

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3
4 AGUDAS CHASIDEI CHABAD OF
5 UNITED STATES,

6 Appellee/Appellant,

No. 07-7002, et. al.

7 v.

8 RUSSIAN FEDERATION, RUSSIAN
9 MINISTRY OF CULTURE AND MASS
10 COMMUNICATION, RUSSIAN STATE
LIBRARY, and RUSSIAN STATE
MILITARY ARCHIVE,

11 Appellants/Appellees.
12

13 Monday, March 17, 2008

14 Washington, D.C.

15 The above-entitled matter came on for oral
16 argument pursuant to notice.

17 BEFORE:

18 CIRCUIT JUDGE HENDERSON AND SENIOR CIRCUIT
19 JUDGES EDWARDS AND WILLIAMS

20 APPEARANCES:

21 ON BEHALF OF THE APPELLANTS:

22 JAMES H. BRODERICK, JR., ESQ.

23 ON BEHALF OF THE APPELLEE:

24 NATHAN LEWIN, ESQ.
25

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P R O C E E D I N G S

THE CLERK: Case number 07-7002 et. al., Agudas Chasidei Chabad of United States v. Russian Federation, et. al., Appellants; Does, 1-10. Mr. Broderick for the Appellants, Mr. Lewin for the Appellees.

JUDGE HENDERSON: Mr. Broderick. Before you begin, and Madam Clerk if you would hold the clock a minute, let me just make an announcement that I hope is not necessary to make, but in view of what happened here in court on Friday -- everyone has been told repeatedly not to use electronic equipment, not to check Blackberries, not to use cell phones, and so forth.

This is a long morning. We've got three big cases. If you absolutely feel that you have to use an electronic device, leave the courtroom because on Friday, somebody's use of an electronic device blew our speaker system, we had to take a recess, and it's very, very disruptive. So, not only will you be removed if you are using it, but we may not stop there, so with that warning, Mr. Broderick, go ahead.

ORAL ARGUMENT OF JAMES H. BRODERICK, JR., ESQ.

ON BEHALF OF THE APPELLANTS

MR. BRODERICK: I will adhere to the Court's admonishment. Good morning, Your Honor, and may it please the Court. I will be presenting the argument for the Russian Federation, the Russian Ministry of Culture and Mass

1 Communication, the Russian State Library, and the Russian
2 State Military Archives. They are appellants in the archive
3 appeal and appellees in the library appeal. I have reserved,
4 with the Court's permission, two minutes for rebuttal time if
5 the Court will accept that.

6 This case presents the issue of whether property that is
7 located in the territory of a foreign sovereign -- claims for
8 possession of that property are within the jurisdiction of the
9 United States District Court -- the United States courts.
10 This is property that has never been in the United States.

11 As this Court explained in Peterson, the expropriation
12 exception to the Foreign Sovereign Immunities Act turns on the
13 first question of whether or not rights in property that were
14 taken in violation of international law are at issue. The
15 Court's decision in Peterson, finding no such rights in the
16 case before it, turned not as Chabad would have it on the
17 intangible nature of the property in question, but we submit
18 on the contingent nature of the alleged rights in question,
19 and that seems to us the difference.

20 The district court got it right with respect to the
21 Library, that when the Library was taken in the 1920's, when
22 it was expropriated and nationalized by the communist
23 government of the then Soviet Union, it was the property of
24 the Fifth or the Sixth Rebbes, it was the personal property of
25 those Rebbes, and it --

1 JUDGE WILLIAMS: I don't really understand that
2 claim at all. You appear to rely heavily on the Gourary case.
3 I cannot see how the Gourary case could possibly have any
4 collateral estoppel effect here. Chabad won completely
5 against its adversaries there, and the question that you
6 raise, the difference between Rebbe's ownership and the -- or
7 the Chabad's ownership as trustee and the exact origins of its
8 title, were not a basis on which Chabad could have appealed or
9 cross-appealed.

10 MR. BRODERICK: It seems to me, Your Honor, that --

11 JUDGE WILLIAMS: That was a dispute, if it was a
12 dispute, between Chabad and the Rebbe's heirs.

13 MR. BRODERICK: Correct, Your Honor. As Judge
14 Posner said --

15 JUDGE WILLIAMS: I misstated that. The case was
16 between Chabad and the Rebbe's heirs. The dispute you're
17 talking about is a potential dispute, as far as I can make out
18 completely potential, between Chabad and the religious
19 community for which it is representative.

20 MR. BRODERICK: Well, it seems to me that the
21 proposition that Chabad could -- had rights since the -- since
22 forever in the Rebbe's personal books and property was
23 necessarily rejected by the Court in Gourary. That issue was
24 before the Court --

25 JUDGE WILLIAMS: The Court took a particular route

1 to its conclusion in favor of Chabad, right?

