

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. vs. 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: Okay.

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 property.
11 Congress in fact had the European Convention in front of
12 it which said rights, interests and obligations in
13 property. Congress chose language from the European
14 Convention elsewhere but did not choose that language
15 here. Congress said only rights in property.

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

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

1 obligations from the European Convention, we are only
2 saying rights. And this Court --

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

7 MR. HOWLEY: Yes. Yes. The, the
8 counterclaim exception --

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

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

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

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

21 JUSTICE SCALIA: Good.

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

24 MR. HOWLEY: I don't think there is a
25 distinguished, a distinction between a mortgage and a

1 tax lien.

2 JUSTICE BREYER: Well, so think they can't
3 enforce mortgage under this? That is to say the bank
4 can't; it's not an interest of property in mortgage?

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

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

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

24 JUSTICE KENNEDY: Well, on that point in
25 some jurisdictions and perhaps you can tell me about New

1 York, I had thought and correct me if I'm wrong, that
2 tax liens have a superior status to other liens in that
3 they are an, an interest or an estate in the property as
4 opposed to an attachment.

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

9 MR. HOWLEY: Well, yes. It is superior to
10 other types of liens.

11 JUSTICE KENNEDY: Yes.

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

17 JUSTICE KENNEDY: Is there New York law to
18 that effect?

19 MR. HOWLEY: Yes, there is. And we have
20 cited it in our brief. The Respondent has attempted to
21 distinguish it, because a Court of Claims jurisdictional
22 act was passed that deemed a lien an interest in
23 property for purposes of jurisdiction in the New York
24 Court of Claims but the essential nature of a lien is
25 not, under New York law, a right in the estate.

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

7 MR. HOWLEY: There appears to be in
8 different jurisdictions, different treatments of liens.

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

12 MR. HOWLEY: This is a question of Federal
13 law. This Court has held --

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

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

24 And so when defining what a right in
25 immovable property in issue means, we have to give that

1 the meaning that the restrictive theory of sovereign
2 immunity required at the time in 1976. And in 1976, no
3 court here in the United States or anywhere in the world
4 had held that sovereign immunity was abrogated merely by
5 having a statutory lien on the property.

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

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

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

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

25 JUSTICE GINSBURG: But anyway, at a time

1 closer to the passage of the Act, the State Department
2 was taking the position that a lien was an interest in
3 land.

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

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

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

11 MR. HOWLEY: It's not beyond the realm of
12 the conceivable.

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

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

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

24 MR. HOWLEY: Yes.

25 JUSTICE BREYER: Okay. So why do people

1 lend money to build embassies?

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

8 JUSTICE BREYER: And how did it work before
9 1605 was passed, how did they used to build, in the 19th
10 century, embassies, if you know.

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

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

21 MR. HOWLEY: Well, this Court held in Saudi
22 Arabia against Nelson that it's not just engaged in,
23 related to commercial activity, but the cause of action,
24 the claim has to be based upon commercial activity.

25 JUSTICE SCALIA: So the Indian embassy could

1 own real estate throughout New York City, which it
2 wouldn't have to pay taxes on? Or if it didn't, nothing
3 could be done about it?

4 MR. HOWLEY: It depends on the use they put
5 that property to.

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

8 MR. HOWLEY: The mere ownership of the land
9 is not --

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

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

16 JUSTICE SCALIA: But the buying and
17 occupying of it is commercial activity.

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

23 JUSTICE KENNEDY: Why isn't it commercial
24 activity for New York to say, we provide garbage
25 services, electric services, et cetera.

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

11 JUSTICE KENNEDY: But they pay fees and New
12 York taxes. Suppose New York doesn't have fees.
13 Suppose they say, we'll just do this out of our property
14 tax.

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

21 JUSTICE GINSBURG: And in reality, you will
22 never get there, because the Vienna Convention deals
23 with the substantive liability -- you're talking about
24 jurisdiction. On your theory, you would never get to
25 the fee for picking up the garbage, because you wouldn't

1 have any jurisdiction.

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

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

14 MR. HOWLEY: Yes. There cannot be a suit
15 for taxes. There could be a suit for specific fees for
16 services rendered. But --

17 JUSTICE GINSBURG: Even -- even if this, the
18 building were only the mission and the representative,
19 the minister to the U.N., even then --

20 MR. HOWLEY: Yes.

21 JUSTICE GINSBURG: -- the water of a
22 municipal service, garbage collection, could be charged.

23 MR. BAKER: Yes, Justice Ginsburg, just as
24 if the Indian mission went out to a private water
25 company and said, please supply me with water, the

1 private water company could sue, based on commercial
2 activity, to collect for the water it had provided. It
3 doesn't matter if it's the city.

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

6 MR. HOWLEY: The nature of the activity
7 doesn't change just because it's the city providing the
8 water as opposed to a private entity providing the
9 water. We have to look at the nature of the activity.

