Bank Markazi v. Peterson: Separation of Powers Takes a Backseat to Foreign Policy

I. OVERVIEW

The Iranian Government's involvement in the 1983 bombing of a United States Marine barracks in Beirut, Lebanon, led to a series of lawsuits brought by the victims of the bombings, their surviving family members, or estate representatives, under the terrorism exception of the Foreign Sovereign Immunities Act of 1976 (FSIA).[1] The plaintiffs brought these suits in the United States District Court for the District of Columbia.[2] The sixteen groups of plaintiffs obtained billion-dollar judgments, most of which remain unsatisfied, by Iran's default.[3] To enforce their respective judgments, the plaintiffs registered their complaints in the United States District Court for the Southern District of New York, and moved under Federal Rule of Civil Procedure Rule 69, seeking the turnover of approximately $1.75 billion in assets from a New

1. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1319 (2016). The plaintiffs individually numbered over 1000 and were divided into sixteen different groups. *Id.*

2. *Id.*

3. *Id.* at 1319-20. A problem with proceedings under the FSIA terrorism exception is that plaintiffs "have often faced practical and legal difficulties" at the enforcement stage. *Id.* at 1317-18.

York bank account allegedly owned by Bank Markazi, the Central Bank of Iran.[4]

While the turnover proceeding was ongoing, President Obama issued Executive Order No. 13599, "blocking [a]ll property and interests in property of any Iranian financial institution, including the Central Bank of Iran, that were presently held in the U.S."[5] Additionally, Congress passed § 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, a separate action from Executive Order No. 13599, that provided that once a court makes specific findings, certain financial assets will be subject to execution for damages awarded to plaintiffs against Iran in cases involving acts of terrorism and FSIA's related exception.[6] Under the Congressional statute's second provision, the specific assets owned by Bank Markazi in its New York account are available for execution by the holders of terrorism judgments against Iran.[7]

Bank Markazi argued, *inter alia*, that the Court lacked subject-matter and personal jurisdiction because the assets that were allegedly in Bank Markazi's account were not actually owned by the bank or located in New York.[8] Bank Markazi also stated that Congress's enactment of § 502 invaded the power of the courts.[9] The District Court disagreed with these contentions and found against Bank Markazi.[10] On appeal to the Second Circuit, Bank Markazi argued § 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012 also violates the separation of powers doctrine by dictating the court's outcome in a

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4. *Id.* at 1320. The turnover proceeding was initiated by the plaintiffs from Peterson v. Islamic Republic of Iran, 264 F. Supp. 2d 46 (D.D.C. 2003), and the rest of the plaintiff groups joined later. *Id.*

5. *Id.* at 1318 (quoting Exec. Order No. 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012)). President Obama issued this order using powers granted by the International Emergency Economic Powers Act (IEEPA). *Id.* The IEEPA allows the Executive to freeze the assets of a foreign enemy state in the United States. *Id.* Assets blocked under the IEEPA can be executed to satisfy judgments against a terrorist party, as they were here, according to the Terrorism Risk Insurance Act of 2002. *Id.*

6. *Id.* at 1318-19.

7. *Id.* at 1319.

8. *Id.* at 1321. The assets located in the New York account were owned by Clearstream Banking S.A., a Luxembourg-based company. *Id.* Clearstream held Bank Markazi's bonds and deposited the interest earned in Bank Markazi's Clearstream account. *Id.* Then, at Bank Markazi's request, the interest payments were deposited into a third party bank, Banca UBAE S.p.A., before finally being remitted to Bank Markazi. *Id.*

9. *Id.* at 1322.

10. *Id.* The District Court noted that the statute was not meant to undermine the court system's power but simply change the applicable law for future cases. *Id.* The District Court also reminded the Bank that the issue of liability for Iran had already been decided, and the only issue that they were deciding on is the execution of the judgments using the assets present. *Id.*

particular case.[11] The Second Circuit similarly found against Bank Markazi, holding that § 502 did not compel any judicial findings, but instead, that it "retroactively and permissibly changed the applicable law."[12] The Supreme Court granted certiorari to consider the separation of powers issues presented by Bank Markazi.[13] The Supreme Court of the United States *held* that § 502 does not violate the separation of powers principle. *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