2 MR. BRODERICK: Correct.

3 JUDGE WILLIAMS: But it's Appellate Practice 101
4 that you can't appeal the route taken by a district court.

5 JUDGE EDWARDS: Why does it matter? I mean, isn't
6 your focus rights in property? You don't have to be on the
7 collateral estoppel stage to make the argument.

8 MR. BRODERICK: Well, Your Honor, in fact --

9 JUDGE EDWARDS: I mean, isn't that your answer to
10 Judge Williams? I mean, I thought you were presenting the
11 case -- I mean, you -- I understood you to be presenting a
12 case which says in effect we have that as well, but if the
13 Second Circuit never entered the fray, they still have no
14 satisfied the rights in property prong of the Foreign
15 Sovereign Immunity Act upon which they are attempted to appear
16 in court.

17 MR. BRODERICK: That is correct, Your Honor.

18 JUDGE WILLIAMS: And what is the basis then of that
19 argument?

20 MR. BRODERICK: The basis of that argument --

21 JUDGE WILLIAMS: Particularly in light of your
22 concession at the outset that it was not necessary for them to
23 prove ownership.

24 MR. BRODERICK: Well, Your Honor, it's not my
25 concession in the sense that it is an element of this Court's

1 subject matter jurisdiction, and --

2 JUDGE WILLIAMS: What is the it in that sentence?

3 MR. BRODERICK: The it is that rights in property
4 taken in -- the rights taken in violation of international law
5 being placed at issue by the claimant.

6 JUDGE WILLIAMS: Okay. There are two issues, I take
7 it, at least. One is are the interests rights in property,
8 right?

9 MR. BRODERICK: Correct.

10 JUDGE WILLIAMS: And the other issue is whose rights
11 are they? Now Peterson did not seem to speak to the second at
12 all, right?

13 MR. BRODERICK: Well, because it was foreclosed by
14 the first.

15 JUDGE WILLIAMS: You say it was foreclosed by the
16 first, but is there any indication in the opinion that the
17 Court was about to get to that?

18 MR. BRODERICK: The Court describes the fact that
19 there were concessions made at oral argument that the rights
20 that the plaintiff was claiming in the insurance fund were
21 rights that were subject to the will of the sovereign, that is
22 the Kingdom of Saudi Arabia, and could be taken away at any
23 time and were entirely contingent rights, and stressed that
24 those concessions undermined any claim of rights in property
25 of -- enforceable rights in property it would seem to me.

1 JUDGE WILLIAMS: Okay. I'm not sure how that
2 advances your case at all.

3 MR. BRODERICK: It advances our case here, Your
4 Honor, because we think that the law clearly stands for the
5 proposition that before --

6 JUDGE WILLIAMS: Well, now you're back to --

7 MR. BRODERICK: No --

8 JUDGE WILLIAMS: -- collateral estoppel, I take it.

9 MR. BRODERICK: Not just collateral estoppel. In
10 some sense, it seems to me, it's almost direct estoppel; that
11 is, estoppel of that pleading. In their complaint, they
12 allege that the rights that they have in the collection are
13 those rights that are described in the Gourary case, and those
14 rights that are described in the Gourary case are not the
15 rights that they are claiming before this Court because the
16 Gourary case does not hold that their rights are from time
17 immemorial, if you will, in the Rebbe's books and possessions,
18 and that, it seems to me, is why one needs to look, at least
19 to some degree, to the Gourary case to decide this question.
20 As Judge Edwards points out, they have the burden, it seems to
21 me, of establishing rights in property.

22 JUDGE EDWARDS: It's my understanding that the
23 principal battleground here is the district court's
24 determination as a matter of law that under the statute, the
25 expropriation exception does not require rights in property

1 actually belong to the plaintiff. Now at first, second and
2 third blush, that seemed extraordinary to me as a proposition
3 because it goes so far as to implicate notions of standing. I
4 don't know how you could read the statute that way.

5 Now you can elaborate. I'm going to ask the other side
6 as well. I don't know how you can come into court and say
7 under the statute, there are rights in property somewhere,
8 there is property and someone has rights in it, and we don't
9 have to show that we have the rights and we're in under the
10 statute. That's the way I read the district court as saying,
11 it doesn't require that they actually belong to the plaintiff,
12 which means if I had an interest, I could sue, too.

13 MR. BRODERICK: I agree, Your Honor, and that -- and
14 it seems to me that in a sense, again, given that the Foreign
15 Sovereign Immunities Act creates no substantive rights, that
16 this is in a way a statutory standing test that you must be
17 able to show rights in property that were taken in violation
18 of (indiscernible) --

19 JUDGE EDWARDS: Not just that there is property with
20 respect to which someone has rights.

21 MR. BRODERICK: Exactly.

22 JUDGE WILLIAMS: Just to go back, let's assume that
23 for purposes of showing the exception, the plaintiff must
24 establish rights in property, assume that as a matter of law.
25 Now so far as this appeal is concerned, it's very hard for me

1 to see how you could win on that proposition. You could get a
2 remand on that proposition, but I don't see how you could win
3 on it given your position in your motion to dismiss. You say
4 the district court is wrong here in saying the defendants
5 conceded for jurisdictional purposes only Chabad's claims of
6 right to the entire collection?