10 JUSTICE SCALIA: Of course, this isn't a
11 suit for the taxes. I mean, we are not talking about a
12 suit for the taxes.

13 MR. HOWLEY: We are here --

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

16 MR. HOWLEY: No. No, Justice Scalia.
17 Absolutely not. Joint Appendix page 78 is the city's
18 amended complaint. And even in their foreclosure claim,
19 even in their foreclosure claim, what they ask is for a
20 judgment of foreclosure directing that the Defendant pay
21 the amount of taxes, interest and other charges due.
22 They are not asking for an interest in the property.

23 All this case is about is money. It's not
24 about rights in the property. And there is a very big
25 problem with allowing a claim for money to become a

1 right in property merely by having a local law passed
2 that converts the claim into a lien. The City of New
3 York tomorrow could pass a law that said, if you don't
4 pay your parking tickets, that is automatically
5 converted into a lien on the property. And then while
6 we can't sue you for the parking tickets, we have
7 created a right in your property.

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

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

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Howley.

23 Mr. Srinivasan.

24 ORAL ARGUMENT OF SRI SRINIVASAN

25 ON BEHALF OF THE UNITED STATES,

1 AS AMICUS CURIAE, SUPPORTING PETITIONERS

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

4 An action to determine whether property
5 taxes are owed is not a case in which rights of
6 immovable property are an issue, and it's not
7 transformed into such a case by attaching a lien, and
8 recharacterizing the case as one to determine the
9 validity of the lien.

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

18 So under Respondent's view, the fact that
19 this case involves a debt that arises out of property
20 taxes is largely beside the point. The load bearing
21 weight of that theory rests entirely on the supposed
22 effects of the lien on the property. And so for
23 example, you could have a case in which a commercial
24 activity is brought into play, where the plaintiff sues
25 a foreign sovereign for commercial activity that occurs

1 --

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

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

17 MR. SRINIVASAN: Well, the lien wouldn't
18 constitute a right in the property, and that's
19 consistent with what -- the way this Court has always
20 described liens. As we point out in pages 21 and 22 of
21 our brief, the Court has said --

22 JUSTICE SCALIA: Enforceable or not.

23 MR. SRINIVASAN: The lien would not be
24 enforceable against a foreign sovereign, because -- at
25 least with respect to the immovable property.

1 JUSTICE SCALIA: That seems very strange to
2 me.

3 MR. SRINIVASAN: We are only talking about
4 the immovable property exception. And with respect to
5 that exception, this Court has expounded that a lien on
6 land constitutes no property or right in the land
7 itself. And it said that on more than one occasion.

8 CHIEF JUSTICE ROBERTS: I thought that the
9 Department submitted a good brief on this issue, but in
10 1985. What do you do with all the arguments -- I'm
11 looking at page 12 of your brief in the Englewood case,
12 which you argued that these liens were interests in
13 property. Are those arguments no longer valid?

14 MR. SRINIVASAN: Well, we, of course,
15 reviewed our position in that case, and we have come to
16 the conclusion that it was incorrect. And in the
17 Englewood case, that argument was the third argument in
18 the brief. The first two arguments in the brief were
19 more along the lines of the Court of Appeals decision.

20 JUSTICE KENNEDY: Well, what about the
21 argument that it was an interest in property. The brief
22 was very clear that it is an interest in property, and
23 that a tax lien is almost sui generis, in that it is an
24 estate in the property.

25 MR. SRINIVASAN: I don't --

1 JUSTICE KENNEDY: It survives bona fide --
2 it survives bona fide purchaser without notice?

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

8 MR. SRINIVASAN: Well, let me try to take up
9 some of those in order. First with respect to the
10 question of whether holders of a lien are entitled to
11 compensation in eminent domain, we don't take issue with
12 the proposition that a lien is property. A lien is
13 property, but the question under the statute is whether
14 a lien confers a right in the underlying immovable
15 property. And so in an eminent domain proceeding it may
16 just be that just compensation is owed to a lien holder
17 because to the extent that the eminent domain proceeding
18 takes that lien there's compensation owed for that
19 property. But that doesn't --

20 JUSTICE SCALIA: What property is it a right
21 in if not the immovable property?

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

23 JUSTICE SCALIA: And it follows that
24 immovable property and when the immovable property
25 disappears the lien disappears. You know, if it's blown

1 away or flooded, it's now in the Atlantic; the lien is
2 gone.

3 MR. SRINIVASAN: Well, I think --

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

7 MR. SRINIVASAN: Well, I don't think it's a
8 right in property, Justice Scalia. The lien is a
9 species of property, of intangible personal property, in
10 the same sense that a cause of action would be, because
11 after all what a lien is is essentially at bottom a
12 claim.