II. BACKGROUND

A. The Foreign Sovereign Immunities Act and Its Exceptions

The FSIA sets forth the general rule that U.S. courts, both federal and state, are not granted personal or subject-matter jurisdiction over foreign states unless the claim falls within an FSIA immunity exceptions.[14] Originally a common law doctrine, the Supreme Court established foreign sovereign immunity in its decision in *Schooner Exchange v. McFadden*.[15] Over ninety years later, the Court's decision in *Underhill v. Hernandez* introduced the act of state doctrine, which "extends immunity to all acts of a foreign state" that occur within the territorial bounds of a sovereign.[16] The act of state doctrine includes personal protection for individuals as long as they act within their capacity as a government official.[17] In the 1930s and 1940s, the Court began to "yield to the Executive in cases involving foreign affairs" and established a two step procedure, where a foreign state could choose either to petition the State Department or utilize the courts for an immunity determination.[18] In 1952, the State Department issued the Tate Letter, announcing that immunity would no longer be extended to foreign sovereigns for actions that were "considered private, commercial, or nonofficial."[19] The Tate Letter's language was vague and strained the two step system, and as a result, the State Department struggled to make

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11. *Id.*
12. *Id.*
13. *Id.*
14. Luke Ryan, Comment, *The New Tate Letter: Foreign Official Immunity and the Case for a Statutory Fix*, 84 FORDHAM L. REV. 1773, 1794 (2016).
15. *Id.* at 1788. *Schooner* was an action brought by an American to recover their vessel that had been commandeered by the French Navy. The Supreme Court affirmed the district court's dismissal of the claim and established the doctrine of absolute immunity for foreign sovereigns. *Id.*; Schooner Exchange v. McFadden, 11 U.S. 116, 146-47 (1812).
16. Ryan, *supra* note 14, at 1789.
17. *Id.*; *see also* Underhill v. Hernandez, 168 U.S. 250, 252 (1897).
18. Ryan, *supra* note 14, at 1789-90.
19. *Id.* at 1790-91.

impartial immunity decisions while the courts grappled with applying a clear standard to their rulings.[20] This system remained in place until the creation of the FSIA in 1976, when Congress sought to both clarify the law by stating the precise circumstances under which a party can bring a suit against a foreign sovereign as well as eliminate the previous disarray of common law necessitating the statute.[21] The FSIA eliminated the previous two step procedure; by affording immunity to most sovereign nations. Its construction is similar to the act of state doctrine but differs in that it also lists acts considered as exceptions to immunity.[22]

The Supreme Court has consistently stated that the FSIA is the sole jurisdictional basis over a foreign state in U.S. courts.[23] The FSIA contains an exception for terrorism that lists certain categories of conduct considered acts of terrorism.[24] The conduct is defined as: "the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency."[25] In order to satisfy this exception to the statute, plaintiffs must "prove a theory of liability under which defendants cause the requisite injury or death."[26] A default judgment may be entered against a foreign defendant that fails to appear before the court, but before the judgment can be granted the plaintiff must present "evidence satisfactory to the court."[27]

B. The International Emergency Economic Powers Act

The United States has a longstanding history of using economic sanctions as a tool of foreign policy.[28] In 1917, the Trading with the

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20. *Id.* at 1791-92.
21. *Id.* at 1792.
22. *Id.* at 1793-94.
23. *See* OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 392-93 (2015); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989).
24. *See* 28 U.S.C. § 1605A(a)(1) (2012). It is important to note that on September 28, 2016, in recognition of the growing international threat of terrorism, Congress enacted the Justice Against Sponsors of Terrorism Act. *See* Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(b) 130 Stat. 852 (2016). This Act was designed to provide the broadest possible constitutional basis to bring claims against foreign organizations or persons that engage in or aid acts of terrorism against the United States. *Id.*
25. 28 U.S.C. § 1605A(a)(1).
26. Flanagan v. Islamic Republic of Iran, 87 F. Supp. 3d 93, 115 (D.D.C. 2015) (citing Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52, 73 (D.D.C. 2010)).
27. *Id.* at 114.
28. Barbra J. Van Arsdale, Annotation, *Validity, Construction, and Operation of International Emergency Economic Powers Act, 50 U.S.C.A. §§ 1701 to 1707*, 183 A.L.R. Fed. 57, § 2 (2003).

Enemy Act (TWEA) granted the Executive the power to "investigate, regulate, prevent or prohibit transactions in times of war or declared national emergencies."[29] In 1977, Congress introduced the International Emergency Economic Powers Act (IEEPA) as an amendment to the TWEA for the purpose of guiding the Executive's authority over international economic transactions during wartime or national emergencies.[30] The amendment narrowed the wider range of powers that the TWEA had previously provided to the Executive.[31] As a result, new powers could be utilized to confront any unusual or substantial threat to the U.S. economy, its national security, or foreign policy, as long as the threat's source is located, either "in whole or in substantial part," outside of the United States and the Executive has declared a national emergency in response to the threat.[32]