7 MR. BRODERICK: Your Honor, the issue of subject
8 matter jurisdiction, it seems to me, is open to challenge at
9 any point in litigation.

10 JUDGE WILLIAMS: Yes, but we can't assume facts in
11 your favor that you conceded at the district court.

12 MR. BRODERICK: It seems to me that's a procedural
13 question as to whether or not rights taken in violation of
14 international law had been properly placed at issue by the
15 claims in this case. As we said, the case as it was postured
16 in the Central District of California did not have the benefit
17 of this Court's explanation of the hierarchy, if you will, of
18 the expropriation exception through the Foreign Sovereign
19 Immunities Act.

20 JUDGE WILLIAMS: Well, okay. So it would seem to me
21 then --

22 MR. BRODERICK: And -- I'm sorry.

23 JUDGE WILLIAMS: -- if there's a problem, the remedy
24 would be to remand for the district court to address the issue
25 of Chabad's property interest.

1 MR. BRODERICK: Your Honor, this is a question of
2 sovereign immunity and subject matter jurisdiction, and where
3 it seems to me that as the district Court in Gourary said,
4 that the claim that Chabad had rights in the property before
5 it was delivered in trust to New York was based upon -- and I
6 believe the words were implausible arguments, and where it was
7 soundly rejected.

8 I understand the Court does not like me going back to
9 Gourary --

10 JUDGE WILLIAMS: It sounds like an effort to try
11 collateral estoppel again, which you've lost me on.

12 MR. BRODERICK: If I may go back to that issue, Your
13 Honor. As Judge Posner said in the Warner Electric case, one
14 may appeal if one has something to gain. In this case --

15 JUDGE WILLIAMS: Something to gain from the
16 litigation.

17 MR. BRODERICK: From the litigation. Exactly.
18 And --

19 JUDGE WILLIAMS: What did Chabad have more to gain
20 from the litigation than what it gained?

21 MR. BRODERICK: A finding that it had always owned
22 the property, not that --

23 JUDGE WILLIAMS: Finding. You talk as if the
24 Southern District of New York was sort of an Olympian
25 determinator of rights in the world, and the Southern District

1 of New York's involved in litigation -- was handling
2 litigation between two parties --

3 MR. BRODERICK: Agreed, Your Honor, but the --

4 JUDGE WILLIAMS: -- and Chabad won.

5 MR. BRODERICK: -- but Chabad brought before the
6 court in that case the proposition that it had always owned
7 the property. It also put before --

8 JUDGE WILLIAMS: That was the route that the court
9 took, but it gave Chabad victory.

10 MR. BRODERICK: It did, Your Honor, but it gave
11 Chabad a victory that was less than what it wanted, and that
12 was because --

13 JUDGE WILLIAMS: Only vis-a-vis people who were not
14 before the court.

15 MR. BRODERICK: Well, they were in the sense --

16 JUDGE WILLIAMS: Vis-a-vis the parties it was
17 litigating with, it was a complete victory.

18 MR. BRODERICK: They were before the court, Your
19 Honor, it seems to me, in the sense that Chabad was declared
20 to be the trustee for the entire Chabad community. That
21 included the litigants, the Gourarys in that case. And
22 Chabad, by virtue of that case, was put in a legal position
23 where it had the duties of a trustee in a charitable trust and
24 owed duties that were enforceable by third parties as a matter
25 of law by virtue of the court's findings.

1 JUDGE WILLIAMS: What brought those duties into play
2 in that case? I mean, the Rabbis (indiscernible) were
3 claiming complete ownership, right?

4 MR. BRODERICK: Correct. And the Rabbis --

5 JUDGE WILLIAMS: And they lost completely.

6 MR. BRODERICK: Yes. And they are now -- they have
7 the status by virtue of that case as beneficiaries of a
8 charitable trust, and it seems to me that is not what Chabad
9 wished to have, and it seems to me it is also something that
10 could have been cross-appealed. Chabad was unmistakably
11 putting forth the position that it was the owner outright of
12 those, and it did not win that proposition.

13 I see that my time (indiscernible) --

14 JUDGE EDWARDS: You do read what you wrote the same
15 way that Judge Williams reads it? That is, a concession on
16 the rights of properties -- in the motion to dismiss you said:

17 Here, for purposes of this motion only, the first prong,
18 rights in property at issue, is not disputed inasmuch as
19 plaintiff's claims of right to the library and the archive are
20 placed in issue by the plaintiff's complaint.