13 CHIEF JUSTICE ROBERTS: Well, how can the,
14 how can the lien holder then bring an action to enjoin
15 waste of the immovable property?

16 MR. SRINIVASAN: Well, a lien holder can
17 bring an action to enjoin waste, but it's important to
18 understand what interest the lien holder is protecting
19 in that situation. An action for waste by a lien holder
20 is to protect the security interest. It's different
21 from an action for waste by someone who holds a right in
22 the property. And New York law appears to recognize
23 this because New York I think has two species of waste
24 actions, one brought by a security interest holder and
25 one brought by the holder of property rights. There's a

1 case, Travelers Insurance, in which the Second Circuit
2 reviewed New York law in this matter -- it's at 14 F.3d
3 114 -- and describes how there's two species of waste
4 actions depending on which sort of plaintiff you have in
5 issue. And that recognizes that the interest, if you
6 will, that a lien holder has in the property, is
7 different from a right in the property.

8 JUSTICE BREYER: What about paragraph 3 just
9 after paragraph 2 in the complaint? Paragraph 3 asks
10 the court to bar and forever foreclose the defendants
11 from all right, interest, claim, etcetera in the parcel.
12 Well, what about that? What they're asking, I just
13 heard it. So what's the answer to that? They seem to
14 be saying, we have the right to the parcel, you the
15 defendant have no right to the parcel.

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

19 JUSTICE BREYER: Well, I did in part, so he
20 can answer.

21 MR. SRINIVASAN: Because Respondents have
22 repeatedly indicated in this case and in the court of
23 appeals and in this Court that they can't foreclose on
24 the property and so they've abandoned any claim for
25 foreclosure. And a foreclosure action wouldn't result

1 in the property being deeded to Respondent. It would be
2 put up for sale and a third party would purchase it. So
3 I'm not -- I can't tell you exactly what that paragraph
4 means.

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

10 MR. SRINIVASAN: Well --

11 JUSTICE GINSBURG: So the title is certainly
12 clouded by this lien.

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

17 JUSTICE SCALIA: It doesn't have to be a
18 right in the property. If you look at it from the
19 owner's point of view, it is a cloud on the owner's
20 title in the property. It affects the owner's title.
21 Even if you assert that it doesn't give any title to the
22 lien holder, it impairs the title of the property owner.
23 And that's all that's required, as I read the title, in
24 which rights in immovable property are an issue, and
25 here the question is whether the, the mission's right to

1 the property is, is impaired by this lien.

2 MR. SRINIVASAN: I think our arguments apply
3 equally both to the lien holder and to the property
4 owner, Justice Scalia, in the following sense, that with
5 respect to both of them a lien -- the lien doesn't
6 affect rights of possession, it doesn't affect the right
7 to exclude others, which this Court has characterized as
8 the most fundamental of property rights. It doesn't
9 affect the right to receive income from the property.

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

13 MR. SRINIVASAN: Well, it has a practical
14 consequence on conveyance because it, as Justice
15 Ginsburg said, amounts to a cloud on title. But there
16 are other instruments that result in a cloud on title
17 but that wouldn't be considered rights in property. One
18 example would be a contract, a purchase option contract
19 to purchase property. The holder of a purchase option
20 wouldn't be considered to have a right in the property
21 unless and until the option was exercised. At least
22 that's the general rule, even though the purchase
23 contract in a sense constitutes a cloud on the title in
24 the same way that a lien might constitute a lien on the
25 title.

1 JUSTICE GINSBURG: How long did the United
2 States take the opposite position and when did it
3 change?

4 MR. SRINIVASAN: I'm sorry?

5 JUSTICE GINSBURG: How long did the United
6 States adhere to the position that's reflect in the
7 Englewood brief and when did it change?

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

12 And let me point out with respect to the
13 Englewood brief, the first two points made in that brief
14 were along the lines of the court of appeals reasoning
15 in this case, which was to the effect that a statute
16 that refers to a right in immovable property encompasses
17 obligations arising out of immovable property. And
18 Respondent doesn't attempt to defend that position, but
19 that's the predicate on which our Englewood brief
20 rested. And so we think there's good cause for us to
21 revisit our position from that case.

22 Now, with respect to the question of whether
23 a lien establishes rights in property, which is now the
24 focus of Respondent's argument, I would point out that
25 in other areas of the law the Court has looked to

1 questions concerning whether there is a right to exclude
2 others, whether there is a right to obtain income from
3 the property, whether there is a right to assert
4 possession of the property. That's, for example, the
5 types of considerations this Court takes into account in
6 the tax area in assessing whether a Federal tax lien can
7 attach to a property by virtue of the fact that there is
8 a right to property at stake. And we think the same
9 sorts of consideration should inform the Court's
10 assessment of the immovable property exception in this
11 case.

