

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   AMERICAN INSURANCE ASSOCIATION, :

4   ET AL. , :

5                   Petitioners :

6           v. :   No. 02- 722

7   JOHN GARAMENDI, INSURANCE :

8   COMMISSIONER, STATE OF :

9   CALIFORNIA :

10   - - - - - X

11                                   Washington, D. C.

12                                   Wednesday, April 23, 2003

13                   The above-entitled matter came on for oral

14   argument before the Supreme Court of the United States at

15   10: 10 a.m.

16   APPEARANCES:

17   KENNETH S. GELLER, ESQ. , Washi ngton, D. C. ; on behalf of

18           the Petitioners.

19   EDWIN S. KNEEDLER, ESQ. , Deputy Sol icitor General ,

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

21           the United States, as amicus curiae, supporting the

22           Petitioners.

23   FRANK KAPLAN, ESQ. , Santa Monica, Californi a; on behalf of

24           the Respondent.

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
now in Number 027-22, American Insurance Association  
versus John Garamendi.

Mr. Geller.

ORAL ARGUMENT OF KENNETH S. GELLER  
ON BEHALF OF THE PETITIONERS

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

58 years ago almost to the day the United States  
and its allies defeated Nazi Germany and World War II came  
to an end in Europe. Ever since that time, the United  
States Government has been actively engaged in a series of  
initiatives to obtain just compensation for victims of the  
war. These efforts continue to the present day.

Beginning in the mid-1990s, the Federal  
Government has been engaged in extensive negotiations with  
other Governments concerning claims of Holocaust victims.  
The President himself has stated repeatedly that it's in  
the foreign policy interests of the United States to have  
these claims resolved exclusively in an international  
forum and through nonadversarial means, rather than  
through costly, time-consuming and contentious litigation.

To achieve these goals in the context of unpaid

1 insurance claims, the President has taken three actions.  
2 First, the United States has facilitated and encouraged  
3 the establishment of the International Commission on  
4 Holocaust Era Insurance Claims, or ICHEIC.

5 Second, the United States, with the personal  
6 intervention of the President himself, has negotiated  
7 agreements with Germany and Austria under which those  
8 countries and their insurance companies agreed to provide  
9 hundreds of millions of dollars in compensation for unpaid  
10 insurance claims and to follow procedures worked out with  
11 ICHEIC to process insurance claims in a nonadversarial  
12 manner and under relaxed standards of proof, and --

13 QUESTION: Mr. Geller, I -- let me mention a  
14 couple of things that I find troubling about the case, and  
15 one is that when Congress passed a law in this area it  
16 didn't include any language preempting State laws such as  
17 California has, and when the President put out his  
18 executive order or agreement it doesn't expressly do so,  
19 either. How does that affect our analysis, do you think?

20 MR. GELLER: Well, the statute that Congress  
21 passed was the Holocaust Assets --

22 QUESTION: Yes, right.

23 MR. GELLER: -- Commission Act, which clearly  
24 gave authority to the President to take control of this  
25 issue, and didn't provide any role for the States

1    whatsoever.

2                   QUESTION:   But it didn't preclude a role.

3                   MR. GELLER:   But in the area of foreign affairs,  
4   under this Court's decision in Zschernig, and in the area  
5   of foreign commerce under many of this Court's  
6   decisions --

7                   QUESTION:   Well, Zschernig has never been cited  
8   since it was written.  It's kind of a troublesome thing to  
9   hang your whole --

10                  MR. GELLER:   Our whole case does not depend on  
11   Zschernig --

12                  QUESTION:   -- case on, and we have in the  
13   meantime decided, for instance, Barclay's Bank, which has  
14   some language in it that speaks against recognizing the  
15   kind of --

16                  MR. GELLER:   I don't --

17                  QUESTION:   -- authority you talk about, and we  
18   have the Breard case, that criminal case, Breard versus  
19   Greene.  Now, how do we deal with those?

20                  MR. GELLER:   Well, to begin with I think  
21   Barclay's is completely distinguishable, Justice O'Connor,  
22   on at least three grounds.  First, Barclay's concerns  
23   solely the Foreign Commerce Clause, and the Court said in  
24   Barclay's that Congress has primacy under the Foreign  
25   Commerce Clause, and it read the record in that case to

1 conclude that Congress had acquiesced in or approved what  
2 California was trying to do in the area of taxation, so  
3 there was no suggestion that what California was trying to  
4 do in that case prevented the Federal Government from  
5 speaking with one voice in the area of foreign commerce.  
6 There's nothing, to begin with, comparable in this case to  
7 suggest that Congress has done anything to authorize  
8 California to engage in regulation of foreign insurance  
9 policies involving foreign companies and foreign  
10 beneficiaries.

11               Secondly --

12               QUESTION: But the United States must have been  
13 aware that this California legislation existed.

14               MR. GELLER: I --

15               QUESTION: And the -- part of the story is that  
16 this State legislation was on the books before the  
17 executive agreement with Germany and Austria that you've  
18 just applauded, so when California acted there wasn't any  
19 such accord.

20               MR. GELLER: Well, several things, Justice  
21 Ginsburg, and then I want to get back to answer Justice  
22 O'Connor's question. First, the Holocaust Act, the  
23 Federal Holocaust Act was passed before the HVIRA, so it  
24 could not in any way be read as acquiescing in or  
25 approving anything that California was doing in this area.

1           Secondly, and Mr. Kneedler will, I think, speak  
2 to this, the executive agreement did not expressly preempt  
3 any claims, because these were claims largely by foreign  
4 nationals against foreign companies, and the President did  
5 not believe it would be appropriate to extinguish all of  
6 those claims, but we're not dealing in this case with  
7 claims by individuals. We're dealing with actions by a  
8 State which interfere with what the President himself has  
9 said are his goals in an area, a very sensitive area of  
10 foreign affairs.

11           And this case is not like -- this case is much  
12 stronger than Zschernig, because in Zschernig, the Federal  
13 Government had done nothing in the area. Nonetheless,  
14 this Court said that the States cannot enter into an area  
15 where it has the potential for embarrassment, or to  
16 interfere with the --

17           QUESTION: Zschernig involved criticism of a  
18 foreign government.

19           MR. GELLER: So does this statute. This statute  
20 criticizes --

21           QUESTION: Is that really a sound basis for a  
22 decision like Zschernig, to say Oregon probate judges were  
23 inquiring about the policies of Eastern European  
24 countries? I mean, I -- I don't regard that as a very  
25 strongly reasoned opinion.

1           MR. GELLER: But this case, Chief Justice, is  
2 much stronger than Zschernig because this is not a case,  
3 unlike Zschernig, where the President has done nothing in  
4 the area. Here, the President has aggressively entered  
5 the area and tried to impose a solution which he has  
6 concluded is in the best interests of the foreign policy  
7 of the United States, so it's not a question of field  
8 preemption.

9           Zschernig could be looked at as a case of field  
10 preemption. What the Court essentially said, I think, in  
11 Zschernig is that there is a field of foreign affairs  
12 where, even if the United States Government has done  
13 nothing, the States cannot enter. This is a case that I  
14 think gets much more clearly analogous to conflict  
15 preemption. Here, the President, with the acquiescence of  
16 Congress, has aggressively moved to try to solve a very  
17 serious international problem, and --

18          QUESTION: But Mr. Geller, said in that very  
19 agreement there is to be no preemption. The President  
20 said that when California law was already on the books.

21          MR. GELLER: I don't think it specifically says  
22 there's to be no preemption. We're not dealing here, to  
23 begin with, Justice Ginsburg, with claims by individuals.  
24 We're dealing here with State legislation, and in the  
25 executive agreement the President -- the President



1 promised to use his best efforts to prevent the States  
2 from interfering with the executive agreement. He has  
3 concluded on many occasions that what California has tried  
4 to do here is a direct interference, a direct interference  
5 with the foreign policy position of the United States,  
6 which is to funnel all of these claims through an  
7 international commission.