In 2001, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act), which further expanded the Executive's powers. This statute authorized the Executive to block property transactions during a pending investigation.[33] President Obama exercised these powers by issuing Executive Order No. 13599, which blocked all assets of the Government and Central Bank of Iran in the United States.[34] Pursuant to the requirements of IEEPA, the President issued this order in conjunction with the national emergency declared by President Clinton's earlier Executive Order No. 12957.[35] In Executive Order No. 12957, President Clinton declared the Iranian Government actions were "an unusual and extraordinary threat to the national security, foreign policy, and the economy of the United States," declaring a national emergency as a result of this assessment.[36]

The courts have addressed many challenges to IEEPA, including challenges to its operation, validity, and constitutionality.[37] In *Dames &*

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29. *Id.*
30. *Id.*
31. *See id.*; 50 U.S.C. §§ 1701-1702 (2012).
32. Van Arsdale, *supra* note 28, § 2.
33. *Id.*; *see* Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001, Pub L. No. 107-56, § 105, 115 Stat. 272 (2001).
34. *See* Exec. Order No. 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012) (ordering when an asset is blocked in the United States, it cannot be removed from the United States and placed in or returned to another country).
35. *Id.* President Clinton declared a national emergency to prevent all trading with Iran in response to Iran's growing nuclear capabilities. *Id.*
36. *See* Exec. Order No. 12957, 60 Fed. Reg. 14615 (Mar. 15, 1995).
37. Van Arsdale, *supra* note 28, at § 2.

Moore v. Reagan, the Supreme Court upheld the President's power to suspend pending claims in U.S. courts made by U.S. citizens against Iran, pursuant to Executive Order No. 12294, in order to implement a hostage release agreement with Iran.[38] The Court also found that IEEPA authorized the President to nullify attachments and direct individuals possessing blocked Iranian funds to remit the funds to the Federal Reserve Bank for an ultimate return to Iran.[39] In *Holy Land Foundation for Relief & Development v. Ashcroft*, the U.S. Court of Appeals—D.C. Circuit held that the Treasury Department did not violate a plaintiff's due process rights by designating the plaintiff a Specially Designated Global Terrorist (SDGT).[40] This designation is necessary in order to block a party's assets under IEEPA, as the Holy Land Foundation's strong ties to Hamas warranted this designation.[41] In denying certiorari, the Supreme Court decided that the District of Columbia Circuit ruling was clear on the issue.[42]

C. Section 201 of The Terrorism Risk Insurance Act of 2002

Pursuant to the FSIA, and subject to U.S. international commitments at the time of FSIA's enactment, a foreign state's property located within the United States is "immune from attachment, arrest, and execution," unless a statutory provision states otherwise.[43] An exception to this immunity allows applicable property located in the United States to be executed or attached post-judgment if the judgment results from a claim the terrorism exception provides no immunity for a foreign government.[44] The attachment or execution can occur regardless of whether the property has current or past involvement with the actions at the basis of the claim.[45] The Terrorism Risk Insurance Act of 2002 (TRIA) "created a new exclusion from immunity for certain assets" that are designated as blocked resources of a terrorist party, their agents, and their intermediaries.[46] In order for the assets of a foreign defendant to be

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38. Dames & Moore v. Reagan, 453 U.S. 654, 686 (1981).

39. *Id.* at 674-75.

40. Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 167-68 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004).

41. *Id.* at 159-60.

42. Van Arsdale, *supra* note 28, § 7.

43. Jill M. Marks, Annotation, *Construction and Application of § 201 of the Terrorism Risk Insurance Act of 2002, Public Law 107-297, § 201, 116 Stat. 2337*, 190 A.L.R. Fed. 155, § 2(a) (2003).

44. *Id.*

45. *Id.*

46. *Id.; see also* Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201(a), 116 Stat. 2337 (2002) (codified in a note of 15 U.S.C. § 6701).

executed post-judgment under § 201, a claimant must show they have "obtained a judgment against a 'terrorist party,' as defined in the statute," and that the provisions of § 201 do not otherwise exempt the defendant.[47] Additionally, the plaintiff has a duty to show that the assets fit the statutory definition of blocked assets, and that the assets are not U.S. government property, as federal sovereign immunity bars individual recovery of such assets.[48]

The only instance that the Supreme Court addressed the Terrorism Risk Insurance Act of 2002 was in *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*.[49] Elahi obtained a $312 million judgment against the Iranian Government for its involvement in the assassination of his brother.[50] Separately, the Iranian Government held an arbitral judgment against a U.S. military supplier for $2.8 million, and Elahi sought to use the money from Iran's award in the separate judgment to satisfy his own judgment under TRIA.[51] The Court reversed the Ninth Circuit's decision that the arbitral judgment was actionable under TRIA, ruling instead that the asset was not blocked at the time of that decision, and therefore could not be used to execute the plaintiff's judgment.[52]

D. The Iran Threat Reduction and Syria Human Rights Act of 2012

The United States has been imposing sanctions on Iran since the Iranian Revolution in 1979.[53] The Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRSHA), along with similar executive orders regarding Iran, have a wide range of effects including "effects on Iran's economy, family remittances, education of Iranians abroad, and the availability and cost of imported goods."[54] ITRSHA disparagingly affects Iran's energy output, which directly impacts Iran's manufacturing capabilities and transportation industry.[55]

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47. Marks, *supra* note 43, at § 2(a); *see also* Terrorism Risk Insurance Act of 2002 § 201(d)(4).

