate or the Philippine Government owns

1 these assets?

2 MR. SWIFT: The lower court -- well, not as  
3 --

4 JUSTICE STEVENS: It decided there was no  
5 remedy, I understand that. But has it decided the  
6 merits of the basic dispute?

7 MR. SWIFT: It has, based on evidence, based  
8 on depositions, that these assets belonged to Marcos.

9 JUSTICE GINSBURG: But where is that? Then why  
10 were they bothering with the statute of limitations?

11 Both courts said that the action would be time barred in  
12 New York. But if they made a definitive ruling that the  
13 assets belonged to the Marcos estate and not the  
14 Philippine Government, then that would be preclusive.

15 MR. SWIFT: I -- are you saying that --

16 JUSTICE GINSBURG: I just did not find in  
17 either the district court or the court of appeals an  
18 answer to that basic question: Whose assets are they?  
19 It seemed to me they were assuming the assets belonged  
20 to the estate and not to the Philippine Government, but  
21 they made no specific finding on that issue.

22 MR. SWIFT: There are a number of findings,  
23 but obviously, because the Philippine Government was not  
24 a party in the case, there was no finding specific to  
25 the Philippine Government. But the finding that they

1 were -- belonged to Ferdinand Marcos is sufficient. You  
2 do not need the counter-finding that they did not belong  
3 to the Republic.

4 JUSTICE GINSBURG: But then you're ignoring  
5 a 1955 law that says anything that belongs to Marcos  
6 that he didn't get legitimately belongs to the  
7 government.

8 MR. SWIFT: Well, again, that's a forfeiture  
9 issue. The assets have to be in the Philippines, and  
10 there have been many forfeiture proceedings in the  
11 Philippines as to Marcos assets.

12 To answer a question Justice Kennedy raised  
13 earlier, aren't there other assets, they've have already  
14 recovered over a billion dollars of assets. There is  
15 still hundreds of millions, if not a billion, in the  
16 Philippines.

17 You know, from the record and what I've  
18 submitted, that we're not able to transfer our American  
19 judgment to the Philippines. The United Nations Human  
20 Rights Committee has even found a violation of  
21 international law by the Republic in preventing us from  
22 doing that. We've had to go to that body. Do we think  
23 that we are going to get justice in a Philippine court  
24 that's never adjudicated human rights violations, much  
25 less our right to assets? Think how easy it would

1 be for the Marcoses and the Philippine Government to  
2 simply make a deal as to these assets. Because --

3 CHIEF JUSTICE ROBERTS: Aren't those  
4 issues that could be addressed when the Philippines  
5 attempt to enforce a judgment they would get in the  
6 Philippines if they do in fact get such a judgment?

7 MR. SWIFT: Well, then we run into such  
8 issues like the act-of-state doctrine. And we have --  
9 then we will -- our defense will be undermined because  
10 they will say a U.S. court cannot reexamine those --  
11 that determination. So it's a catch-22 for us. We  
12 proceeded as we were entitled --

13 JUSTICE BREYER: Do you have -- I mean I  
14 don't see you have a claim there as opposed to the --  
15 the worst that would happen, not necessarily good for  
16 your clients, but the worst that would happen would be  
17 that the assets would be devoted to victims and their  
18 families in the Philippines. I mean, namely to the  
19 Philippine people. So I don't see some kind of  
20 fundamental unfairness here, unless you can point one  
21 out.

22 MR. SWIFT: Well, I --

23 JUSTICE BREYER: I mean they'll treat you  
24 like another creditor and you have -- but is there some  
25 terrible unfairness going on?

1           MR. SWIFT:  What Your Honor is suggesting is  
2   that a useful approach to this case is to say, well, if  
3   the Philippine Government gets the money, then won't  
4   that benefit everybody?  Well, then you have to look at  
5   the characteristic of the country, something I'm very  
6   familiar with but which I don't want to -- I think it  
7   would be inappropriate in this proceeding to talk about.

8           JUSTICE BREYER:  Is there -- is there  
9   something special going on, specially unfair, in respect  
10  to the delays where you are treated differently than  
11  other litigants in the Philippines?