8 QUESTION: Well, if we can look just at the  
9 agreement, isn't this what is usually called an executory  
10 agreement, rather than a -- than a fully executed  
11 agreement? In other words, it says the United States,  
12 recognizing the importance of the objectives of this  
13 agreement, shall in a timely manner use its best efforts  
14 in a manner it considers appropriate to achieve those  
15 objectives. That's -- that's something yet to be done.  
16 That's not --

17 MR. GELLER: No, I think, Justice --

18 QUESTION: It sounds to me like executory,  
19 rather than fully --

20 MR. GELLER: I think what the agree -- Just --  
21 Mr. Kneidler is probably better equipped to address the  
22 meaning of the executive agreement, but it seems to me  
23 what -- what the President has chosen to do there is to  
24 promise to use his best efforts to look to see whether any  
25 States or localities are taking actions which interfere

1 with the promises that the President has made to foreign  
2 countries and foreign insurance companies to try to  
3 achieve legal peace in the United States, and in those  
4 instances where the States have taken action which  
5 interferes directly with that -- with that promise, the  
6 President has promised to use his best efforts, such as to  
7 file briefs in this Court and others, arguing that  
8 these -- these State statutes are preemptive, so it's --  
9 there's no -- I think in the lingo of a statute there is  
10 no express preemption here, but there's clearly implied  
11 preemption under the Supremacy Clause.

12 QUESTION: Mr. Geller, I may have misheard you,  
13 but didn't you describe the agreement a little more  
14 broadly than its terms? The President's agreement, as I  
15 understood it, was to funnel all the claims through the --  
16 the -- this -- this new body, and I don't understand that  
17 producing the information that's sought in this case would  
18 preclude that from being done.

19 MR. GELLER: Well, the -- the international  
20 commission not only set up a claims resolution process, it  
21 also has procedures for the disclosure of information  
22 which take into account European privacy laws, Justice  
23 Stevens. It was a very --

24 QUESTION: But that's a different argument. I  
25 mean, that's not based on the text of the executive

1 agreement.

2 MR. GELLER: Well, the executive agreement chose  
3 the -- the President chose through the executive agreement  
4 and through his negotiations with foreign countries to use  
5 the ICHEIC system, rather than any parallel system, in  
6 part because of the concern about violating European  
7 privacy laws. The California statute would be a blatant  
8 violation of European --

9 QUESTION: Well, but as I understand it, the  
10 California -- one of the purposes of the California  
11 statute is to -- to uncover claims that might not be known  
12 about. It produces the information that would then allow  
13 the claimant to go to the -- the --

14 MR. GELLER: But the international commission  
15 has a separate -- separate policy for divulging  
16 information that -- and right now the, it's in the process  
17 of finalizing that. Under the international commission,  
18 all of the insurance companies are producing their data  
19 bases in private --

20 QUESTION: But all, Mr. Geller, would you  
21 clarify all, because I had the impression from the briefs  
22 that there were only five companies, and that they cover  
23 something like a little over 35 percent --

24 MR. GELLER: No, that's -- that's --

25 QUESTION: -- of the universe of -- of claims?

1                   MR. GELLER: -- false, Justice Ginsburg. It's  
2 based on outdated information. In light of the agreements  
3 that the United States has reached with Germany and  
4 Austria, all the insurance companies in those countries  
5 have agreed to follow the ICHEIC procedures so that with  
6 the inclusion of all the German insurance companies, all  
7 the Austrian insurance companies, all the Dutch insurance  
8 companies, and many of the Swiss insurance companies, I  
9 would say that the ICHEIC system now covers at least  
10 double the percentage that the --

11                   QUESTION: It's still a wholly voluntary --

12                   QUESTION: How -- how specifically does the --  
13 does the California statute interfere with the operations  
14 of the commission?

15                   MR. GELLER: It interferes in a number of  
16 different ways, Justice Kennedy. It interferes, to begin  
17 with, because it presents the possibility that these  
18 companies will have to pay twice, and it was a specific  
19 promise on the part of the United States that they would  
20 not have to pay twice.

21                   QUESTION: Well, that's assuming there's a suit  
22 brought later, but --

23                   MR. GELLER: That's assuming, that's -- this is  
24 all a part of the California system. The only purpose --

25                   QUESTION: And that doesn't meet Justice

1 Stevens' point that this is just a disclosure --

2 MR. GELLER: Well, that's -- I want to get to  
3 that as the second reason, but I want to make sure the  
4 Court appreciates the first reason. It was very important  
5 that these companies not be made to pay twice, and the  
6 President --

7 QUESTION: I -- I don't understand. Why would  
8 that be? Why is there a risk?

9 MR. GELLER: It would be because under the  
10 international commission these companies have already made  
11 a substantial payment, over \$100 million, to settle their  
12 claims, but if the California process is allowed to  
13 continue, it's possible that people will be able to bring  
14 suit in California and recover separate --

15 QUESTION: This case is about a disclosure  
16 statute --

17 MR. GELLER: It's --

18 QUESTION: -- there's other legislation that is  
19 not before us.

20 MR. GELLER: I under --

21 QUESTION: We are talking about a statute that  
22 doesn't authorize anybody to bring suit. It simply  
23 requires disclosure.

24 MR. GELLER: But the only purpose of the  
25 statute, and this is as clear as can be from the face of

1 the statute, is to provide information so that  
2 Californians can bring suit in California, but the second  
3 way in which the California statute, Justice Kennedy,  
4 interferes with the ICHEIC process is that all of these  
5 companies agreed to the ICHEIC process on the assumption  
6 that European privacy laws would be respected. That's --  
7 that is one of the principal reasons why the United States  
8 has negotiated this alternative system. Under the --

9 QUESTION: Mr. Geller, one -- would you explain  
10 one thing that is troubling? The privacy interest that is  
11 being asserted, one can understand an insured doesn't want  
12 the insurance company to divulge the insured's records,  
13 but we are dealing with a unique situation here in that  
14 many of these insureds, the insureds that were concerned,  
15 were killed in the Holocaust, and it seems to me to raise  
16 a privacy interest with respect to those people and their  
17 beneficiaries is -- is kind of ironic.

18 MR. GELLER: But Justice Ginsburg, this is very  
19 important. Under -- we're dealing with tens of millions  
20 of insurance policies here. Only a small percentage of  
21 those policies has to do, have to -- relate to Holocaust  
22 victims. California would require, and this is a critical  
23 point for the Court, California would require disclosure  
24 of the intimate details of all 10 million of those  
25 policies, 99.9 percent of which have nothing at all to do

1 with California, and nothing to do with any victims of the  
2 Holocaust. Under the ICHEIC system, under the ICHEIC  
3 system, the only policies that will be publicly disclosed  
4 on a data base are policies held by -- by possible victims  
5 of the Holocaust.

6 QUESTION: How does one know that?

7 MR. GELLER: It -- it know -- under I -- under  
8 the ICHEIC system, all of the policies written during this  
9 era that are on electric data base are to be -- are to be  
10 put into a system, and independently ICHEIC has done a  
11 census of all of the possible Holocaust victims in Germany  
12 during the pre-war period through various records and come  
13 up with several hundred thousand names which will be  
14 matched against the list of policyholders, and when there  
15 is a match, that list will be put out on a public data  
16 base. The German --

17 QUESTION: There was a list --

18 MR. GELLER: The German --

19 QUESTION: There was a list that was due out in  
20 April. Has --

21 MR. GELLER: That will -- I'm told that list  
22 will be out by the end of this month, and the German  
23 insurance authorities have concluded that publication of  
24 that list would not violate any privacy laws because it  
25 would be for the benefit of the people who are trying to

1 recover on these unpaid Holocaust era insurance policies.  
2 California, by contrast --

3 QUESTION: I take it you could make that  
4 argument even absent the claims commission.

5 MR. GELLER: Absolutely. Absolutely. What  
6 California has tried to do here would violate the foreign  
7 affairs power as well as the Commerce Clause, even absent  
8 the -- the personal intervention of the President himself  
9 to seek an alternative solution to this vexing  
10 international problem, that's right.