48. Marks, *supra* note 43, at § 2(a).

49. *See generally* Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, 129 S. Ct. 1732 (2009); *see also* Marks, *supra* note 43, at § 5(b).

50. *Elahi*, 129 S. Ct. at 1737.

51. *Id.*

52. *Id.* at 1745. TRIA requires that in order for assets to be executed post-judgment, they must meet TRIA's definition of a blocked asset. Since the assets here were not blocked at all, they could not be used to execute Elahi's judgment. *Id.*

53. Joy Gordon, *Crippling Iran: The U.N. Security Council and the Tactic of Deliberate Ambiguity*, 44 GEO. J. INT'L L. 973, 974 (2013).

54. *Id.*

55. *Id.*

After ITRSHA's enactment, Congress called for "prompt enforcement of the current multilateral sanctions regime with respects to Iran" and "expanded cooperation with international sanctions enforcement."[56] Congressional statements expressed continued dissatisfaction with the rest of the world for failing to comply with either the United Nations or the United States' rules.[57] The design of ITRSHA's sanctions against Iran's economy intended to adversely affect Iran's ability to engage in international financing and banking operations, as well to produce weapons.[58] The first sanction denied Iran access to any sovereign debt markets.[59] The second financial sanction blocked immunity for any foreign person identified as an "official, agent, or affiliate," of the Iranian Royal Guard and limited the ability of these officials, agents, or affiliates to aid or conduct certain transactions with the Iranian Royal Guard.[60]

Section 502, the most recent addition to IRTA, concerns U.S. interests in certain financial assets of Iran.[61] Section 502 allows the asset's execution or attachment in order to satisfy certain judgments if the assets: 1) are "held in the United States for a foreign securities intermediary doing business in the United States"; 2) are "a blocked asset (whether or not subsequently unblocked) that has property described in subsection (b)"; and 3) are "equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or related intermediary holds abroad."[62] Subsection 502(b) lists the descriptive

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56. Raj Bhala, *Fighting Iran with Trade Sanctions*, 31 ARIZ. J. INT'L & COMP. L. 251, 313 (2014).

57. *Id.*

58. *Id.* at 328. Aside from direct sanctions on Iran's ability to operate in the world of international finance, ITRSHA also barred Iran from circumventing direct sanctions by prohibiting other countries from engaging in joint ventures for Iranian petroleum resource development above $20 million. *Id.* at 316. These sanctions applied retroactively to any joint venture that occurred from January 1, 2002, through ITRSHA's enactment. *Id.* at 317. "The only way to avoid sanctions was to terminate the [joint venture] within 180 days of [ITRSHA's] enactment." *Id.*

59. *Id.* at 329; *see also* Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 213(a)(1)-(2), 126 Stat. 1214 (2012) (codified as amended in scattered sections of 22 U.S.C.). This sanction was designed to block Iran from funding Hezbollah and Iran's own nuclear armament production using foreign capital. Bhala, *supra* note 56, at 328.

60. Bhala, *supra* note 56, at 329; Iran Threat Reduction and Syria Human Rights Act § 302(a)(1)(A)-(B). Essentially, this sanction expanded sanctions to individuals that are up to two steps removed from the Iranian Royal Guard: 1) the agent, 2) any foreign individual that supports the agent. Bhala, *supra* note 56, at 331.

61. Iran Threat Reduction and Syria Human Rights Act § 502.

62. *Id.* § 502(a)(1)(A)-(C).

property that was the subject of *Peterson v. Islamic Republic of Iran*.[63] Congress clarified that the extent of the attachment or execution is not allowed to violate constitutional rights, nor Article III standing, including those rights pertaining to foreign sovereign immunity.[64]

E. Separation of Powers

The separation of powers between the Executive, Legislative, and Judicial branches of the U.S. government can be described as an arena with three overlapping zones, a governmental triptych of sorts.[65] The manner in which the Presidential and Congressional powers overlap was famously articulated by Justice Robert H. Jackson.[66] Where the two branches overlap in areas of authority, presidential actions can be "void unless plainly authorized by Congress . . . valid unless plainly prohibited by Congress," or Congress may be silent on the matter.[67] The Supreme Court's role is to invalidate legislative and executive actions that it determines irreconcilable with the Constitution.[68] The Court's determination in these matters prevents Congress from playing an interpretive role in determining the extent of the constitutionally derived authority of the branches of government.[69]