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

15 MR. SRINIVASAN: Well, an easement I think
16 would qualify as a right in property because at least
17 your standard easement would provide a right of access
18 to the property by a thoroughfare. And so both sides
19 would be affected in their use of the property in that
20 sense.

21 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
22 Mr. Cardozo.

23 ORAL ARGUMENT OF MICHAEL A. CARDOZO

24 ON BEHALF OF THE RESPONDENT

25 MR. CARDOZO: Mr. Chief Justice and may it

1 please the Court:

2 There are three reasons this case puts in
3 issue rights in immovable property: First, the plain
4 language of the statute; second, the statute's purpose
5 and legislative history; and third, international
6 practice as it existed in 1976.

7 JUSTICE SCALIA: Mr. Cardozo, before you go
8 any further, I had been under the impression from your
9 brief that you're not trying to enforce anything
10 against, against India or against the mission. You just
11 said you wanted a declaratory judgment that the lien is
12 a valid lien. But, but here it is in your complaint
13 you're asking for foreclosure. Which, which is it?

14 MR. CARDOZO: Justice Scalia, we know that
15 Section 1610 would preclude us from actually
16 foreclosing. We're not allowed to do that. There's no
17 question about that.

18 JUSTICE SCALIA: You just asked for it to
19 scare them? Was that it?

20 MR. CARDOZO: No. We do want, as the
21 discussion preceding me highlighted, we do want to get
22 in and take what we think is, as a practical matter, is
23 our property. But we can't. We understand that. So
24 what we're, what we're saying in our complaint in
25 paragraph 3, as Justice Breyer pointed out, is we would

1 like to bar them from holding title. But as we quickly
2 conceded as soon as we filed the action, we can't
3 foreclose because of the provisions of Section 1610.
4 But it doesn't mean that the fact that we can't
5 foreclose doesn't mean that we don't have a right in
6 property. Let me give you a very good illustration. If
7 there is a possessory dispute, someone, an embassy,
8 rented premises and agreed that if they didn't pay the
9 rent they would lose their ability to continue to occupy
10 the premises and they failed to pay rent, that's a title
11 dispute. The person who rented the property would bring
12 a suit saying: I have a right to get back into my
13 property and there is clearly a right in property in
14 Section 1605. I can't believe that Congress said, that
15 Congress intended to say, well, you can bring an action
16 for nonpayment of rent and seek possession except for
17 1610, that's okay. There's jurisdiction in an action
18 for rent, but if you want possession of property because
19 you haven't paid your taxes, and of course you still
20 can't foreclose, there's no jurisdiction. That doesn't
21 make any sense.

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

25 MR. CARDOZO: Your Honor, it may or may not

1 cover the commercial act exception. And going back to a
2 question that Justice Breyer asked, there are, there are
3 cases, not in the United States, but -- and we're citing
4 some of them in footnote 24 in the red brief -- that
5 when someone, not the commercial property exception,
6 someone lent money to, to build an embassy and they
7 defaulted on the mortgage, the German court said
8 jurisdiction. It's not a question of enforcement, but
9 jurisdiction.

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

14 We believe that we have a right in the
15 Indian and Mongolia premises. We --

16 JUSTICE BREYER: The problem that actually
17 is bothering me with your side of the case which I find
18 difficult is, suppose I accept this principle that you
19 have. All right, it seems to me anything at all can be
20 reduced to a lien, any judgment, at least certainly slip
21 and fall cases and you didn't keep the ice up in front
22 and I want \$4 million damages plus 300 million in
23 punitives and where it is I have a lien against the
24 embassy here. And I can't think of a distinction once I
25 go down your road. I mean, he at least has an absolute

1 distinction which I can see, but once I go down your
2 road where is the stopping place? What's the principle?

3 MR. ROBERTS: Let me try, Justice Breyer.
4 First of all, if there was a judgment on that
5 hypothetical tort action that you just mentioned, if
6 there were a judgment you wouldn't have gotten the
7 judgment in the first place unless you had originally
8 come within --

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

14 MR. ROBERTS: Yes.

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

18 MR. ROBERTS: And the stopping place I think
19 is a Federalism concept and a due process concept,
20 because as this Court has held in a number of cases,
21 there's a real due process question if liens are created
22 with no concern about the effect on the defendant. You
23 have to take a look at the interest of the so-called
24 plaintiff and you have to find whether there is a
25 relationship between the lien and the underlying claim.

1 Now --

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

12 MR. CARDOZO: Justice Scalia, they did say
13 that and certainly if an easement is a right in
14 property, either because of the hypothetical you just
15 gave or a traditional easement, there is nothing
16 different with a tax lien. In fact, a tax lien is a
17 much greater interest.