11 For California, which has absolutely no  
12 relationship to any of these policies, to insist that they  
13 all be made public is, we think, a clear violation of the  
14 Commerce Clause.

15 QUESTION: How -- how does it relate to the --  
16 suppose we want to link the harm that this does under the  
17 privacy laws to the operation of the commission. How do  
18 we do that? Just, the -- the burden and the cost to the  
19 companies that might better be expended on the claim --

20 MR. GELLER: It's simply that California has no  
21 relationship to any of these policies. These policies  
22 were all policies written in Europe by European companies,  
23 and California's --

24 QUESTION: But that's a separate argument from  
25 the operation of the commission.



1                   MR. GELLER: It is a separate argument from  
2 the -- I think the -- the --

3                   QUESTION: Tell us briefly the principle of  
4 Federal law that you say governs this. All of the sudden  
5 you're talking about the Foreign Commerce Clause.

6                   MR. GELLER: Yes. We made three arguments --

7                   QUESTION: And I thought earlier in the argument  
8 you had said, oh, that really isn't our case, we don't  
9 need that, and that's what Zschernig --

10                  MR. GELLER: No, I -- that's not true, I was --  
11 I was trying to distinguish the Barclay's case -- the  
12 Barclay's case.

13                  QUESTION: All right. Well, what do you --

14                  MR. GELLER: In addition --

15                  QUESTION: What do you say is the principal  
16 flaw?

17                  MR. GELLER: There are -- there are three  
18 arguments that we have made to attack this California  
19 statute. One is, is that it is, under many decisions of  
20 this Court, including the recent decision in Crosby, in  
21 clear conflict with United States foreign policy. The  
22 President has set out a particular policy to try to  
23 resolve the last remaining issue from World War II. It  
24 involves channeling all of these foreign claims into an  
25 international commission in a way that respects European

1 privacy laws. California has set up a --

2 QUESTION: And what case -- what case  
3 establishes that principle, clear conflict?

4 MR. GELLER: I would submit, United States  
5 versus Pink, United States versus Belmont are two cases in  
6 which the President issued executive agreements and the  
7 Court found that they preempted State law. I would --

8 QUESTION: Yes, but here you -- that's the big  
9 difference between those. They preempted State law.  
10 There's no pretense by -- the executive says I'm going to  
11 use my best efforts.

12 MR. GELLER: Those case -- those executive  
13 agreements, I do not believe, had any express preemption  
14 provisions in them. The Court simply concluded --

15 QUESTION: But when you take what the President  
16 undertook, which was just to use best efforts, that  
17 doesn't sound like --

18 MR. GELLER: Under the Supremacy --

19 QUESTION: -- this Court would have much to --

20 MR. GELLER: Justice Ginsburg, I think it's the  
21 operation of the Supremacy Clause. Here, the President  
22 has set out a policy for the United States, and has issued  
23 an executive agreement with foreign countries to try to  
24 implement that policy, and I think it is clear under the  
25 Supremacy Clause that the States cannot do anything that

1 would frustrate or interfere with the operation --

2 QUESTION: With full knowledge, when the  
3 President did that, that there were these laws in  
4 California.

5 MR. GELLER: And at the time that the -- that  
6 these laws were in the process of being passed, the  
7 President's personal representative, Stuart Eizenstat,  
8 wrote a letter to the Governor of California saying,  
9 please do not pass this law because it will interfere with  
10 what the United States is trying to do in the area of  
11 foreign policy, and I think it would be a shame if this  
12 law went into effect because of the disastrous impact it  
13 would have on the ICHEIC system, which the President of  
14 the United States -- which two successive Presidents of  
15 the United States have concluded is in the best foreign  
16 policy interests of the United States, and the best  
17 interest of Holocaust victims in order to get money into  
18 their hands quickly.

19 But secondly, Justice O'Connor, in addition to  
20 the foreign affairs power, we think this is a blatant  
21 violation of the -- of the Foreign Commerce Clause, which  
22 once again is not within the power of the States to  
23 interfere with. Here we have foreign insurance policies  
24 that have absolutely no nexus to the State of California.  
25 They are regulated by foreign --

1                   QUESTION: Why do you say they have no nexus to  
2 California? Is it not true that there are 4- or 5,000  
3 residents of California who may or may not be  
4 beneficiaries of policies that they don't know about?

5                   MR. GELLER: Yes, but this -- first of all, this  
6 Court has held that the fact that someone --

7                   QUESTION: Am I right on that assumption?

8                   MR. GELLER: You're right on that assumption,  
9 but to begin with, Justice Stevens, we're talking about  
10 10 million policies that you're trying to regulate, and at  
11 the maximum they say they may --

12                  QUESTION: Well, you have to go through a big  
13 data base to find the 5,000.

14                  MR. GELLER: Well, I don't -- I don't think that  
15 there, that under this Court's decisions that the fact  
16 that there may be a few thousand people in the State  
17 gives --

18                  QUESTION: But if they do nothing more than  
19 identify policies people don't know about, how will that  
20 interfere with the basic program? Couldn't they then  
21 require those claims be prosecuted in the tribunal that  
22 they're setting up?

23                  MR. GELLER: Because ICHEIC has set up an  
24 alternative disclosure system and the -- which respects  
25 European privacy laws and secondly because the -- the

1 State of California simply has no power to exert its  
2 influence, even in the form of a disclosure obligation, on  
3 contracts that have no -- absolutely no nexus to the  
4 State.

5 QUESTION: Mr. Geller, as I understand it, this  
6 ICHEIC system is wholly voluntary. There's no law that  
7 enforces it. And update me on something else that you did  
8 earlier. You said many more insurance companies that were  
9 in it than 35, 40 percent. As I understand it, 80 percent  
10 of the claims that were made to ICHEIC were turned down  
11 because the claimants were not able to identify  
12 sufficiently their heirs themselves --

13 MR. GELLER: I think most of the information in  
14 the record, Justice Ginsburg, and the information that the  
15 State relies on relates to several years ago, not to the  
16 current ICHEIC process before the German foundation and  
17 the Austrian foundation and a number of the Dutch  
18 companies had decided to participate fully in that  
19 process.

20 QUESTION: Is this in the record?

21 MR. GELLER: These are all events that --  
22 they're in the public record. They're not in the record  
23 of this case, Justice Souter, but there are public  
24 documents from ICHEIC and from the President describing  
25 all of this.

1           If the Court has no further questions, I'd like  
2 to reserve the balance --

3           QUESTION: Very well, Mr. Geller.

4           Mr. Kneedler, we'll hear from you.

5           ORAL ARGUMENT OF EDWIN S. KNEEDLER

6           ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

7           SUPPORTING THE PETITIONERS

8           MR. KNEEDLER: Mr. Chief Justice, and may it  
9 please the Court:

10          The California statute at issue here is not a  
11 statute of general application that happens to have an  
12 incidental impact on foreign Nations, foreign countries,  
13 or foreign transactions. It is a statute that is written  
14 exclusively and specifically with respect to a category of  
15 foreign insurance transactions occurring in foreign  
16 countries between foreign companies and foreign nationals  
17 more than 50 years ago, and it concerns a subject matter,  
18 the settlement of claims arising out of international  
19 conflict, that has -- has always been understood by this  
20 Court to be the responsibility of the national Government,  
21 as reflected most recently in *Dames & Moore*.