21 I don't even know what that means, but what is it you
22 think you've argued with respect to that point?

23 MR. BRODERICK: There is a footnote --

24 JUDGE EDWARDS: I'm looking at the footnote.

25 MR. BRODERICK: -- that says that we are contesting

1 the rights in property and maintaining that that is an element
2 that they have to show, and we made that plain when the case
3 came to the District of Columbia, that that is what we were
4 contending. We brief it in the court below, it was fully
5 argued in the court below, and Judge Lambert (phonetic sp.)
6 reached that issue, but we think that -- and he reached it --
7 he implicitly reached it with respect to the library and we
8 think he should have reached it with respect to the archive,
9 and come to the same conclusion.

10 I see that my time is going down and I want to make a
11 brief point on the acts of state doctrine, and that is that
12 the reach of the acts of state that Chabad was challenging,
13 the actions of the Bolshevik government, the actions of the
14 USSR, and the actions of the Russian Federation, are
15 quintessential acts of state. Expropriation of property, the
16 acts of a judicial body, the acts of a legislature, they are
17 acts taken within the territory of the Russian Federation and
18 as such --

19 JUDGE WILLIAMS: True for the library, not for the
20 archives. I mean, you make a strong opening in the blue brief
21 on the location of the archives when taken, but then by the
22 time we get to the yellow brief, you seem to say, well, there
23 are a lot of issues here.

24 MR. BRODERICK: I agree, Your Honor. Our position
25 on the archive is with the exhaustion of remedies doctrine,

1 which we believe is imported into the --

2 JUDGE WILLIAMS: I understand.

3 JUDGE HENDERSON: All right. We'll give you some
4 time in reply.

5 MR. BRODERICK: Thank you, Your Honor.

6 JUDGE HENDERSON: Mr. Lewin, good morning.

7 ORAL ARGUMENT OF NATHAN LEWIN, ESQ.

8 ON BEHALF OF THE APPELLEES

9 MR. LEWIN: May it please the Court. Maybe it would
10 be most effective for me first to address Judge Edwards'
11 question regarding rights in property.

12 Our position is not that we don't have to prove the right
13 in property, we acknowledge we will have to at a trial prove
14 that Agudas Chasidei Chabad owned and owns the library and the
15 archive. The point at this juncture, however, is this is at
16 the very threshold of the litigation, and what Judge Lambert
17 held was that for purposes of a motion to dismiss the issue of
18 who owns the library, whether it was owned by the individual
19 Rebbe or whether it was owned by Agudas Chasidei Chabad today
20 or even in 1917, is not an issue that can be determined on a
21 12(b)(1) motion.

22 JUDGE EDWARDS: Well, actually, I'm not sure that's
23 right. I mean, that's why I'm asking the question. We're
24 talking about subject matter jurisdiction. These matters
25 routinely can be converted into what is a mini-trial on the

1 requirements of subject matter jurisdiction, and even
2 converted into summary judgment if necessary, but affidavits
3 can be presented to dispose of the issue short of a full trial
4 on the merits of the case.

5 MR. LEWIN: That's definitely true, Judge Edwards.
6 And had Russia not conceded -- here's where the language of
7 the concession becomes very important. Had they not stated as
8 -- what they did, then it's possible that Judge Lambert would
9 have said to the parties, okay, now let's see whether -- I
10 will discuss if Chabad owns this, we'll have a mini-trial,
11 exactly as you said. He said --

12 JUDGE EDWARDS: Why do you think it's conceded?
13 Because Judge Lambert didn't say it was conceded.

14 MR. LEWIN: Oh, he did say it was conceded, but he
15 went on to rule on it in any event, but I think the language
16 -- he begins by saying there was a concession, and then he
17 goes on to say I'll rule on it as well in any event. But the
18 point is procedurally, had they not made the concession, then
19 -- before Judge Lambert, it would have been perfectly proper,
20 but Judge Lambert said, no, we're not taking new evidence, he
21 wanted only memoranda on District of Columbia law once the
22 case was transferred to the District of Columbia.

23 So, if this Court were to say, look, it is appropriate at
24 this point to make the rights in property issue and to have a
25 court decide it, then exactly as Judge Williams said, the

1 proper thing to do would be to remand and say, okay, now have
2 your mini-trial.

3 JUDGE EDWARDS: Yeah, because neither a trial judge
4 nor an appellant judge can accept the concession on subject
5 matter jurisdiction if it appears as a serious issue.

6 MR. LEWIN: I understand that.

7 JUDGE EDWARDS: Thus, it can't be dispositive.

8 MR. LEWIN: I understand that, but nonetheless in
9 view of what they said, the issue before Judge Lambert was a
10 very narrow one and there was no evidence taken. We submit
11 that it would be appropriate to remand the case ultimately to
12 the district court, we think on both archives and library, and
13 I'll get the library in a minute, but to send the case back
14 and we think the whole matter of ownership, who owns these
15 properties, the library and the archive, could be decided at a
16 trial on the merits. There's nothing that would prevent that.