18 JUSTICE BREYER: I still have my question
19 because I'm not worried about malevolence, is that I don't
20 carry around in my head all of the possible things that
21 might be liens against property. And so maybe my
22 imagination is wrong, but I want to know are you are
23 arguing that every lien against the property is in fact
24 a right in property which allows a lawsuit, or are you
25 arguing that there is some distinction between some and

1 the other. And I noticed that the Restatements and
2 others are trying to distinguish between whether the
3 lien in question grows out of the property or it doesn't
4 grow out of the property, which I find possibly hard to
5 work with and so I want to know how you see it.

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

14 JUSTICE GINSBURG: Well, let's take the
15 parking ticket that your colleague raised, that New York
16 would make a parking ticket a lien, unpaid parking
17 ticket a lien on all, all property.

18 MR. CARDOZO: Justice Ginsburg, I think that
19 would be a hard question, but if it does not run afoul
20 of the constitutional concerns that I just articulated
21 and it was a lien applicable not just of course to
22 foreign sovereigns, but to any unpaid parking ticket --

23 JUSTICE GINSBURG: Yes, yes.

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

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

5 MR. CARDOZO: I think, I think it certainly
6 would, Justice Souter, if in fact there was a hearing.

7 JUSTICE SOUTER: Well, provided that,
8 provided notice of hearing was offered, the parking
9 ticket lien would be in the same position as this lien,
10 right -- the hearing.

11 MR. CARDOZO: I think that's right. I think
12 that's right. And so --

13 JUSTICE KENNEDY: And under New York law
14 does property, do property tax liens have some superior
15 status? Are they distinct under New York law from other
16 liens?

17 MR. CARDOZO: Well, they're -- as tax liens
18 you may get into a priority fight in a bankruptcy
19 context.

20 JUSTICE KENNEDY: Without reference to
21 priority.

22 MR. CARDOZO: I don't believe that they
23 would have any different lien, any different status,
24 although my colleague corrects me and says that yes, tax
25 liens -- tax liens do have in certain circumstances a

1 greater priority. It's hard to think through exactly
2 where that issue would be.

3 JUSTICE KENNEDY: I -- I had thought they
4 had a greater priority and that they even survived
5 purchase from bona fide sellers.

6 MR. CARDOZO: That certainly, that is
7 certainly true and a property -- excuse me for
8 interrupting -- a tax lien would run forever with no
9 time limit, for example, whereas a mechanics lien has a
10 statutory time on it. If you got into a dispute about
11 those two liens obviously the tax lien would have --
12 would have priority.

13 JUSTICE STEVENS: May I ask -- may I ask
14 this question? Suppose another jurisdiction had a tax
15 system which was just a little different from New York's
16 and didn't provide for a lien until after a suit had
17 been brought and there had been a failure to pay or had
18 to get a judgment first. On that case, that
19 jurisdiction could not enforce this tax law?

20 MR. CARDOZO: That is correct, Justice
21 Stevens.

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

1 MR. CARDOZO: Well, we start off with the
2 statutory language and the statutory language says right
3 in property. We are not talking about the abstract
4 right to tax.

5 JUSTICE STEVENS: But, but the basic issue
6 in final analysis is whether they have to pay their
7 taxes, isn't it?

8 MR. CARDOZO: I'm sorry.

9 JUSTICE STEVENS: The ultimate issue is
10 whether they have to pay their taxes.

11 MR. CARDOZO: The ultimate substance --
12 underlying substantive issue is that but -- and of
13 course, the State Department even today says these taxes
14 should be paid. But the jurisdictional issue is whether
15 there is a right in property. And so if you just -- if
16 you don't create a lien, if a particular State did not
17 create a lien, that would not give you the right, which
18 is what the statute, statutory language says.

19 JUSTICE SCALIA: Do you know any States that
20 don't? Isn't it fairly standard? For --

21 MR. CARDOZO: I believe -- I believe it is
22 fairly standard, Justice Scalia.

23 JUSTICE SCALIA: Yeah.

24 MR. CARDOZO: I -- there may be one out of
25 50 States that, that don't say this. I think --

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

15 MR. CARDOZO: I, I agree with that. And
16 here today the right that India and Mongolia claim in
17 their property is in issue, because we say you do not
18 have the full right to your property and if this lien
19 runs long enough, it's going to wipe out the value of
20 their property completely. And all the statute, the
21 statute doesn't say as the European Convention says the
22 foreign sovereign's right in property. The statute says
23 either -- in effect, either side's right in property.

24 JUSTICE SOUTER: Yeah.

25 MR. CARDOZO: And I think we can also get a

1 great deal of help by looking --

2 JUSTICE SCALIA: The -- the -- the European,
3 the European treaty looks at it from the other side,
4 you're saying. It looks at it from the foreign
5 sovereign side.

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

17 JUSTICE SCALIA: Would the obligations
18 arising out of the property in the European Convention
19 include the obligation to pay taxes, property taxes?