22          QUESTION: Mr. Kneedler, I thought that the only  
23 requirement is put on a company licensed to do business in  
24 the United States. The -- California isn't reaching out  
25 to grab a foreign insurance company that isn't doing

1 business in the United States. It is asking questions of  
2 a company licensed to do business in the State of  
3 California.

4 MR. KNEEDLER: But disclosure is a form of  
5 regulation. This is true, this is obvious from our  
6 securities laws, it is -- it is evident from this Court's  
7 decision in the BMW case of several years back, where the  
8 Court -- which had to do with disclosure, and the Court  
9 said that one State may not try to enforce its policies  
10 with respect to the disclosure of information in other  
11 States, and we think that --

12 QUESTION: Did we do that? Does the United  
13 States do that, or States under blue sky laws in the  
14 securities area? Do we require disclosures of, say,  
15 affiliates that are set up in --

16 MR. KNEEDLER: Under blue sky laws, under the, I  
17 believe it's the Hall decision, the Court said that a  
18 State could require disclosures -- with respect to  
19 in-State transactions it could require disclosures about  
20 issuance of securities out of State that are related to  
21 in-State transactions. We have no in-State transaction  
22 here.

23 California has claimed two possible connections  
24 to the State to justify this statute. The first is that  
25 the companies, the insurance companies, certain insurance

1 companies do business in California. Those are not the  
2 ones that issued these policies, but they do business in  
3 California. Under this Court's decisions, I think most  
4 notably the Connecticut General case that is cited in the  
5 petitioner's brief, is a case where the Court said the  
6 fact that insurance companies do business in the State is  
7 not a sufficient basis for a State in that case to tax  
8 transactions, insurance policies that are entered into  
9 outside of that State, so it's clear that the fact that  
10 certain insurance companies do business in the State does  
11 not give California a right to regulate through disclosure  
12 transactions and policies that happened outside the State  
13 and, a fortiori, that's true with respect to foreign  
14 transactions.

15           The other interest that California has been --  
16 has asserted, which I think Justice Stevens referred to,  
17 is the fact that some number, a very small percentage of  
18 Holocaust survivors are in California, and with respect to  
19 that, this Court's decision in Shutts make, and other  
20 decisions make clear that moving to the forum State an  
21 adjudicatory jurisdiction is not a sufficient nexus, or --  
22 or legislative jurisdiction is not a sufficient nexus for  
23 a State.

24           What we have here, again, is one State of the  
25 Union trying to establish its own foreign policy, in the



1 words of the Zschernig suit --

2 QUESTION: Mr. Kneedler, suppose there were no  
3 Federal efforts in this area, which there weren't for  
4 sometime, and as I said, the executive agreements we're  
5 talking about post-dated this California disclosure law,  
6 suppose there was nothing, would you still say that  
7 because of the potential for interference there could be  
8 no State disclosure legislation of this character?

9 MR. KNEEDLER: Yes. This, in our view, is -- is  
10 a violation of the Constitution. We think that the --  
11 that the longstanding efforts by the National Government  
12 to work out cooperative agreements with Germany and -- and  
13 other countries in Europe arising out of the Holocaust  
14 underscores vividly why this is a matter of national  
15 concern, but we would be making the same argument  
16 irrespective of that.

17 The -- the structure of our Constitution assigns  
18 to the National Government the resolution of foreign  
19 policy issues, and this is a -- this is a very major and  
20 longstanding foreign policy issue about how foreign  
21 countries should resolve claims about their own nationals.  
22 These policies were issued to European nationals. It may  
23 be that there are beneficiaries or policyholders in  
24 California now, but this is -- this is exclusively a  
25 matter for the National Government --

1                   QUESTION: Mr. Kneedler, could I ask you to  
2 comment on one aspect? As I understand it, one of the big  
3 insurance companies is an Italian company here that had --  
4 wrote policies throughout Europe. Does this -- does the  
5 executive agreement with Germany and Austria have any  
6 bearing on that -- on that?

7                   MR. KNEEDLER: Not, not directly, but -- but we  
8 do think that the executive agreement manifests the  
9 executive branch's policy with respect to the resolution  
10 of Holocaust era claims, and there are, I think, two  
11 principal conflicts with respect to the United States  
12 policy. One is the one, and I want to underscore this,  
13 the one that was mentioned with respect to the -- to the  
14 lists.

15                  ICHEIC is establishing essentially a registry,  
16 the very thing that California wants to do, but in a much  
17 narrower sense that has been negotiated specifically to  
18 avoid conflict between German privacy laws and -- and  
19 United States law, and what -- what -- through this  
20 matching exercise and through use of various lists of --  
21 of Holocaust survivor organizations, Jewish organizations,  
22 and census lists in Germany will be putting together a  
23 pretty comprehensive list of Holocaust survivors and  
24 insurance policies issued in Germany to disclose in a way  
25 that German authorities believe that list will not violate

1 German privacy laws. The California statute, Germany  
2 takes the firm position would violate German -- German  
3 privacy laws.

4 The other conflict is the whole thrust of the  
5 United States policy has been voluntary and cooperative,  
6 not mandatory and regulatory.

7 QUESTION: That's -- that's part of the problem  
8 I have with the executive agreement argument. It seems  
9 executory. It seems like something further is to be done,  
10 the United States will use its best efforts.

11 MR. KNEEDLER: Well, but the best efforts was,  
12 it will use its best efforts with State and local  
13 governments, in other words in direct communications,  
14 and -- and Assistant Secretary -- Secretary Eizenstat and  
15 others communicated --

16 QUESTION: Well, it could sign a supplemental  
17 agreement saying that we now agree that these laws should  
18 be superseded, just like we did in Pink.

19 MR. KNEEDLER: But this -- this agreement says  
20 that -- says two things, that it would be in the interest  
21 of the -- this is on page 155a of the -- of the petition  
22 appendix, that it would be in the interest of the two  
23 countries for the foundation to be the exclusive remedy  
24 for the forum of the resolution of claims, and on  
25 page 156a the agreement provides for the resolution of

1 claims through ICHEIC and supplemental procedures to be  
2 developed through ICHEIC, which includes the development  
3 of this -- of this list.

4 QUESTION: Mr. Kneedler, how does that relate to  
5 the litigation that was ongoing in the Eastern District of  
6 New York that I think involved a slave labor question?  
7 Did the United States take a position that that  
8 litigation, which involved people who moved here, or their  
9 survivors moved here after, that that was improper  
10 litigation?

11 MR. KNEEDLER: No. Those -- that did not  
12 involve State regulation, that involved private lawsuits,  
13 and there was a settlement which the United States  
14 encouraged. Again, this was part of the overall approach  
15 of the United States Government.

16 QUESTION: But you were -- one branch of this  
17 was that the -- the United States people who moved here  
18 after, there was no connection with them

19 MR. KNEEDLER: Right, and if -- if --

20 QUESTION: Well, those plaintiffs were all  
21 people who were certainly not in the United States when  
22 this happened.

23 MR. KNEEDLER: Right, and if -- if there are  
24 sufficient adjudicatory connections to the United States,  
25 that would be fine.

1 I wanted to mention --

2 QUESTION: What were they in that case?

3 MR. KNEEDLER: Well, if the, if the -- if the

4 defendant was doing business in the United States, if a --

5 if a suitable class action --

6 QUESTION: Was that so of the companies that

7 were defendants in that case?

8 MR. KNEEDLER: It wasn't -- it wasn't entirely,

9 but there was a settlement there. Some of these issues

10 were not definitively resolved.

11 QUESTION: My only question was, did the United

12 States take the position --

13 MR. KNEEDLER: I don't --

14 QUESTION: -- to stop that litigation --

15 MR. KNEEDLER: I -- I don't believe so.

16 QUESTION: -- because it was interfering with

17 the executive --

18 MR. KNEEDLER: I don't -- I don't believe so

19 specifically, but that was early in the -- in the -- in

20 this settlement effort.