17 If Judge Lambert had said, look, I won't decide the
18 rights in property issue ripe preliminarily, but I think we'll
19 have discovery and then a full trial, and we'll decide whether
20 I will discuss if Chabad owns this or owned it then, that
21 would have been, we submit, an appropriate procedure, but
22 certainly what you're saying, Judge Edwards, would be an
23 appropriate procedure as well. But that was foreclosed by
24 their concession essentially, and by the procedure in the
25 district court.

1 Now, coming to the merits, this is an extraordinary
2 situation. Assuming, for example -- I put to the Court a
3 hypothetical. Assuming a large Jewish library was seized by
4 the German Nazi government in 1937, and then assume today's
5 German government were to say, okay, that was really wrong,
6 we're not anti-Semitic and today's German government isn't,
7 however, this library is part of the cultural heritage of
8 Germany and, therefore, we're entitled to keep it. I think
9 nobody would say that's an act of state, that's not a
10 violation of the expropriation provision.

11 Under the Altmann decision in the Court of Appeals in the
12 Ninth Circuit, which the Supreme Court didn't grant cert. on,
13 but nonetheless, the Ninth Circuit said clearly attention by
14 the Nazi government for the purpose of persecuting Jews and
15 taken from Jews just because they were Jewish is not entitled
16 to act of state, it's clearly an expropriation.

17 We submit what the Russian government is saying today is
18 parallel in every way to that hypothetical. The Russians from
19 the Bolsheviks and the Communists in 1917, 1920, and the mid-
20 1029's persecuted their Jewish population. They sentenced the
21 Rebbe to death --

22 JUDGE WILLIAMS: There's at least one difference,
23 and that is the Bolshevik government was almost universally
24 confiscating any private property. In other words, I don't
25 dispute you that there were likely all kinds of anti-Semitic

1 impulses at work, but they were not necessary to the result in
2 that case, necessary to explain the behavior of the Bolshevik
3 government.

4 MR. LEWIN: It's true that they expropriate much,
5 much more than the Nazi government did, but to the extent that
6 they dealt with this library, they did it not because they
7 were taking it for some purported governmental communistic,
8 socialistic purpose, they were taking it to suppress and
9 persecute Jews in the Soviet Union, and the proof of it is
10 that they sentenced the Rebbe to death, they ended up --

11 JUDGE WILLIAMS: Well, they sentenced a lot of
12 people to death.

13 MR. LEWIN: Pardon?

14 JUDGE WILLIAMS: They sentenced a lot of people to
15 death.

16 MR. LEWIN: They did, but this is -- well, we submit
17 this is something which we should be able to prove at trial.
18 If we fail -- you know, whatever the consequences are, the
19 question is whether at this preliminary juncture, the
20 plaintiff should be prohibited from proceeding with a trial at
21 which it could establish, and we submit it could establish,
22 that the taking in 1917, 1920, whatever, it's viewed as a
23 taking by Bolsheviks and the Communists was parallel to the
24 taking that the Nazis did of Jewish property in the 1930's.
25 That's one argument.

1 Of course, our second argument is that even if one views
2 it as a taking -- as an ordinary taking, no different than
3 others that the Bolsheviks took, they took it not from a
4 private party who was a citizen of the Soviet Union, the
5 Rebbe, but we think we can prove at trial, and some of that
6 evidence was introduced in the Gourary trial, we could prove
7 at trial that this was property of a international religious
8 organization even back in 1917 and 1920. It was not private
9 property.

10 What happened in the Gourary case, and some of the
11 evidence that's reported in the Gourary case, and I did have
12 the honor of representing Agudas Chasidei Chabad both in the
13 trial court and the Court of Appeals in the Gourary case, and
14 let me say in that regard, Judge Williams, that what you said
15 to counsel is absolutely true. We won the Gourary case
16 totally. With regard to the litigation --

17 JUDGE WILLIAMS: Counsel argued ultimately that the
18 Rebbe's heirs are in some way, as a result of the Gourary
19 decision, beneficiaries of a trust that would be advantageous
20 potentially for Chabad to deny -- to have rejected.

21 MR. LEWIN: The fact is, Judge Sifton took the
22 narrowest ground of a whole range of arguments that we
23 presented to him. There's no doubt about that. He could have
24 said from the very inception, this library -- and when we say,
25 again, this was a totally different library, the library in

1 the Gourary case was a library which was begun in 1925 after
2 this library had been taken by the Bolsheviks and the
3 Communists. So another library was begun, and Judge Sifton
4 said, okay, I'm not going to decide that this library belonged
5 to Agudas Chasidei Chabad from the outset, although the Rebbe,
6 when he was in Poland, wrote saying, please, Agudas Chasidei
7 Chabad, take back the books that you loaned to me, that's what
8 the Rebbe said in his letters.