20 MR. CARDOZO: It would include a controversy
21 over that absolutely. And let, let me talk about the
22 international practice because we should take a look at
23 international practice to -- to guide us.

24 What was the practice in 1976? Well, first
25 of all we know that the restatement second and comment

1 in paragraph 68 says disputes over rights or interest in
2 property. And the restatement third, which was
3 concededly a few years after the 1976 adoption of the
4 statute, makes it perfectly clear. It says it
5 explicitly. But where did the restatement --

6 JUSTICE SCALIA: This says what explicitly?

7 MR. CARDOZO: Says that there is
8 jurisdiction over tax claim. Section 455 of -- of
9 restatement third.

10 CHIEF JUSTICE ROBERTS: Over tax liens or
11 claims?

12 MR. CARDOZO: Over tax claims. Excuse me,
13 Chief -- Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: And you don't go
15 that far.

16 MR. CARDOZO: That -- we don't have to go
17 that far because we believe we, as a -- we have a right
18 in property arising from the lien. Now let's look at
19 the foreign cases before we get to the European
20 Convention and we cite a number of them in footnote 24.
21 There is for example the case I referred to in response
22 to Justice Breyer, a suit over a mortgage. A suit over
23 a mortgage. It's not the commercial exception; a suit
24 over a mortgage.

25 There is a case in England in 1975 which

1 analyzes broadly what's the meaning of this real
2 property exception. And that case in England which we
3 cite says a security interest, a suit over security
4 interest for a mortgage, there is jurisdiction within
5 the immovable property exception.

6 There is a large number of cases. You look
7 at the Harvard Review of 1932, the status of the law at
8 that time, extensive review of all the relevant cases,
9 says the same thing. Then that brings us to the
10 European Convention which was adopted shortly before the
11 FSIA and which the State Department told Congress was
12 consistent with the FSIA.

13 JUSTICE KENNEDY: Is this the Vienna
14 Convention?

15 MR. CARDOZO: Pardon me? No, the European
16 Convention.

17 JUSTICE KENNEDY: European Convention.

18 MR. CARDOZO: Right. And the European
19 Convention in Article 9 as I say has a very broad
20 immovable property exception. I'm not looking just at
21 the language. I'm looking at what does this convention
22 reflect as far as international practice was at the
23 time? And that practice at the time as reflected by the
24 convention, as reflected by these cases, all say that
25 there is a very broad immovable property exception that

1 should cover this kind of dispute.

2 Now let me make one, one or two final
3 points. If this --

4 CHIEF JUSTICE ROBERTS: Well, the -- the
5 convention used language quite different than that was
6 used by Congress. So I'm not quite sure how that
7 international practice reflected in or arising out of
8 the convention is terribly pertinent.

9 MR. CARDOZO: I'm not, Mr. Chief Justice,
10 I'm not talking just about the language. I'm talking
11 about the European, the international practice as
12 reflected by that convention because the 1976
13 legislative history of the FSIA says we are trying to
14 conform United States practice into the, the practice
15 that is followed internationally. And I --

16 CHIEF JUSTICE ROBERTS: And in some cases
17 they used language directly from the convention and in
18 this case they didn't so it seems to me a particularly
19 ill-advised source for looking for what they were trying
20 to do.

21 MR. CARDOZO: Then I would say where did
22 they get that source from? And that's where I cite the,
23 first the international cases themselves which reflect
24 as of 1976 the same philosophy reflected by the European
25 Convention. There is no question that the wording is

1 different. I'm not, I'm not disputing that. What I'm
2 saying is that wording conveys an intent from the
3 international point of view to have the broad parameters
4 of an international, of an immovable property exception
5 and that was consistent with the international cases
6 that have been decided at that time.

7 JUSTICE STEVENS: Did their practice draw a
8 distinction between occupied by the ambassador himself
9 and property occupied by employees of the embassy?

10 MR. CARDOZO: As a substantive matter,
11 Justice Stevens, the answer to that question is of
12 course yes. Because the Vienna convention in Article 20
13 -- 23 says that the premises of -- of the mission may
14 not be, may not be taxed. And then you look at Article
15 1 to look at what is the meaning of premises of the
16 mission and they talk about where the business of the
17 mission is conducted, or where the ambassador resides.
18 It doesn't talk about the rest of the employees. And
19 since 1952, the State Department even before the Vienna
20 convention and subsequent has been advising missions in
21 New York, it's on their web site today that they must
22 pay taxes on staff housing.

23 JUSTICE SCALIA: Can I ask you what, what do
24 you get out of this case? You've withdrawn your claim
25 for judgment of foreclosure. What are you going to get

1 out of it? Declaratory judgment that they owe the
2 taxes? I'm not sure they have ever contested that they
3 don't owe taxes.

4 MR. CARDOZO: Oh yes I think if you look, if
5 you look at the Petitioners' brief I think they do
6 contest that they, that they have to pay the tax. But
7 what we'll get out of this is the following.