21 I want to make two important points about the

22 United States, the -- the Constitution's assignment of

23 responsibility. The Constitution assigns responsibility

24 to the National Government for foreign relations and

25 foreign commerce because any retaliation or any adverse

1 impact will be felt by the Nation as a whole, not by the  
2 State that -- that triggers it, and this is a point that  
3 the Court has made in Japan Lines and numerous cases over  
4 the years, and this case illustrates that, because what is  
5 going on here is complicating. It is an impediment with  
6 our relations with European countries at a very sensitive  
7 time, and you have one State who -- that is not  
8 participating in all of those other efforts and doesn't  
9 have to balance the -- the insult that might arise from a  
10 statute like this against all of the other issues that are  
11 on the United States' plate in dealing with foreign  
12 Governments at a particular time.

13           This is the very reason, that the States don't  
14 have enough information and the full responsibility and  
15 the National Government has to look out for the interests  
16 of the Nation as a whole, why one State may not thrust  
17 itself into foreign policy like this. The due process and  
18 foreign commerce arguments are very complementary of that  
19 because they impose independent limitations on a State  
20 thrusting its regulatory power outside of not only its own  
21 borders but in this case outside the Nation's borders to,  
22 again, regulate through disclosure information about  
23 insurance policies in other countries. The very fact that  
24 Germany and California insurance regulations generally  
25 maintain privacy of insurance information shows that

1 questions of privacy and disclosure are matters of  
2 regulation.

3 QUESTION: Mr. Kneedler, would your argument be  
4 different if California, instead of providing this  
5 registry in public disclosure said, we want this  
6 information in order to decide whether we will allow these  
7 companies to do business in California?

8 MR. KNEEDLER: May I -- may I answer?

9 Yes, that would present a different question.  
10 We don't think that California could require this blanket  
11 disclosure. I think under international comity analysis,  
12 under this Court's decision in *Aerospace*, there may be  
13 some ability for the State to request certain relevant  
14 information --

15 QUESTION: Thank you, Mr. Kneedler.

16 MR. KNEEDLER: -- to investigate the  
17 suitability.

18 QUESTION: Mr. Kaplan, we'll hear from you.

19 ORAL ARGUMENT OF FRANK KAPLAN

20 ON BEHALF OF THE RESPONDENT

21 MR. KAPLAN: Mr. Chief Justice, and may it  
22 please the Court:

23 California's reporting statute addresses a  
24 despicable practice by insurance companies. That practice  
25 is the deception of elderly Holocaust survivors in the

1 refusal to provide them with basic policy information.  
2 That stonewalling has occurred for decades, and it  
3 continues today, and it continues in California.

4 California responded to this insurance --

5 QUESTION: Was the United States unaware of this  
6 problem when it negotiated an executive agreement?

7 MR. KAPLAN: Absolutely not, Justice Kennedy.  
8 The United States was well aware of California's efforts  
9 in this regard. The 1998 statute that was referred to  
10 earlier that was passed by Congress occurred about  
11 4 months after there was substantial testimony at a  
12 congressional hearing in which several State insurance  
13 commissioners --

14 QUESTION: No, my -- my question was, was  
15 United -- the United States unaware of -- of the  
16 wrongdoing that you're describing to us, or the -- or the  
17 inappropriate corporate response, and the answer is, I  
18 assume that they were, and they did nothing about it in  
19 the executive agreement, other than to have this very  
20 specific claims procedure.

21 MR. KAPLAN: That -- that's correct, Your Honor.

22 QUESTION: It's not as if California has  
23 uncovered something the United States didn't know about.

24 MR. KAPLAN: That's right. There were -- there  
25 were numerous hearings held by the National Association of



1 Insurance Commissioners that are matters of public record  
2 in 1997 and 1998. There was a congressional hearing in  
3 1998, again in the year 2000, 2001, 2002, all of which  
4 described in extensive detail the stonewalling that had  
5 been committed by survivor -- against survivors.

6 QUESTION: I -- I don't think -- the problem, at  
7 least for me, doesn't concern the desirability of the  
8 insurance company practice. I'll concede, absolutely it's  
9 totally undesirable.

10 The problem, I think, for your side in my mind  
11 is letters, for example, from the Deputy Under Secretary  
12 of State Eizenstat to California, the insurance  
13 commissioner and the Governor, about this very statute,  
14 where he's speaking in an official capacity to say that  
15 the statute has the unfortunate effect of damaging the one  
16 effective means now at hand to process quickly and  
17 completely unpaid insurance claims from the Holocaust  
18 period, that this law has already potentially damaged and  
19 could derail the settlement, et cetera, so the record is  
20 full of the Deputy Under Secretary of State who negotiated  
21 the settlement, Eizenstat, Ambassadors, the President,  
22 lists of -- in treaties, or executive agreements anyway,  
23 and you the -- and you know what I'm referring to. All  
24 right.

25 Why doesn't all of that, taken together,

1 constitute what Justice Harlan in dissent in *Zschernig*  
2 called a Federal policy in the foreign affairs area, so  
3 that if we take the dissent in *Zschernig* it would seem,  
4 hypothetically, for -- I'm trying to get your answer --  
5 that that long list of things shows a Federal policy such  
6 that Harlan and Stewart and the others, Harlan being at  
7 the extreme there, would have to say that California's  
8 statute is contrary to the Federal policy in this area,  
9 has an impact on foreign affairs of a negative nature  
10 through the conflict with the privacy statutes of  
11 Switzerland and Germany, and therefore is contrary to the  
12 foreign affairs power given to the executive branch by  
13 Article 2 of the Constitution.

14 All right, that's a long question, but those are  
15 the things that I'd like you very much to focus on from my  
16 point of view.

17 MR. KAPLAN: I will, Justice Breyer. Thank you.

18 We're dealing here with a State commercial  
19 regulation, and -- and, in fact, we're dealing with a --  
20 an area of State regulation that is a quasi-public  
21 business, insurance. It's long been regulated by the  
22 States. Congress delegated that authority to the States  
23 60 years ago, and the States have been in that business  
24 ever since. We believe that it's Congress, not the  
25 executive, that deals with matters of foreign commerce.

1                   QUESTION: Do you think that the -- the  
2 President cannot effectively preempt on foreign policy  
3 grounds by his action an agreement? Do you take that  
4 position?

5                   MR. KAPLAN: I -- I take the position, Your  
6 Honor, that in limited circumstances such as this Court  
7 dealt within the Pink and Belmont case, where you -- you  
8 had the recognition of a foreign Government, or in the  
9 Dames & Moore situation where you had a foreign policy  
10 crisis and you --

11                  QUESTION: I think you could answer yes or no.

12                  MR. KAPLAN: I apologize, Your Honor. Would you  
13 repeat the question? I apologize.

14                  QUESTION: Well, do you take the position that  
15 there can never be a preemption on foreign policy grounds  
16 by action of the President alone?

17                  MR. KAPLAN: No. I think it's possible that the  
18 President could do that in some limited circumstances that  
19 I've indicated, but those circumstances do not exist here.  
20 You have an expressly nonpreemptive executive agreement  
21 entered into after our law was passed. The -- the  
22 agreement was entered into after --

23                  QUESTION: Well, of course -- of course, if  
24 there were a preemptive -- I'm trying to bring you back to  
25 my question.

1                   MR. KAPLAN: Sure.

2                   QUESTION: I mean, if, in fact, we had a  
3 preemptive statute, or if we had a preemptive treaty, and  
4 I think, but I'm not sure, that an executive agreement is  
5 a kind of treaty, we would be dealing with the Supremacy  
6 Clause. We wouldn't be dealing with the foreign affairs  
7 power of the President.