In *Dames & Moore v. Reagan*, the Court described the separation between Presidential, Congressional, and its own powers regarding foreign affairs.[70] President Carter implemented several executive orders, ratified by President Reagan, that nullified attachments and liens on Iranian assets in the United States, directed these assets' transfer back to Iran, and suspended claims against Iran presented to the International Claims Tribunal.[71] The petitioners argued that the executive orders were beyond the President's statutory and constitutional powers.[72] The Court disagreed with this contention, finding that the executive orders nullifying attachments and directing the transfer of assets were consistent with IEEPA and TWEA, and thus fell within the second category of

63. *Id.* § 502(b).
64. *Id.* § 502(a)(1); *see* U.S. CONST. art. III.
65. Laurence H. Tribe, *Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine,* 126 YALE L.J. F. 86, 86 (2016) (explaining a triptych is a work of art that consists of three hinged panels that can be displayed either open faced or folded shut).
66. *Id.*
67. *Id.* at 92.
68. *Id.* at 89.
69. *Id.* at 90.
70. Dames & Moore v. Reagan, 453 U.S. 654, 659-60 (1981).
71. *Id.* at 663-66.
72. *Id.* at 667.

Presidential authority described by Justice Jackson.[73] The Court also determined that the petitioner read the FSIA incorrectly and asserted that the executive orders divested the courts of jurisdiction.[74] The Court found that the executive orders simply suspended claims and did not divest the courts of jurisdiction, and that the Executive's ability to affect the substantive law governing a lawsuit was acquiesced to by Congress.[75]

In *United States v. Klein*, the Court addressed the constitutionality of statutes passed by Congress during the Civil War that pertained to the "forfeiture, confiscation, or appropriation to public use" of property owned by non-combatant enemies without providing any compensation.[76] During the Reconstruction period, Congress set out a series of acts that established guidelines for the manner in which the government ought to handle the property of former confederate loyalists.[77] These acts allowed the government to seize property but also allowed individuals that had been pardoned by the President to have their property rights restored.[78] Congress's final provision instructed the Court of Claims that an individual's pardon was insufficient to establish standing for a claim to restore property and could not be used as proof of evidence of loyalty.[79] The second half of the provision stated that the Supreme Court must dismiss certain appeals from the Court of Claims because accepting a pardon without a disclaimer would be considered conclusive evidence against the individual's loyalty.[80] In *Klein*, the estate administrator of a pardoned individual had won the right to receive proceeds from the U.S. government's sale of the deceased's abandoned cotton in the Court of Claims in 1869.[81] Subsequently, the U.S. filed an appeal, and in 1870, Congress passed the provisions just discussed, and the Attorney General filed a motion for the claim's remand and mandate for dismissal pursuant to the new Congressional act.[82] The Court ruled Congress's provision was unconstitutional because it violated the separation of powers by placing a statutory restriction on the federal court's jurisdiction and assigning the rule of decisions for the pardon claims.[83]

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73. *Id.* at 674.
74. *Id.* at 684-85.
75. *Id.*
76. United States v. Klein, 80 U.S. 128, 130 (1871).
77. *Id.*
78. *Id.* at 131-32.
79. *Id.* at 133.
80. *Id.* at 134.
81. *Id.* at 132.
82. *Id.* at 133.
83. *Id.* at 147-48.

In a more recent decision, *Plaut v. Spendthrift Farm, Inc.*, the Court explained that the constitutional delegation of authority denies Congress from "requir[ing] federal courts to exercise the judicial power in a manner that Article III forbids."[84] In *Plaut*, the petitioners brought an action in the United States District Court for the Eastern District of Kentucky in 1987 alleging that the defendants committed fraud and deceit in stock sales in 1983 and 1984, therefore violating rule § 10(b) of the Securities Exchange Act (SEA) and SEC rule 10(b)(5).[85] While the plaintiff's claim was in pretrial proceedings, the Court made a ruling in both *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson* and *James B. Beam Distilling Co. v. Georgia*.[86] Together, the effect of these decisions caused the District Court to apply the time limits from *Lampf* to the *Plaut* petitioners' claim and dismiss the suit with prejudice.[87] The President then signed § 27A of the SEA, which provided, in pertinent part to plaintiffs, to reinstate claims commenced on or before June 19, 1991, that were subsequently dismissed after the rulings on that date as long as the claims would have been timely filed consistent with any preexisting laws on June 19, 1991.[88] The petitioners moved to reinstate their claim pursuant to § 27A in both the District Court and the United States Court of Appeals for the Sixth Circuit.[89] The Court granted certiorari and held that § 27A violated the separation of powers principle because the statute retroactively directed an Article III Court to reopen final judgments, which is an action exclusively within judicial power, and outside of the limits of Congress.[90] Although the Court maintains this stance as a proponent of exclusively judicial authority, it can often be seen as evading tough constitutional questions and referring back to the other branches for clarification, even without principled justification.[91]

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84. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995).