9 But regardless of that, Judge Sifton said I'm not
10 accepting your broad ground, I'm accepting a narrow ground,
11 and I don't know how we could possibly have appealed from a
12 case that we won totally even as to the books that came after
13 the war, but --

14 JUDGE WILLIAMS: Well, the argument is that in some
15 way, the judgment of the district court gave the rights of a
16 trust beneficiary to the otherwise losing party.

17 MR. LEWIN: And really gave us all the relief we
18 wanted, which was that the defendant in the case could not go
19 out and make any private claim to these books and sell them.
20 That's what initiated the lawsuit. We brought a lawsuit
21 against him saying these are not private property, they belong
22 to the community, and you can't go out and sell them. We went
23 into court seeking an injunction against him on that basis,
24 and we won that case totally.

25 If I had tried to appeal from footnote nine of Judge

1 Sifton's opinion, it would have taken the Second Circuit 10
2 seconds to say that's no -- they can't possibly appeal from
3 the fact that the judge in footnote nine said something that
4 you don't like and didn't accept your broadest argument.

5 JUDGE EDWARDS: Let me go back to your argument on
6 the act of state doctrine as to the library, because I'm
7 really not following it. There was clearly a taking in 1917
8 and '20, and it certainly by those in power in Russia, and
9 those takings were then certified by the acts of state in the
10 1990's, and I'm not sure what you have left and what remedy do
11 you think you have.

12 The Russian government in the 1990's, by the various acts
13 taken with the arbitration board, et cetera, made it clear
14 that this is our decision. So now the United States
15 government court is supposed to issue what to the Russian
16 government and say notwithstanding your acts of state, we're
17 mandating what?

18 MR. LEWIN: We're mandating the return of a library
19 that --

20 JUDGE EDWARDS: Well, then what is the act of state
21 -- I mean, I understand what you want, but what is the act of
22 state doctrine about then?

23 MR. LEWIN: (Indiscernible) --

24 JUDGE EDWARDS: I thought it would precisely cover
25 that kind of a situation.

1 MR. LEWIN: But it does not cover -- and the
2 Sabbatino case made it clear, there are situations where it
3 does not cover and does not entitle a sovereign to claim an
4 act of state, and one of them, we submit, is -- and that's why
5 I made the parallel with the Nazi taking, that if the German
6 government today said, okay, with an official German act, we
7 are keeping a library that Hitler took in 1937.

8 JUDGE EDWARDS: Well, but you see, the problem with
9 the archive situation factually is very different, and so when
10 you reference back to that -- it's a different fight. It's
11 about rights of property, at least as I'm looking at it,
12 because it was never taken by act of state in the first place.
13 So, that's different.

14 MR. LEWIN: But (indiscernible) --

15 JUDGE EDWARDS: Now, here we have a situation where
16 there isn't any doubt whatsoever there were acts of state that
17 certified the taking. If the doctrine exists, then we are
18 bound to follow it. I'm not sure how we get out from under
19 it. I mean, horrible hypotheticals don't necessarily relieve
20 us of our obligation to follow the law. I mean, that happens
21 every day.

22 MR. LEWIN: Yes, Judge Edwards, but the fact is that
23 the original taking back in 1917 and 1920 was not protected by
24 the act of state doctrine for two reasons --

25 JUDGE EDWARDS: Right, but let's assume that's

1 right, okay?

2 MR. LEWIN: Right.

3 JUDGE EDWARDS: I don't know how you get around --
4 because there's nothing in the doctrine that forecloses it,
5 how you get around the subsequent acts of state that certify
6 the original takings.

7 MR. LEWIN: Well, two answers to that.

8 JUDGE EDWARDS: Okay.

9 MR. LEWIN: One is that the subsequent act of state,
10 and we argue that in the brief, in 1992 is itself an
11 expropriation. Even though it is a taking, it comes in under
12 the second pick of the (indiscernible), it came in 1992 --

13 JUDGE EDWARDS: Okay. Let's assume that I think the
14 expropriation occurred in '17 and '20 and you just -- it's
15 subsequently certified, so I'll remove that argument.

16 MR. LEWIN: All right.

17 JUDGE EDWARDS: What's your second argument?

18 MR. LEWIN: Then our point is that the taking in
19 1917 and 1920 is not protected by the act of state doctrine
20 because it is the kind of taking that is outside of what
21 Sabbatino contemplated because it is discriminatory, not done
22 for a public purpose, and without compensation, and done to
23 suppress the Jewish community. That's something we should be
24 able to prove at trial. We agree, it's our burden to prove
25 that at trial, but if we prove at trial --

1 JUDGE EDWARDS: Well, wait. Now let me make sure
2 I'm understanding you. You think the case law suggests that
3 the goodness of the foreign government is in play when we
4 decide to apply the act of state doctrine?