8                   But the argument here is not the Supremacy  
9 Clause. Nobody claims that there is preemption. What  
10 they are claiming is, is that there is interference with,  
11 in Harlan's words, a Federal policy in the foreign affairs  
12 area, so if you're taking the position it has to be  
13 preemptive under the Supremacy Clause, then you're saying  
14 that all this material is totally irrelevant.

15                  Now, that's a possible position, but I want to  
16 know what your view is.

17                  MR. KAPLAN: Our view is that where the  
18 executive simply expresses an aspiration where -- which is  
19 the situation here, where he's indicated he'll use his  
20 best efforts, it's no different than --

21                  QUESTION: Oh, no, it's -- what I've read to you  
22 is not an aspiration. What I read to you were statements  
23 by the Deputy Secretary of State --

24                  MR. KAPLAN: Yes.

25                  QUESTION: -- that said the California statute

1 is totally contrary to the efforts that they were trying  
2 to make. I would -- of course, it's not legally saying  
3 California is illegal, and that's why I'm -- that's what I  
4 want you to explore.

5 MR. KAPLAN: The response, Justice Breyer, is  
6 this. Under the Barclay's decision, Congress is the  
7 primary authority when -- when dealing with --

8 QUESTION: I thought Barclay's had to do with  
9 the Commerce Clause.

10 MR. KAPLAN: It dealt with both the Commerce  
11 Clause and the foreign affairs power. The Zschernig case  
12 was taken for review by the Court. The Court did not  
13 dispose of that, and we believe that the foreign affairs  
14 issue is subsumed within the Barclay's decision when  
15 you're dealing with matters of State commercial  
16 regulation.

17 QUESTION: The -- Barclay's dealt with the  
18 Foreign Commerce Clause, and it made the point that the  
19 one voice in that area was Congress, not the President.  
20 It wasn't dealing -- that case did not deal with executive  
21 agreements, as I recall it, and I think I have a pretty  
22 good memory of that case.

23 MR. KAPLAN: Yes.

24 QUESTION: And that being so, you see, the --  
25 this is not the same for that reason, and also what we're

1 talking about here is, the Governments of Switzerland and  
2 the Governments of Germany, not private people, saying  
3 that if California enforces this statute, 98 percent of  
4 which has nothing to do with Holocaust victims, that is,  
5 the insurance policies don't, that is, what we're worried  
6 about under our privacy statutes is Gwendolyn finds out  
7 that Uncle Harry in England left all the money to Cecily  
8 instead of Gwendolyn and, of course, Cecily doesn't want  
9 that to occur. That's her private affair. That's why  
10 Germany and Switzerland have laws that say these matters  
11 are quiet, silent, private, and those Governments are  
12 telling us that your statute violates their privacy law  
13 because of its overbreadth.

14 MR. KAPLAN: Foreign Governments were  
15 extraordinarily upset about the -- the tax that was the  
16 subject of the Barclay's case. In fact, the British  
17 Government passed retaliatory legislation, and this --  
18 this Court found that that was not sufficient when there  
19 was no specific indication by Congress of an intent to bar  
20 the State law.

21 Here, you've had testimony by Deputy Secretary  
22 Eizenstat before Congress --

23 QUESTION: Yes, but -- but that's -- the  
24 Congress has principal concern with revenue and fiscal  
25 policy. It doesn't have principal concern with foreign

1 policy. It's very different.

2 QUESTION: And that was the reason that Barclay  
3 said you -- yes, you're right that the executive branch  
4 was in there saying look, all these foreign countries are  
5 upset, and we think that they have a good case. That was  
6 the executive position, and this Court said, but you're  
7 dealing in an area where Congress has the lead, holds the  
8 lead rein and not the President. That's the only point  
9 that -- we -- when we were talking about the Foreign  
10 Commerce Clause authority, that's a different question  
11 than the executive authority.

12 MR. KAPLAN: I -- I believe, Justice Ginsburg,  
13 the issue here is whether the President, by engaging in  
14 some negotiation, or expressing an aspiration as to what  
15 the President thinks the foreign policy ought to be, can  
16 trump a State regulation, and I think the consequence of  
17 that being so would be dramatic for matters of State  
18 regulation, because State regulation often has some sort  
19 of foreign implication to it, since we're dealing with a  
20 global economy and there are often foreign affiliates that  
21 are called upon to report on information, and if -- if  
22 that law was overturned because a foreign Government or  
23 the executive branch complained about that conduct, State  
24 regulatory law would effectively be thwarted.

25 QUESTION: Well, we can -- we can distinguish

1 those cases. As -- as pointed out by -- by your  
2 adversary, the difference in this law is that it is only  
3 directed at foreign Nations.

4 MR. KAPLAN: No -- no, Your Honor --

5 QUESTION: The -- the only -- the only  
6 disclosure required is -- is by affiliates abroad, isn't  
7 it?

8 MR. KAPLAN: Justice Scalia, that's not correct.  
9 The disclosures are required by California licensees,  
10 including companies that wrote insurance who were  
11 California licensees.

12 QUESTION: What disclosures are required by  
13 those licensees?

14 MR. KAPLAN: Disclosure of the name of the  
15 policyholder, where the policyholder lived, and the name  
16 of the beneficiary --

17 QUESTION: Yes.

18 MR. KAPLAN: -- and the status of the policy as  
19 to whether it's paid --

20 QUESTION: Of policies written by them?

21 MR. KAPLAN: Yes, or their affiliates. Or their  
22 affiliates. You have a situation, for example, where  
23 Generali has been licensed to do business in California  
24 since 1935 --

25 QUESTION: Policies written anywhere in the



1 world?

2 MR. KAPLAN: Written in Europe.

3 QUESTION: Ah. In other words, it's only  
4 directed at the regulation of foreign matters.

5 MR. KAPLAN: It's -- it's direct --

6 QUESTION: We can -- we can easily distinguish  
7 those -- those California's laws that -- that are general  
8 laws which have some indirect effect upon foreign affairs.  
9 This -- this thing is directed at foreign operations.

10 MR. KAPLAN: It's directed at a concern that  
11 California has by reason of the migration of -- of a large  
12 number of Holocaust survivors to the State and, in fact,  
13 the numbers that we've indicated in our submissions, Your  
14 Honor, are that there are at least 20,000 Jewish Holocaust  
15 survivors, and we don't know how many non-Jewish Holocaust  
16 survivors there are in the State.

17 QUESTION: And to that -- and for that reason  
18 California candidly made specifically reference to  
19 Nazi-controlled Germany, to present-day Germany, and to  
20 Europe, and to the Holocaust, none of which are of  
21 California's concern when it conflicts with the  
22 President's power to deal with those matters.

23 MR. KAPLAN: Justice Kennedy, I -- I guess I  
24 disagree. I think California has a substantial concern.  
25 It has a concern about people in the State who don't have

1 basic policy information that they're seeking.

2 QUESTION: Why don't they, because you see,  
3 as -- as it's been argued to us anyway, there are two ways  
4 of achieving this result. Way number 1 would have  
5 privately people whom you select, or trust, to go through  
6 the 10 million policies that were sold, pick out all those  
7 that might have to do with Holocaust victims, and make  
8 them public. I take it that's the route that Secretary  
9 Eizenstat negotiated.

10 The other way is California's way, which is, you  
11 make the whole 10 million public, so Gwendolyn and  
12 everybody else finds out everybody else's information,  
13 which happens to be a way that would violate the privacy  
14 laws of Switzerland and Germany.

15 Now, what interest does California have in doing  
16 it the second way, rather than the first way?

17 MR. KAPLAN: California has an interest in  
18 obtaining information that companies doing business in the  
19 State have so far exhibited they're unwilling to provide.  
20 By requiring the information that the law asks for, we  
21 will be sure that there's no further stonewalling  
22 occurring in the State, and that companies that want to do  
23 business in the State will not engage in that conduct in  
24 the future. It will also assure that people --

25 QUESTION: Well, it looks like the way this

1 scheme is written is, the -- the companies doing business  
2 in California have to provide the information even if  
3 they're unable to do so, even if when they go to an  
4 affiliated, or company related somewhere down the line,  
5 let's say in Germany or Austria, and ask for the  
6 information, and German or Austrian law prohibits that  
7 from being disclosed, then the California company will  
8 have its license yanked. Now, what kind of law is that?