85. *Id.* at 213.

86. *Id.* at 214. The Court cited *Lampf,* which established a time limit of one year from the date of discovery and three years from the alleged violation to bring claims under § 10(b) of the Securities Exchange Act and SEC rule 10(b)(5). *Id.* (citing Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991)). The Court also discussed the holding in *Beam* which required that new rules of federal law that is applied to the parties in the case that announces the rule must be applied to all cases that are pending direct review. *Id.* (citing James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544 (1991)).

87. *Plaut*, 514 U.S. at 214.

88. *Id.* at 214-15.

89. *Id.* at 215.

90. *Id.* at 240.

91. Tribe, *supra* note 65, at 91.

One example of a challenging constitutional issue is determining the validity of statutes that apply retroactively.[92] Retroactive statutes give different legal effect to conduct that occurred before the statute's enactment.[93] These statutes come in different forms—they can be retroactive on their face, reaching back to add new duties and rights to completed issues, or they can have retroactive effect without express statutory language.[94] To analyze the validity of retroactive statutes, the Supreme Court inquires whether a statute abrogates a vested right.[95] However, this type of analysis is circular because vested rights are supposed to be those that are perfected to the point that they cannot be removed by statute.[96] There are many different legal scenarios for categorizing retroactive statutes according to the Court, with one extreme being that the statute has "no discernible public purpose."[97] If that is the case, the Court will generally not uphold the statute's constitutionality.[98] The other extreme is the example where the legislature acts as an emergency remedy for "substantive evils" and the "Court is more likely to be sympathetic" to this situation.[99]

The Court directly addressed the scope of the retroactive statutes in *Landgraf v. USI Film Products.*[100] In *Landgraf*, the Court focused on whether the Title VII provisions of the Civil Rights Act of 1991 were applicable to a Title VII case pending appeal at the time of the statute's enactment.[101] The Court found against the retroactive application of the statute but noted that such restrictions due to unconstitutionality "are of limited scope" and require a violation of a specific constitutional provision, not just facial unfairness, in order to be deemed unconstitutional.[102] Additionally, the Court held in *Robertson v. Seattle Audubon Society*, that the prohibition *Klein* established does not necessarily take hold when Congress amends applicable law.[103] In *Robertson*, the issue was the application of amendments to the

92. *See* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692 (1960).
93. *Id.*
94. *Id.*
95. *Id.* at 696.
96. *Id.*
97. *Id.* at 697.
98. *Id.* at 697-98.
99. *Id.* at 698.
100. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 272-280 (1994).
101. *Id.* at 247.
102. *Id.* at 267. The specific provisions are the *Ex Post Facto* clause, the Takings Clause, and the Due Process Clause. *Id.* at 266.
103. Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992).

Department of the Interior and Related Agencies Appropriations Act to an ongoing case between multiple government officials and the Seattle Audubon Society.[104] In its decision, the Court allowed an amendment to a statute to stand, even though the amendment explicitly referenced pending cases.[105]

III. THE COURT'S DECISION

In the noted case, the Supreme Court heavily relied on the *Klein*, *Robertson, Landgraf*, and *Plaut* decisions, amongst others.[106] These cases provided background for the Court's analysis of Congress's power to amend the applicable law of pending cases.[107] In the noted case, the Court held that the new provisions in § 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012 did not upset the separation of powers.[108] In doing so, the Court engaged in a multifaceted separation of powers analysis involving Bank Markazi's arguments against Congress's ability to amend applicable law and against retroactive application of the amendments.[109]

The Court granted certiorari to review the separation of powers issues.[110] Bank Markazi's first argument was that Congress had "effectively dictated specific factual findings in connection with a specific litigation—invading the province of the courts."[111] Bank Markazi adamantly argued that Congress had trespassed into the judicial arena with its new amendments, claiming that because the Court stated in *Klein* that Congress cannot "prescribe rules of decision to the Judicial Department . . . in [pending] cases," it did not have the power to enact § 502.[112] Bank Markazi also argued that § 502 did not just amend preexisting law, it directed the Court's fact-finding and the outcome of the case.[113] The Court began its analysis with a reference to *Plaut*, agreeing with Bank Markazi on the basic concept that the Constitution prohibits Congress from "requiring federal courts to exercise their power in a manner that Article III forbids."[114] The Court further agreed that

104. *Id.* at 434-36.
105. *Id.* at 441.
106. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1323 (2016).
107. *Id.*
108. *Id.* at 1329.
109. *Id.* at 1322-24.
110. *Id.* at 1322-23.
111. *Id.* at 1322.
112. *Id.* at 1323 (citing United States v. Klein, 80 U.S. 128, 146 (1871)).
113. *See id.* at 1323-24.
114. *Id.* at 1322-23 (citing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995)).