12          MR. SWIFT:  Yes.  There was purposeful delay  
13  in us being able to transfer our judgment.  We are just  
14  in the pleadings stage after 11 years there.

15          JUSTICE SCALIA:  Counsel, what does  
16  unfairness have to do with it?  I mean the whole  
17  doctrine of sovereign immunity rests upon unfairness.  
18  It says you can't sue the sovereign even if you have a  
19  valid claim.  And when we say we will apply the same  
20  doctrine as to foreign sovereigns, it means the same  
21  thing.  I'm just not terribly persuaded by the fact that  
22  it has unfair consequences.  The doctrine of sovereign  
23  immunity always has unfair consequences.  So, unless  
24  you're asking us to abandon the doctrine, the fairness  
25  argument does not persuade me.

1           MR. SWIFT: Well, I think the issue was  
2 resolved pursuant to 19(b). Unless this Court  
3 determines that there is a per se rule under 19(b), we  
4 weigh factors, and it's the role of this Court to  
5 determine whether or not there was -- the lower courts  
6 did not make a decision based on equity and good  
7 conscience, one of the broadest parameters of  
8 decisionmaking provided by a lower court.

9           JUSTICE SOUTER: May I go back on exactly  
10 that point on the equity to Justice Breyer's last  
11 question? I thought you had given or anticipated his  
12 question in something you said a moment ago, and then  
13 you didn't repeat it, and I may have misunderstood you.  
14 I thought you had told us that the courts of the  
15 Philippines did not recognize, for enforcement purposes  
16 there, the judgment that your clients had obtained in  
17 the United States, and that in effect they, therefore,  
18 if they were going to make a claim on assets in the  
19 Philippines, they would have to sort of start from  
20 scratch again. Is that correct? Did I misunderstand  
21 you?

22           MR. SWIFT: Well, our judgment has not been  
23 enforced. They asked -- initially asked for a filing  
24 fee of \$8.4 million. We appealed that, after eight  
25 years and some months. They finally said, yes, the

1 filing fee is \$10. It was sent back down where  
2 there was still more delay. I mean, I'm a realist. I  
3 mean, how many years is it going to take?

4 JUSTICE SOUTER: So they just -- they in fact  
5 are obstructing the process --

6 MR. SWIFT: That's right.

7 JUSTICE SOUTER: -- trying to recognize it?

8 MR. SWIFT: And the Human -- the United  
9 Nations Human Rights Committee has so found.

10 JUSTICE SOUTER: Let me ask you this: Did  
11 the Philippine Government formally take a position in  
12 raising these obstructive barriers, the \$8 million  
13 filing fee, for example?

14 MR. SWIFT: It did not.

15 JUSTICE SOUTER: Okay. That was sua sponte  
16 with the court?

17 MR. SWIFT: It was sua sponte with the --  
18 actually raised by the Marcoses initially, and the court  
19 simply said yes, it's \$8.4 million.

20 JUSTICE GINSBURG: Isn't that -- I mean it  
21 sounds shocking, but I thought that in the Philippines,  
22 as in many countries, the filing fee is determined by  
23 what you're asking for. So it would be a percentage of  
24 \$2 billion. And if they just did that automatically,  
25 then you say, oh, but, but this -- the filing fee of



1 that size would mean that the plaintiffs can't sue. But  
2 that's -- but it wasn't that they picked whatever figure,  
3 filing fee, out of a hat; it was a percentage of what  
4 was sought in the litigation, right?

5 MR. SWIFT: That's -- you're correct in your  
6 analysis. The -- except that there was another provision  
7 of the fee statute which we went under and which they  
8 ultimately -- the Philippine Supreme Court said that we  
9 were correct.

10 CHIEF JUSTICE ROBERTS: Counsel, before you  
11 sit down, you haven't mentioned anything about your  
12 argument that the Philippines don't have the right to  
13 raise this. Are you throwing in the towel on that one?