9 MR. KAPLAN: It's the same kind of law, Your  
10 Honor, that the Europeans practice, too. We've cited  
11 something in the record. It's the European directive that  
12 appears at 2 E.R. 2747 to 2748. European regulators, just  
13 like State regulators, deal with situations all the time  
14 where there may be a conflict with a foreign law or the  
15 law of another State, and if States are -- are able to  
16 effectively regulate the business that -- that is going on  
17 in the State and the companies doing business here, they  
18 have to have the right to be able to apply their law.

19 Otherwise, there could be a law established  
20 in -- in the Cayman Islands that established a privacy  
21 right for companies doing business in the State, and a --  
22 a company could assert that the law of a foreign country  
23 precluded that company from -- from complying with a State  
24 regulatory law, and we don't think that's how the law  
25 works.

1           QUESTION: Well, are -- are you saying that  
2 there is no way that the United States could act that  
3 would, in fact, have that effect?

4           MR. KAPLAN: I'm sorry --

5           QUESTION: I mean, if -- if Congress passed a  
6 statute in effect condemning what California had done, not  
7 repealing McCarran-Ferguson but simply condemning it,  
8 or -- or authorizing the President specifically to make  
9 what the -- the agreements that the President has made on  
10 an executive basis now, are you saying that neither of  
11 those acts in effect would preclude California from doing  
12 what it is doing under this statute?

13          MR. KAPLAN: No, Justice Souter. I think you'd  
14 have a serious preemption problem there under the --

15          QUESTION: Okay, so it -- it boils down, then,  
16 to an argument about the executive power alone, is that  
17 correct?

18          MR. KAPLAN: Yes, it does. It boils down to a  
19 separation of --

20          QUESTION: Well, is -- is your argument -- and  
21 I -- I will be quiet after this question and let you say  
22 whatever you wanted, but what I want you to focus on is --

23          MR. KAPLAN: Yes.

24          QUESTION: -- do you take the position that  
25 whenever the executive, let's say, agreement by

1 executive -- action by executive agreement is, in the  
2 opinion of a State regulator, inadequate to address the  
3 regulatory problem as the regulator sees it, that the  
4 regulator is free, in effect, to disregard the policy in  
5 the executive agreement? Do you take that position?

6 MR. KAPLAN: I do unless the executive agreement  
7 is preemptive and unless there's something else about the  
8 executive agreement that would give it preemptive quality.  
9 Clearly, the executive agreement --

10 QUESTION: Well, are we talking about form of  
11 words? If the President and executive agreements had in  
12 effect said, and no State can do anything which is  
13 inconsistent with this policy, would your position be  
14 different?

15 MR. KAPLAN: It might be, because I think you'd  
16 be dealing with a situation there where arguably it would  
17 be a preemptive executive agreement which might carry the  
18 same status as a -- a statute by Congress.

19 QUESTION: Why does he have to --

20 QUESTION: What if Congress had -- had ratified  
21 what the President did so that it's no longer just an act  
22 of the President but an act of the President approved by  
23 Congress? Would your position be any different?

24 MR. KAPLAN: Your Honor, then you might have a  
25 situation like *Dames & Moore*, where there was a pattern of

1 congressional acquiescence in the kind of executive  
2 agreements that occurred there.

3 QUESTION: Well, but this isn't -- this isn't  
4 just acquiescence in a -- in an executive agreement. This  
5 is Congress saying, we approve and ratify it.

6 MR. KAPLAN: Then -- then you might have the  
7 kind of specific disapproval of State action that this  
8 Court talked about in the Barclay's case. You don't --

9 QUESTION: Well, why would it be any more  
10 specific than this is? If the executive agreement is not  
11 expressly preemptive, and Congress passes a statute  
12 saying, we agree with it; we think the executive agreement  
13 is right on the money, it wouldn't, in fact, be any more  
14 restrictive or less restrictive than it is now.

15 MR. KAPLAN: I -- I think the difference, Your  
16 Honor, is then you have Congress acting, you have Congress  
17 speaking, which is what this Court in Barclay's thought  
18 was the appropriate actor to speak in matters of foreign  
19 commerce.

20 QUESTION: Congress makes laws. The President  
21 doesn't make laws. I'm not sure that the President can  
22 make an executive agreement preemptive which is not  
23 preemptive in its nature. I mean, all -- all he can say  
24 is, is there any -- any State action which is inconsistent  
25 with our foreign policy expressed in this agreement is

1   invalid, but that's not -- not something that occurs by  
2   reason of his pronouncement. It occurs, if it occurs at  
3   all, by reason of the Constitution, automatically, so it  
4   really doesn't matter whether he says that or not. His  
5   saying it cannot make it happen, and his not saying it, I  
6   think, cannot not make it happen.

7               MR. KAPLAN: I agree.

8               QUESTION: You shouldn't agree.

9               (Laughter.)

10              MR. KAPLAN: Then I won't.

11              (Laughter.)

12              QUESTION: May I ask you whether you think  
13   that --

14              QUESTION: I mean, if you agree -- the problem  
15   is, if you agree with that, that you're then going to say  
16   on the tough kinds of things that you raised, how do we  
17   know if this is a Cayman Island situation fake, or how do  
18   we know if it's a really genuine important policy of a  
19   foreign Government, say, the privacy policy?

20              There are one of two people who can decide that,  
21   the Secretary of State or, say, the Governor or Insurance  
22   Commissioner of California and the problem for you, I  
23   think, is that the Constitution seems to give the  
24   authority to decide that to the Secretary of State and not  
25   the Insurance Commissioner of California because it's a

1 foreign affairs matter.

2 MR. KAPLAN: I -- I think actually the -- the  
3 Constitution gives that authority to Congress, and if the  
4 executive branch --

5 QUESTION: You mean, Congress is supposed to run  
6 foreign affairs on every -- all of these matters?

7 MR. KAPLAN: Congress is supposed to run  
8 foreign -- matters of foreign commerce, including  
9 objections by foreign Governments about the way States are  
10 behaving. If they -- if they think they're behaving  
11 badly, then the executive can go to Congress, lodge a  
12 complaint, and if Congress is so inclined, Congress can do  
13 something about it.

14 Clearly, here, Congress has done nothing about  
15 it. In fact, Congress has -- has encouraged the State  
16 statute. There was testimony before Congress. Congress  
17 didn't say stop doing that. Congress said, we bless what  
18 you've done, we think you're doing a good job, keep doing  
19 it.

20 QUESTION: In what way did Congress say this?

21 MR. KAPLAN: Congress said that in --

22 QUESTION: I mean, was it a committee report, or  
23 an act of Congress?

24 MR. KAPLAN: There were statements made by -- by  
25 Members of Congress in response to testimony that was



1 given, including the 2002 hearing --

2 QUESTION: Well, you're -- you're saying that is  
3 the voice of Congress?

4 MR. KAPLAN: No, I'm not. I'm saying the  
5 McCarran-Ferguson Act is the voice of Congress, the --

6 QUESTION: Well, but you just said a moment ago  
7 that Congress had -- had approved this.

8 MR. KAPLAN: Yes. Congress has approved  
9 it either implicitly or directly through the  
10 McCarran-Ferguson Act, which gives the States authority to  
11 act in matters of insurance. In the Holocaust Commission  
12 Act Congress, in effect, endorsed State action to deal  
13 with Holocaust insurance matters.

14 QUESTION: Is it not true that the -- what the  
15 Congress endorsed there was presidential leadership, not  
16 State action?