8 First of all, start with the fact that the
9 statute says you can bring an action in this
10 jurisdiction even if you can't execute. We have the
11 State Department telling us, the Solicitor General
12 telling us in their briefs, footnote 17, that countries
13 pay lawful taxes. So if we can get, if we can proceed
14 to judgment and get that, and get that declaration, we
15 believe based upon what the Solicitor General has said
16 they will pay their taxes.

17 JUSTICE SCALIA: Yeah, but --

18 MR. CARDOZO: In addition --

19 JUSTICE SCALIA: You say he is wrong about a
20 lot of other stuff.

21 (Laughter.)

22 JUSTICE SCALIA: Why do you believe him
23 about that?

24 MR. CARDOZO: And the -- the reason I
25 believe him about that is that Congress has passed a law

1 that says if you don't pay your taxes reflected by a
2 judgment, whatever the amount of that tax is, you're
3 going to lose 1110 percent of your foreign aid. And so
4 I believe we are going to get a lot out of that.

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

8 I'm still now being very, very literal. I
9 think you're very literal and you say it says, a case in
10 which is involved rights to property. And you say, but
11 this is a right to property in this case; if I win this
12 case then I have a right to sell that house. Therefore,
13 I have a right in property.

14 Now, if that's the reasoning why doesn't
15 that apply to every case where a State might say if you
16 win this case you can sell his house? I mean, I can
17 easily imagine a tort case, a contract case where a
18 State would say, you win, you can sell their house to
19 collect the judgment.

20 MR. CARDOZO: And --

21 JUSTICE BREYER: So I'm still back in a
22 different route at where I'm having the problem, which
23 is a problem of distinguishing in principle between
24 either your absolute principle, "do it," his absolute
25 principle, "don't do it," or something in the middle.

1 MR. CARDOZO: And I think the something in
2 the middle, Justice Breyer, is if you're talking about a
3 prejudgment lien which I think is your hypothetical.

4 It's --

5 JUSTICE BREYER: The hypothetical was doing
6 away with the prejudgment lien. I would say the exact
7 same words apply with just as much force if there is no
8 prejudgment lien because a suit without a lien the State
9 were to say, you win this tort claim, you can go sell
10 this property to collect the judgment, is a suit in
11 which there is at issue your right to sell his property,
12 just as there is here.

13 MR. CARDOZO: But Justice, Justice Breyer,
14 in that hypothetical, you don't have a right in property
15 until you win the case.

16 JUSTICE BREYER: Do you?

17 MR. CARDOZO: We have, we have a, there is
18 an in issue today our right to property and I believe
19 that that is a distinction and I believe also -- and of
20 critical importance.

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

1 MR. CARDOZO: And if --

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

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

10 JUSTICE SCALIA: Well, that's your big
11 defense. To do that they would have to do it for
12 everybody' they would have to do it for Joe Sixpack as
13 well as for the embassy, right?

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

15 JUSTICE SOUTER: Is it only the case that
16 the, that the only instances in which, consistent with
17 the Foreign Sovereign Immunities Act the State could say
18 you get the house, would be instances of litigation
19 arising out of commercial activity?

20 MR. CARDOZO: Yes. That is -- that is --
21 that is correct. Because it's only in the commercial
22 activities exception can you execute and then only in
23 certain limited circumstances --

24 JUSTICE SOUTER: Yeah.

25 MR. CARDOZO: And you can execute unless the

1 premises are not being used for the purposes of the
2 mission.

3 JUSTICE KENNEDY: Now -- now I take it you
4 under New York law and the law of most jurisdictions,
5 the tax lien becomes a lien against the property before
6 any judicial proceedings.

7 MR. CARDOZO: That is correct.

8 JUSTICE KENNEDY: Just because they are
9 unpaid. And this is probably a question more for them
10 than for you, but as you understand their position, if
11 you put a lien on the property for unpaid taxes, are
12 they entitled to demand its removal?

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

15 JUSTICE KENNEDY: You mean of course they
16 can under their view?

17 MR. CARDOZO: No. They can bring an action
18 to quiet title. They can bring an action --

19 JUSTICE KENNEDY: No. No. No.

20 MR. CARDOZO: I'm sorry.

21 JUSTICE KENNEY: Excuse me.

22 JUSTICE KENNEDY: Can they demand that that
23 lien be released --

24 MR. CARDOZO: They can demand it.

25 JUSTICE KENNEDY: No, no.

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

4 MR. CARDOZO: Well, I haven't heard their
5 articulation of that position, but they certainly could
6 write --

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

9 MR. CARDOZO: I think it may. I think they
10 certainly have a right to ask us to reconsider and make
11 the various arguments on the merits to us. There are
12 cases preceding the Foreign Sovereign Immunities Act
13 where a country felt the lien was invalid and brought a
14 lawsuit.