14 MR. SWIFT: Absolutely not. We think that  
15 argument is definitive. First, on one hand, with regard  
16 to the Philippine Government and its PCGG: They were  
17 not parties to the judgment. Therefore under Karcher,  
18 Marino, Devlin --

19 CHIEF JUSTICE ROBERTS: Well, the  
20 Philippines National Bank and Arelma were, and of course  
21 they've appealed. And I understand the law to be they  
22 can raise these arguments. We don't have need to have  
23 an independent basis for the Philippines.

24 MR. SWIFT: That's true, but we've also  
25 pointed out that Arelma and PNB have now thrown in the

1 towel as to the merits. Remember, they're parties that  
2 are separate parties. They had claims on the merits.  
3 Their claims were resolved against them inter se, and  
4 so they no longer have a dog in the fight.

5 JUSTICE GINSBURG: Yes, they do because if  
6 they are able to successfully knock out the judgment,  
7 then they are back to square one. Then they -- they  
8 lost on the merits, but that judgment would be wiped  
9 out.

10 MR. SWIFT: Well, perhaps under rule 19(b)  
11 the lower court may still rule that there is a -- a  
12 definitive judgment as to them against other creditors.  
13 And in fact that -- there has been --

14 JUSTICE GINSBURG: If there was no authority  
15 of the court to proceed, then the judgment is -- is as  
16 though it were never made.

17 MR. SWIFT: Well, that's perhaps one way of  
18 looking at it, Justice Ginsburg. I submit to you that  
19 the -- the decision I would respectfully request you to  
20 look at is Horizon Bank and Trust Company versus  
21 Massachusetts, where the same facts occurred. The First  
22 Circuit -- Massachusetts did the same thing the Republic  
23 of the Philippines did here. It did the two-step dance:  
24 We're sovereign, we're indispensable. It was denied by  
25 the lower court. The lower court then, since the United

1 States was a party and the State didn't have immunity as  
2 to that, it went into the merits determination.  
3 Massachusetts appealed only appealed only the 19(b)  
4 decision. And the court of appeals held that because  
5 they had not appealed the merits decision, the same as  
6 here, therefore, there was no longer a live controversy,  
7 and live controversy is a requirement of standing in  
8 this Court, or power to appeal in this Court.

9           So, in addition, although there isn't a lot  
10 of case law in this Court on this particular point, I  
11 would refer you to the Ashcroft v. Mattis decision  
12 because the same principle was applied there where there  
13 was no appeal permitted to this Court. Finally, the  
14 one thing that I have not really addressed is Merrill  
15 Lynch's interest. The whole nature of "interpleader" is  
16 that the stakeholder should have an adequate remedy.  
17 Merrill Lynch has significant business interests, as do  
18 many banks, many insurance companies, in getting a  
19 resolution. This matter, in itself, has gone on for  
20 eight years. There have been over a dozen appeals in  
21 this particular piece of litigation.

22           Doesn't -- isn't there a significant  
23 business interest that has to be weighed in that  
24 equation so that Merrill Lynch -- only a stakeholder --  
25 will continue to have to defend, defend, defend,

1 interplead and so forth?

2 I submit to you that there is a policy  
3 judgment that has to be made by this Court as to the  
4 rules with regard to interpleader and in rem proceedings  
5 and whether this Court is prepared to surrender  
6 jurisdiction to foreign courts to make --

7 JUSTICE GINSBURG: If -- if the proceeding  
8 can't go forward because of sovereign immunity, that  
9 judgment would shield Merrill Lynch from any other  
10 claim. It could say to any other claimant: Sorry, a  
11 binding judgment has been issued saying this matter  
12 can't be settled without the Philippines being in it.  
13 So I don't really get your: Merrill Lynch is going to  
14 be subject to repeated proceedings. They will be armed  
15 with a judgment that says, suit can't go on without the  
16 Philippines being there.

17 MR. SWIFT: Well, let me -- let me take you  
18 on, on that point. We have one other remedy, and that  
19 is execution. Execution doesn't require joinder of all  
20 parties. It's a singular proceeding that people can  
21 join in, but we would have the right to execute, and you  
22 can bet that that is exactly what we will do.