5 MR. LEWIN: Absolutely.

6 JUDGE EDWARDS: Then what --

7 MR. LEWIN: That's exactly what happened in the
8 Altmann case. Your Honor, the Altmann case, the Austrian
9 government -- the Nazi government took paintings and the court
10 said that is not a permissible act of state -- this is the
11 Ninth Circuit, I'm not saying the Supreme Court said it
12 because they only dealt with the retroactivity issue -- but
13 the Ninth Circuit said -- and the ultimate decision in Altmann
14 was, and indeed I think the Supreme Court also kind of assumed
15 that tainted --

16 JUDGE EDWARDS: Why do you think the Supreme Court
17 assumed --

18 MR. LEWIN: I take that back. I'm sorry.

19 JUDGE EDWARDS: Okay.

20 (Indiscernible - simultaneous speakers)

21 JUDGE EDWARDS: I understand your argument
22 perfectly, but I don't see the case law.

23 MR. LEWIN: Well, the case law is Altmann and any
24 Nazi taking. I don't think this Court would say -- as I said,
25 if the German government said today -- passed a law saying a

1 taking that was done in 1937 of a Jewish library --

2 JUDGE EDWARDS: Yeah, I understand your hypo and I
3 don't think the archive situation is parallel to the library
4 situation.

5 MR. LEWIN: Not the archives -- I'm talking about
6 the library, not the archives. I'm talking about the library
7 in 1917. Why is it any different when the Bolsheviks and the
8 Communists take a library because they want to persecute Jews
9 in 1917 and 1920, and then today's Russian government says
10 it's a cultural heritage of the Russian people so, therefore,
11 we're entitled to keep it, than it would be if today's German
12 government said that what Hitler took in 1937 is now a
13 cultural heritage of the German people? It's totally
14 parallel, and we submit we -- we would undertake the burden at
15 trial of establishing that parallelism.

16 If it's parallel, if it's true, that the 1917 and 1920
17 takings were done to persecute Jews and -- as part of a
18 religious persecution, I don't see the difference between this
19 case and the Altmann case.

20 JUDGE WILLIAMS: Just to sort of flesh out where the
21 key distinctions lie, suppose suit had been brought --
22 Sabbatino hadn't been decided, but suppose suit were brought
23 in 1938 to recover the hypothetical --

24 JUDGE EDWARDS: Right.

25 JUDGE WILLIAMS: -- German library -- Jewish library

1 in Germany confiscated in '36, so there's no change of regime
2 at the time of the suit, what outcome?

3 MR. LEWIN: I think this Court's duty would be to
4 say that under the Foreign Sovereign Immunities Act, that is
5 not protected by the act of state doctrine. The Sabbatino
6 case itself recognizes it doesn't protect every action by a
7 foreign government.

8 Let me say one other point Judge Edwards --

9 JUDGE WILLIAMS: I looked at that passage this
10 morning and sort of rumination on various factors, and then
11 the wind-up sentence is:

12 Therefore, all we decide today is that an act of state
13 challenged against the same government, an act within its own
14 territory, will not be reexamined (indiscernible).

15 MR. LEWIN: That's the holding, but let me make one
16 more point with regard to Judge Edwards. The other
17 distinction is that we maintain -- and it's related to the
18 rights in property, but it's also related to the merits. We
19 maintain that this property was owned in 1917 and 1920 not by
20 a Russian citizen, not by the Rebbe personally, but by the
21 entire worldwide Chabad community, in which case it is not an
22 act of state because what it does is it affects rights not
23 with regard to their own citizens, but with regard to property
24 that's owned by an international community. Consequently, we
25 submit that would be an expropriation that would not be

1 covered, and we should be able to prove that at trial.

2 Our main point is -- and I see my time's up -- our main
3 point is this is the threshold of a litigation. The question
4 is Agudas Chasidei Chabad to be foreclosed at this threshold
5 from making the proof -- we accept that burden of proof, but
6 from establishing at a trial that these component elements of
7 an expropriation that is not covered by the act of state
8 doctrine, and that would be -- give rise to liability under
9 the Foreign Sovereign Immunities Act -- whether it should be
10 foreclosed at this juncture.

11 We submit Judge Randolph was right with regard to the
12 archives, we think he was wrong with regard to the library
13 because the library is also subject, for the reasons I've
14 stated and for those that appear in our brief, too, the claim
15 under the expropriation exception. Thank you.

16 JUDGE HENDERSON: All right. Thank you.

17 THE CLERK: (Indiscernible.)

18 JUDGE HENDERSON: Okay. Why don't you take three
19 minutes, Mr. Broderick.

20 REBUTTAL ARGUMENT OF JAMES H. BRODERICK, JR., ESQ.

21 ON BEHALF OF THE APPELLANTS

22 MR. BRODERICK: Thank you, Your Honor. On the
23 subject of the act of state doctrine, it seems to me the
24 problem for Chabad is that it runs smack into U.S. v. Belmont
25 and U.S. v. Pink (phonetic sp.) in that the very acts of

1 nationalization, expropriation of property, as Judge Williams
2 said earlier, which went on, on a wholesale basis under the
3 Bolshevik regime and under the Communist regime were in fact
4 acts of state that could not be inquired into. Indeed, such
5 that in United States v. Belmont and United States v. Pink,
6 the United States government as the assignee of rights that
7 the Soviet government had acquired by virtue of expropriation,
8 was entitled to bring claims on those rights in the United
9 States courts. So, it seems to me that the acts that he's
10 complaining of that we were focusing on originally are clearly
11 acts of state.