Congress did not have the power to retroactively command the federal courts to reopen final judgments.[115] The Court addressed Bank Markazi's first argument by citing to *Robertson*, a case that expressly distinguished *Klein* by stating that *Klein* does not apply if Congress is amending the applicable law.[116] The Court noted that the language from *Klein* should not be taken "at face value," because of the Court's recognition of Congress's ability to validate the retroactive application of already written statutes to pending cases through statutory amendments.[117]

Bank Markazi argued profusely that § 502 was not a mere amendment because the statute "directed certain factfindings and specified the outcome under the amended law."[118] Bank Markazi also argued that the statute was unprecedented because it prescribes the rules for a single pending case, identified by caption and docket number.[119] The Court found this argument invalid because it is within Congress's power to direct courts to apply new legal standards to facts that are undisputed, and the statute here actually applies to the underlying sixteen consolidated suits.[120] The Court upheld statutes that fit the above description in both the *Peggy* and *Robertson* cases.[121] In *Robertson*, the statute at issue also identified a single pending case by docket number and caption.[122]

After providing this discussion on separation of powers, the Court tackled the issue of the constitutionality of valid statutes' retroactive application.[123] The Court discussed *Landgraf*, which explained the limited scope of constitutional restrictions on retroactive legislation and set out guidelines on how to determine the validity of the statute.[124] First, "the Ex Post Facto Clause flatly prohibits retroactive application of penal legislation."[125] Additionally, the Takings Clause and the Due Process

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115. *Id.*; *Plaut*, 514 U.S. at 219.

116. *Bank Markazi*, 136 S. Ct. at 1323 (citing Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992)).

117. *Id.* at 1324; *see*, *e.g.*, United States v. *Schooner Peggy*, 5 U.S. 103, 110 (1801) (showing the earliest example of the Court recognizing the congressional power to validate the retroactive application of existing statutes to pending cases).

118. *Bank Markazi*, 136 S. Ct. at 1325.

119. *Id.* at 1326.

120. *Id.* at 1326-27.

121. *Id.*

122. *Id.* at 1326-27; *see* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 434-35 (1992).

123. *Bank Markazi*, 136 S. Ct. at 1324.

124. *Id.* (citing Landgraf v. USI Film Prods., 511 U.S. 244, 266-67 (1994)).

125. Landgraf, 511 U.S. at 266-67; *see also* U.S. CONST. art. I § 10, cl. 1 (prohibiting states from passing bills of attainder and laws that impair the obligations of contracts).

Clause are included in the list of guidelines.[126] If a retroactive statute does not violate these provisions, and the new law makes it clear that it applies retroactively, unfairness alone is not a sufficient reason for a court's denial to apply a statute.[127] There is existing precedent for the Court to allow Congress to direct outcomes in pending civil cases using newly amended legislation, and the Court grouped § 502 into that permitted category of statutory amendments from *Landgraf*.[128]

The Court concluded its analysis by citing to *Dames & Moore v. Reagan*.[129] The Court articulated that the political branches of government have the power to block foreign-state assets and govern their availability for attachment and that such actions do not invade Article III judicial power.[130] The Court stated that Congress holds the power to change a foreign state's immunity status and that the change will have an effect on judicial proceedings in progress.[131] Therefore, Congress was acting within its powers when it enacted § 502, as the statute altered the immunity of Iran relating to a particular set of assets.[132]

In his dissent, Chief Justice Roberts asserted that there has never been a statute similar to § 502, because no other statute has been able to "change the law for a pending case" and determine a specific result while "limiting its effect to a particular judicial proceeding."[133] The majority distinguished the *Klein* decision, but Chief Justice Roberts found the interpretation of Article III in *Klein* convincing and disagreed with the stance that *Klein* does not apply.[134] He also distinguished *Robertson* and *Plaut*, stating that both cases did not involve statutes as specific as § 502, with *Plaut* actually invalidating the statute at issue.[135] He argued that in the case at hand, Congress went a step further than removing Bank Markazi's sovereign immunity because it actually stripped the Bank of any legal protection.[136] Chief Justice Roberts' dissent stated that the majority incorrectly used *Dames & Moore*, because the Presidential actions in *Dames & Moore* were not exercises of judicial power as they did not dictate the resolution of particular claims, whereas Congress's