15 JUSTICE KENNEDY: My hypothetical is can
16 they demand that the lien be removed solely because of
17 the Foreign Sovereign Immunities Act.

18 MR. CARDOZO: They could demand that, but I
19 don't think that the Foreign Sovereign Immunities Act answers
20 the underlying substantive question. You'd have to look
21 at the Vienna Convention as well as New York law to
22 answer that question, because all the Foreign Sovereign
23 Immunities Act is talking about is the jurisdictional
24 issue, not the substantive issue.

25 And let me just point out that if we, if we

1 can't bring this lawsuit to have, to try to foreclose or
2 at least to have a declaration of our rights, this
3 lawsuit can't be brought anywhere. No place in the
4 world can New York City have a conclusion as to who owns
5 this property. That is absolutely inconsistent with the
6 underlying immovable property exception and the local
7 action rule, which says that land -- that a sovereign
8 has a prim evil interest in its land, it has the right
9 to adjudicate its property.

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

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

16 So finally, even though we cannot execute on
17 our property -- on the judgment, it has a major impact,
18 this case has a major impact on what we can do. If we
19 can't do it there's no other place for our problems to
20 be resolved. I urge that the decision below be
21 affirmed. Thank you.

22 JUSTICE SOUTER: May I ask you a question in
23 your remaining time. With respect to the statute that
24 authorizes the, the charge against foreign aid, would
25 that statute have any application except either in a

1 commercial case or a case like yours?

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

4 JUSTICE SOUTER: Okay.

5 MR. CARDOZO: -- Justice Souter. I think
6 those are the three things. Of course, you don't need
7 that statute for the commercial exception because you
8 can execute.

9 JUSTICE SOUTER: That's right. You can go
10 directly.

11 MR. CARDOZO: Right.

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

15 MR. CARDOZO: That's right. And Justice
16 Souter, while certainly the Congress that passed those
17 statutes was not the Congress that passed the FSIA,
18 there is, certainly should be an effort to harmonize
19 what the Congress has done.

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

22 MR. CARDOZO: That is obviously the way to
23 reconcile these statutes.

24 JUSTICE SCALIA: What do you do with traffic
25 tickets? They've built up. You know, there's \$100,000

1 owing in traffic tickets by some embassy. How do you
2 get a judgment that that is owing?

3 MR. CARDOZO: You can't get a judgment that
4 that is owing.

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

7 MR. CARDOZO: Not unless, unless the statute
8 is changed, Justice Scalia, which we have from time to
9 time tried to persuade Congress to do.

10 JUSTICE GINSBURG: Foreign aid --

11 CHIEF JUSTICE ROBERTS: Unless New York law
12 is changed and you pass something saying you get a lien
13 on property if you have delinquent property, parking
14 tickets.

15 MR. CARDOZO: That is right, and that would
16 get us right back into the --

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

19 MR. CARDOZO: Yes.

20 JUSTICE GINSBURG: Taxes, not for parking
21 tickets or anything else.

22 MR. CARDOZO: Yes, Justice Ginsburg, it
23 does. It relates to unpaid property, unpaid property
24 taxes. It doesn't apply to unpaid parking tickets.

25 Thank you very much.

1 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
2 Mr. Howley, you have two minutes remaining.

3 REBUTTAL ARGUMENT OF JOHN J.P. HOWLEY

4 ON BEHALF OF THE PETITIONERS

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

6 Article 29 of the European Convention
7 expressly excludes any intent to create an exception for
8 tax claims. That was the international practice at the
9 time. What we have here is a bootstrap and I refer to
10 the Court to its decision in Ministry of Defense of
11 Republic of Iran against Elahi, where this Court said
12 that when you have an action to impose a lien, it is
13 analyzed as an attachment under Section 1609-1610 of the
14 Foreign Sovereign Immunities Act. And what the Foreign
15 Sovereign Immunities Act says is you cannot use an
16 attachment to get jurisdiction where jurisdiction
17 otherwise does not exist.

18 JUSTICE KENNEDY: Do you take the position
19 that it's improper even to notice the property with the
20 lien?

21 MR. HOWLEY: Under New York law, yes, and we
22 have Chief Judge Fulbright for a unanimous --

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

25 MR. HOWLEY: Well, we say that there's no

1 right to impose the lien because the Vienna Convention
2 and New York law prohibit the taxation of the property
3 and you cannot impose the lien to collect something that
4 you're not entitled to. And this is a dispute that has
5 historically been resolved through diplomacy, not in the
6 courts, because the fact is whatever happens in this
7 case to India and Mongolia is likely to happen to the
8 United States around the world and that's a foreign
9 policy question for the State Department to decide.

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

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

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

15 MR. HOWLEY: I am afraid so.

16 Thank you very much.

17 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
18 The case is submitted.

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

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