17 MR. KAPLAN: But in -- but in that statute  
18 Congress recognized that States were acting in this area.  
19 The statute said that the commission there should  
20 coordinate its activities with the States, and it asked  
21 the National Association of Insurance Commissioners to  
22 pass -- to prepare a report, rather, on the activities of  
23 foreign and domestic insurance companies doing business in  
24 this country, and the Ninth Circuit found, and we believe  
25 it was reasonable for it to find that Congress

1 anticipated, understood, and -- and knew that -- that the  
2 States would be acting pursuant to State law and might  
3 have to seek information from entities located outside the  
4 borders of this country.

5 QUESTION: Mr. Kaplan, there -- there was a  
6 reason, I think, why the Federal Constitution gave the  
7 power to conduct foreign affairs not to the Congress but  
8 to the executive, and the reason was that Congress is not  
9 a very good instrument for that purpose, that there are  
10 all sorts of matters that come up where -- this being one  
11 of them, where it is very difficult for a Member of  
12 Congress to cast a vote against Holocaust victims. That's  
13 what we're talking about.

14 Why -- why should the situation exist that,  
15 although the President has the responsibility without  
16 Congress for conducting foreign affairs, his conduct of  
17 foreign affairs can be frustrated by the States unless  
18 Congress comes to his assistance? Why -- why should that  
19 follow?

20 It would seem to me it should follow that he can  
21 protect this foreign affairs field on his own, and does  
22 not have to call for the assistance of Congress.

23 MR. KAPLAN: We believe that that would lead  
24 to -- to a situation where, any time the executive decides  
25 that there's a matter of -- of foreign policy concern to

1 him, legitimate State regulation would have to take a back  
2 seat to that, so you have, in essence, presidential  
3 lawmaking without any --

4 QUESTION: Well --

5 MR. KAPLAN: -- any sort of accountability that  
6 you normally have --

7 QUESTION: It just shifts -- it just shifts the  
8 inertia, really. Congress is the 900-pound gorilla. If  
9 it doesn't like what the President is doing in the field  
10 of foreign affairs, it can stop him as quickly as it  
11 likes. All it has to do is pass a resolution cutting off  
12 any funds for that purpose, cutting off any funds for  
13 this -- for further negotiations about this institution.  
14 Congress always has the trump card.

15 But why should we -- should we require Congress  
16 to protect the President from the States? Why shouldn't  
17 he have an automatic protection from it?

18 MR. KAPLAN: Because except in limited areas  
19 such as Zschernig, in Belmont, in Pink, and in Dames &  
20 Moore, where you have a foreign policy crisis or a  
21 recognition, ordinarily I don't believe that this Court  
22 wants the executive to go off and announce foreign  
23 policy issues that will have effect on State regulation.  
24 It affects issues of federalism and separation of powers.

25 Here, in fact, it was the State regulators that

1   formed ICHEIC. This was a creature of the State  
2   regulators, and after 4 years of not having done anything,  
3   the State regulators decided that enough's enough, these  
4   people are not getting the information. There were 77,000  
5   claims submitted. Only 700 offers were made, less than  
6   1 percent. These people are in a line to nowhere, because  
7   without this information they can't make a claim to  
8   ICHEIC. They can't even call the insurance company,  
9   because they don't even know which insurance company --

10           QUESTION: Mr. Kaplan, we've been told that  
11   that -- that's past history --

12           MR. KAPLAN: It's not.

13           QUESTION: -- as a result of these recent  
14   efforts, that there's much more disclosure coming out of  
15   ICHEIC.

16           MR. KAPLAN: There's not, Your Honor. There --  
17   there's been -- there's expected to be some disclosure  
18   from German companies. We don't know what that's going to  
19   be.

20           The -- insurance was written all over Europe.  
21   The German market was only a small part of this European  
22   market. Generali wrote insurance all over Eastern Europe,  
23   and all the countries in Eastern Europe. They have a list  
24   now sitting in Trieste, Italy, with 340,000 names on it.  
25   They could turn that list over tomorrow. They've refused.

1 There's no privacy issue involving Generali. There's no  
2 Italian law that precludes it. They've simply refused to  
3 turn it over.

4 These survivors do not have access to this  
5 information. They do not know whether their policies were  
6 written by Generali or some other country -- company  
7 because they simply don't have the information that  
8 enables them to even think about making their claim.

9 This is not a claims-paying statute. We're not  
10 asking these companies to pay twice. Survivors would be  
11 grateful if they paid once. There's nothing whatsoever in  
12 this statute that -- that deals with the legitimacy of  
13 these claims, whether they're rightful or not. It simply  
14 gives these people information that allows them to make a  
15 decision as to whether they want to pursue a claim. They  
16 don't have that ability now.

17 If there are no further questions I would --

18 QUESTION: Yes, I have one question, if I might.

19 MR. KAPLAN: Yes, sir.

20 QUESTION: I would draw a distinction in my  
21 question between Eizenstat's letter, which in effect says,  
22 please don't enforce these subpoenas because that will  
23 louse up our negotiations and so forth. Put that to one  
24 side, and -- and I ask you if you would agree or disagree  
25 with the suggestion that if you do enforce the subpoenas

1 you will violate a -- a provision of one of the two  
2 executive agreements?

3 MR. KAPLAN: I don't think there's any violation  
4 of the executive agreements. Those agreements simply  
5 provide, with respect to State regulatory action, that the  
6 United States will use its best efforts. To me, that's a  
7 recognition and an understanding that the Federal  
8 Government knew that insurance is a State matter, a State  
9 regulation. That's all that the Federal Government was  
10 doing. It said, we'll try our best to get the States to  
11 back off, we're making no promises to you because we don't  
12 think we have the authority. We believe in matters of  
13 insurance it's the States that have that authority.

14 QUESTION: Or it could be an acknowledgement by  
15 the President that this is a matter that ultimately  
16 depends upon whether his foreign affairs power is -- is --  
17 trumps the State action in this field, and -- and it could  
18 be a commitment by him to come to this Court to ask us to  
19 make that declaration, which is not a declaration that he  
20 can authoritatively make.

21 MR. KAPLAN: On -- on page 17 of the Solicitor  
22 General's brief in this matter the Solicitor General takes  
23 the position that even as to the executive agreements it  
24 only would have some preemptive effect, if it has any at  
25 all, as to the companies and the countries where the

1 agreements were made, so I believe the Solicitor General  
2 acknowledges it wouldn't have any preemptive effect  
3 whatsoever for the Italian companies, the Swiss companies,  
4 or companies anywhere else in Europe.

5 QUESTION: What about the letter? I -- I --  
6 that's why I asked the question at the beginning.  
7 Eizenstat's letter -- it's on 99a of the appendix. I -- I  
8 didn't know whether that's limited to the subpoena part or  
9 whether it had to do with the disclosure, or whether it's  
10 referring to the statute as a whole. When I read it,  
11 honestly, I thought it was the, probably the statute as a  
12 whole, but I don't know. Do you have any light to shed on  
13 that?

14 MR. KAPLAN: I -- I do not, Your Honor. I don't  
15 recall the --

16 QUESTION: You think it could be the statute as  
17 a whole he's talking about?

18 MR. KAPLAN: It could well have been.

19 QUESTION: Yes, all right.

20 QUESTION: Thank you, Mr. Kaplan.

21 MR. KAPLAN: Thank you very much.

22 CHIEF JUSTICE REHNQUIST: Mr. Geller, the  
23 marshal says you have 5 seconds left, and under the  
24 principle of --

25 (Laughter.)

1                   CHIEF JUSTICE REHNQUIST:   -- de mi ni mi s non  
2   curat lex the case is submi tted.  
3                   (Whereupon, at 11:08 a.m , the case in the  
4   above-entitled matter was submi tted.)  
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