12 It would involve essentially -- to put those questions at
13 issue in this case would essentially be -- you know, I think,
14 ultimately be reversed to going against Belmont and Pink, and
15 it in effect to try and retry the entire sort of history of
16 the Communist and Bolshevik revolutions as decrees that were
17 issued pursuant to which the property was expropriated, they
18 were not discriminatory, except that they were discriminatory
19 against private property and not against private property
20 owned by a particular person.

21 JUDGE EDWARDS: Is that an issue?

22 MR. BRODERICK: It's not an issue -- well, it's an
23 issue on the takings point and it is not an issue --

24 JUDGE EDWARDS: Well, is it a relevant issue with
25 respect to which there has to be a trial?

1 MR. BRODERICK: No. I don't think it is a relevant
2 issue for purposes of application of the act of state doctrine
3 as --

4 JUDGE EDWARDS: Because why?

5 MR. BRODERICK: Because the motives of the
6 government in expropriating property are not
7 (indiscernible) --

8 JUDGE EDWARDS: Are never relevant.

9 MR. BRODERICK: Are never relevant because
10 expropriation of property, unlike other acts by governments
11 and the international takings doctrine, has yet to be --

12 JUDGE EDWARDS: Well, what authority says that?
13 Just like I asked Mr. Lewin, what authority says, because this
14 is where I'm confused at both of you, says that it really
15 doesn't matter. There could be a decree -- could have been a
16 decree in Russia that says take this property because we're
17 out to persecute the Jews and get all of it, and we clearly
18 want to expropriate it, and we have that evidence, it's
19 absolutely clear. Does that change the posture of the case?

20 MR. BRODERICK: Your Honor, I do not believe that it
21 does.

22 JUDGE EDWARDS: But you're not sure.

23 MR. BRODERICK: I'm not sure, but I think I can take
24 comfort in the fact that --

25 JUDGE EDWARDS: Well, do you have some authority? I

1 mean, I --

2 MR. BRODERICK: I think the authority is that under
3 the Foreign Sovereign Immunities Act, jurisdiction is limited
4 to the exceptions that are spelled out in the Foreign
5 Sovereign Immunities Act, and it is not -- it does not include
6 takings of the sort that the Court is --

7 JUDGE EDWARDS: So, none of it is never relevant in
8 your view under the existing case law.

9 MR. BRODERICK: For purposes of a taking in
10 violation of international law, it is relevant insofar as the
11 question of whether or not an alien is being discriminated
12 against. That is the question that is put by the
13 international takings exception of the expropriation
14 exception. The discrimination is not on the basis of -- it's
15 between domestic and alien persons because (indiscernible) --

16 JUDGE EDWARDS: As long as you have a citizen, in
17 your view, it does not matter what the motive of the foreign
18 government is.

19 MR. BRODERICK: Exactly, Your Honor. For better or
20 for worse, we do not inquire into the motives with which a
21 foreign government treats its own citizens.

22 JUDGE WILLIAMS: You're saying then it depends on
23 the citizenship of the previous owner? In other words, the
24 act of state slips away, becomes irrelevant, if the owner is
25 not a citizen?

1 MR. BRODERICK: No, act --

2 JUDGE WILLIAMS: Because then obviously there are
3 factual issues of considerable weight here.

4 JUDGE EDWARDS: Act of state doctrine, seems to me,
5 applies where there are acts of the state within its own
6 territory taken as a government. As this Court said in Wong
7 (phonetic sp.) v. Broadside, the expropriation of property, in
8 that case by the Chinese government, is a quintessential act
9 of state. Again, I think that the issue of --

10 JUDGE WILLIAMS: I thought you used language
11 suggesting that there would be an exception if the act were
12 found to be discriminatory against foreign owners, which this
13 is one of Mr. Lewin's claims.

14 MR. BRODERICK: Well, the act of state doctrine
15 seems to be sort of -- it does merge to some degree with the
16 merits claim of a taking in violation of international law in
17 the sense that international law is only concerned with
18 takings from aliens as opposed to takings from domestic
19 citizens, and in that sense, the question of whether it's an
20 act of state applies. But Sabbatino, obviously, tells us --
21 which is a taking from a foreign citizen -- that that question
22 is subject to act of state doctrine. With that, Your Honor, I
23 submit.

24 JUDGE HENDERSON: Thank you.

25 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

D. Kathleen Stegmiller

03/19/08

D. Kathleen Stegmiller

Date

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