126. *Bank Markazi,* 136 S. Ct. at 1324-25 (citing *Landgraf*, 511 U.S. at 266-67).
127. *Id.* (citing *Landgraf*, 511 U.S. at 267).
128. *Bank Markazi*, 136 S. Ct. at 1325.
129. *Id.* at 1328.
130. *Id.* (citing Dames & Moore v. Reagan, 453 U.S. 654 (1981)).
131. *Id.*
132. *Id.* at 1329.
133. *Id.* at 1333 (Roberts, C.J., dissenting).
134. *Id.* at 1333-34.
135. *Id.* at 1336.
136. *Id.*

enactment of § 502 was essentially a political judgment.[137] The dissent argued that it is simply not in Congress's power to pick the winners and losers of cases.[138]

IV. ANALYSIS

As Chief Justice Roberts enunciated, it can be difficult to draw the line determining the division between legislative and judicial power.[139] In the noted case, the Court navigated the string of statutes that regulate the separation of powers relating to foreign policy.[140] The Court failed to create a consistent standard for foreign immunity determinations since the Court's decision in *Schooner Exchange v. Mcfadden*.[141] While the Court did nothing to clarify a method of determination in the noted case, the majority's analysis seized on the rare opportunity to address a separate problem mentioned in the opinion: the difficulty of enforcing judgments under the FSIA's terrorism exception.[142] This enforcement was the issue for the respondents, as the sixteen groups of plaintiffs had obtained billions of dollars in judgments against Iran, money that they were never likely to see without the enactment of § 502.[143]

In the noted case, the Court chose to interpret *Klein* narrowly and held this decision to be similarly narrow in scope.[144] Such a narrow reading of *Klein*, however, grants Congress the power to outfit legislation to specific pending cases in the future. The statute, on its face, denied the courts the opportunity to decide the merits of the case, when the conclusion could have gone either way. Although *Klein* did not set forth clear rules on how Article III regulates Congress's ability to legislate with respect to a pending case, the majority's reading of *Klein* suggests that there are no limits on separation of powers, except for passing a statute that simply states "X wins."[145]

The Court's use of *Dames & Moore* contradicts the case's stated purpose.[146] In that decision, the Court was emphatic that *Dames* itself is narrow in scope and should not be used as a guideline that can be applied to other situations that are not parallel or exceedingly similar to the

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137. *Id.* at 1336-37.
138. *Id.* at 1338.
139. *Id.* at 1336.
140. *Id.* at 1317-18 (majority opinion).
141. *See* Ryan, *supra* note 14, at 1788.
142. *Bank Markazi*, 136 S. Ct. at 1317-18.
143. *Id.* at 1320.
144. *Id.* at 1324.
145. *See id.* at 1335 (Roberts, C.J., dissenting).
146. *Id.* at 1336-37.

circumstances in *Dames*.[147] In the noted case, the Court decided that Congress had the ability to amend the applicable law, and the Court's acceptance of the statute allowed Congress to make a political judgment appear judicial because Congress essentially decided the case using the language of § 502.[148] The Court's reading of *Dames* also has a potentially negative effect on separation of powers principles. The reading may allow the President to take the same actions through executive orders as Congress did with § 502. The Court's opinion never claimed that Congress was the only branch to have the power to amend the substantive law regarding a specific pending case.

By allowing § 502 to stand, the Court sets a dangerous precedent, giving Congress the potential to change the balance of power necessary for the equilibrium among the branches.[149] The decision will undoubtedly lay a foundation for Congress to expand its powers in the sphere of foreign affairs, a consistent goal of Congress since the enactment of FSIA.[150] This expansion is dangerous because Congress has the tendency to expand its influence and draw more and more powers into its axis of the governmental triptych.[151]

V. CONCLUSION

While there is precedent that allows Congress to amend statutes so they apply retroactively, none of the precedents cited by the Court upheld the validity of a statute that was so narrowly constructed as the one in question. Article III effectively prohibits Congress from deciding cases for the Judiciary, which is what occurred in the noted case at the most basic level. The Court's decision expanded Congress's power while effectively constricting the Court's own powers as an independent judiciary.

Jordan Schlissel*

147. *Id.*
148. *Id.* at 1337; *see* Medellín v. Texas, 552 U.S. 491, 531 (2008).
149. *Bank Markazi*, 136 S. Ct. at 1338.
150. *Id.*
151. *Id.*

* © 2017 Jordan Schlissel. J.D. candidate 2018, Tulane University Law School; B.B.A., Temple University. This Case Note is dedicated to my grandparents, who granted me the opportunity to be raised in this country, and to my parents, whose sacrifices and guidance molded me into the person that I am today.