23 So, to some extent, what is being argued  
24 here is somewhat beside the point because if that money  
25 goes back to Merrill Lynch, we can, and will, execute on

1 that.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
3 Mr. Rothfeld, you have three minutes remaining.

4 REBUTTAL ARGUMENT OF CHARLES A. ROTHFELD  
5 ON BEHALF OF THE PETITIONER

6 MR. ROTHFELD: Thank you, Your Honor.

7 A couple of points. First of all, there is  
8 no doubt that the Republic has a substantial interest in  
9 the assets that are at stake here. And, therefore, its  
10 sovereign immunity, at least in the context of this  
11 case, should be dispositive and should have led to  
12 dismissal under rule 19.

13 There -- this Court in the Provident case  
14 noted that there are certain compelling, substantive  
15 considerations that are dispositive under rule 19 that  
16 make it unnecessary to consider any other balancing  
17 consideration. Sovereign immunity is one such  
18 consideration. And because the Republic has immunity,  
19 has asserted immunity --

20 JUSTICE KENNEDY: Do you agree that the Ninth  
21 Circuit gave sovereign immunity great weight in the  
22 balancing?

23 MR. ROTHFELD: I think it gave it no weight  
24 at all. I think it said that, yes, in theory, sovereign  
25 immunity is entitled to weight. But in this case we are

1 going to ignore it completely because we believe that if  
2 the Republic appears in New York and asserts its  
3 interests, it will lose under statute-of-limitation  
4 grounds. That is a completely inappropriate way of  
5 treating it.

6           Once the sovereign immunity was asserted and  
7 there was a substantial interest in the asset here, as  
8 there undoubtedly was, that should have been the end of  
9 the matter.

10           The second point is there is no question  
11 that, ultimately, this is a dispute between the Marcos  
12 estate and the Republic. There is no question that the  
13 claims of the Respondents here are entirely derivative  
14 of the Marcos estate; and, therefore, that is something  
15 that has to be decided first: Whether this belongs to  
16 the estate, this property, or to the Republic. That  
17 is a determination that should be made in the courts of  
18 the Philippines.

19           It is not a question of surrendering the  
20 jurisdiction of U.S. courts. There is a general  
21 consensus that stolen assets, assets stolen by corrupt  
22 leaders, should be returned to the nation of origin, and  
23 determination as to ownership should be made by the  
24 courts of that nation. That's stated in the U.N.  
25 Convention on Corruption to which the U.S. and the

1 Philippines are party.

2 All of the nations that have an interest in  
3 the Arelma assets, not only the Republic but the  
4 United States and Switzerland, all agreed that it is  
5 appropriate for the Sandiganbayan to make that  
6 determination as between the Republic and the estate.

7 If it's ruled for the estate, the Respondent  
8 can attempt to collect as a judgment creditor. If it  
9 goes to the Republic, the Republic can assert its  
10 interest directly with Merrill Lynch as the owner of  
11 Arelma. If Merrill Lynch declines to pay, it can in a  
12 number of ways try to enforce its judgment, either with  
13 the assistance of the United States according to U.S.  
14 statute, in which case the Sandiganbayan's factual  
15 determinations would be dispositive, or it can bring an  
16 action in the -- under New York law. That is the only  
17 way in which there could be a single proceeding that  
18 resolves everybody's interests.

19 In this proceeding, as all agree, the  
20 Republic is free, for whatever it is actually worth, to  
21 sue Merrill Lynch. That is precisely what rule 19 is  
22 designed to avoid, duplicative litigation, the  
23 possibility of duplicative liability.

24 If the Sandiganbayan rules, the Republic  
25 comes here and initiates an action, everybody who has a

1 claim can be brought into that action. As Justice  
2 Ginsburg noted, there is no possibility that Merrill  
3 Lynch could be subjected to duplicative liability  
4 because this Court's judgment would determine that the  
5 Republic is an indispensable party.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 Mr. Rothfeld. The case is submitted.

8 [Whereupon, at 11:04 a.m., the case in the  
9 above-entitled matter was submitted.]

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