
LEADING CASES

CONSTITUTIONAL LAW

Article III — Separation of Powers — Foreign Affairs — Bank Markazi v. Peterson

Cases about foreign affairs have long raised unique and challenging separation of powers issues.¹ Last Term, in *Bank Markazi v. Peterson*,² the Supreme Court approved Congress's efforts to make certain Iranian assets available to satisfy the judgments in cases brought against Iran for its role in specific instances of international terrorism. Apart from its conclusion that Congress had not intruded upon the Article III judicial power, the Court relied on the foreign affairs context to provide "[a]dd[ed] weight" to its decision.³ As the Chief Justice noted in dissent, the Court's Article III analysis tips the balance of power in favor of Congress over courts in adjudicating the disposition of foreign-state assets.⁴ But the Court's reliance on the foreign affairs context also invites other difficult constitutional questions about executive unilateralism and how courts should address other Article III questions where foreign affairs are at stake.

Bank Markazi involved claims brought under the "terrorism exception" of the Foreign Sovereign Immunities Act of 1976 (FSIA).⁵ The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of" the United States.⁶ Although foreign sovereigns are generally immune from suit, the FSIA makes an exception for state sponsors of terrorism.⁷ But victims of state-sponsored terrorism who prevail on the merits of their claims often face another hurdle: locating property subject to execution to satisfy the judgment.⁸

¹ See, e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076 (2015) (resolving a dispute between Congress and the President regarding the content of passports); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 322, 329 (1936) (rejecting nondelegation arguments in the foreign affairs context). See generally Jonathan L. Entin, *War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations*, 45 CASE W. RES. J. INT'L L. 443 (2012) (describing courts' limited role in resolving foreign affairs issues).

² 136 S. Ct. 1310 (2016).

³ *Id.* at 1317.

⁴ See *id.* at 1337–38 (Roberts, C.J., dissenting).

⁵ Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

⁶ *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 393 (2015) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989)).

⁷ See 28 U.S.C. § 1605A (2012).

⁸ A complex body of law governs which foreign-state assets may be subjected to post-judgment execution. Originally, "only foreign-state property located in the United States and 'used for a commercial activity' was available." *Bank Markazi*, 136 S. Ct. at 1318 (quoting 28 U.S.C. § 1610(a)(7)). Then Congress passed the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322, to allow for execution against assets blocked by the President pursu-

Deborah Peterson and other plaintiffs in sixteen consolidated cases against the Islamic Republic of Iran found themselves in just such a conundrum.⁹ After obtaining judgments against Iran for its role in international terrorism — mostly arising out of an attack on a Beirut outpost of the U.S. Marines in 1983¹⁰ — Peterson registered the judgments in the U.S. District Court for the Southern District of New York and moved for execution.¹¹ The court initiated judgment-enforcement proceedings.¹² But Bank Markazi, Iran’s central bank, was not so eager to pay. It raised a host of legal defenses,¹³ which proceeded to litigation.

Then in 2012 — while the case was still pending — Congress decided the plaintiffs deserved to be paid. It passed (and the President signed) the Iran Threat Reduction and Syria Human Rights Act of 2012.¹⁴ Section 502 of the Act, codified at 22 U.S.C. § 8772, provided that, if a court found certain facts regarding the assets,¹⁵ then “the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG),” would be subject to execution to satisfy Peterson’s judgment.¹⁶ The law abolished Bank Markazi’s other defenses: it applied “notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempt[ed] any inconsistent provision of State law.”¹⁷ And because all of the facts about the assets that the court had to

ant to his authority under the Trading with the Enemy Act or the International Emergency Economic Powers Act (IEEPA). See *Bank Markazi*, 136 S. Ct. at 1318. The IEEPA authorizes the President to block transactions and freeze assets based upon his identification of an “unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States.” 50 U.S.C. § 1701(a) (2012). In February 2012, President Obama blocked the assets at issue here. See *Bank Markazi*, 136 S. Ct. at 1318.

⁹ *Bank Markazi*, 136 S. Ct. at 1310, 1319–20.

¹⁰ *Id.* at 1319–20, 1320 n.6.

¹¹ *Id.* at 1320; see also 28 U.S.C. § 1963 (allowing a judgment obtained in one district to be registered “in any other district” and “have the same effect as a judgment of the district court of the district where registered”).

¹² *Bank Markazi*, 136 S. Ct. at 1320.

¹³ The Bank argued, among other defenses, that the court lacked subject matter and personal jurisdiction, that the blocked assets were not assets “of” the Bank, that the blocked assets were not located in New York, that the political question doctrine rendered the case nonjusticiable, and that execution on the Bank’s assets would violate treaty obligations. *Id.* at 1321 (referring to Bank Markazi’s arguments as a “kitchen sink” approach); see *id.* at 1321 n.13.

¹⁴ Pub. L. No. 112-158, 126 Stat. 1214 (codified in scattered sections of 22 U.S.C.).

¹⁵ The court, before allowing execution of the judgment against the assets in question, was required to find that “Iran h[eld] equitable title to, or the beneficial interest in, the assets” and that “no other person possess[ed] a constitutionally protected interest in the assets . . . under the Fifth Amendment to the Constitution of the United States.” 22 U.S.C. § 8772(a)(2).

¹⁶ *Id.* § 8772(b).

¹⁷ *Id.* § 8772(a)(1).

“find” before subjecting them to execution were undisputed, the effect was that the *Peterson* plaintiffs would be paid.

Bank Markazi, stripped of its other defenses,¹⁸ argued that § 8772 was unconstitutional. By dictating the result in a single pending case, the Bank argued, § 8772 usurped the judicial prerogative to decide cases in violation of the separation of powers.¹⁹ The district court rejected the argument, reasoning that § 8772 “merely ‘chang[ed] the law applicable to pending cases’” and did not “usurp the adjudicative function assigned to the federal courts.”²⁰ The Second Circuit unanimously affirmed,²¹ and the Supreme Court granted certiorari to resolve the separation of powers question.²²

The Court affirmed in an opinion by Justice Ginsburg.²³ It began by listing the powers forbidden to Congress: Congress may not “requir[e] federal courts to exercise the judicial power in a manner that Article III forbids”;²⁴ it “may not usurp a court’s power to interpret and apply the law to the [circumstances] before it”;²⁵ it may not “vest[] review of the decisions of Article III courts in officials of the Executive Branch”;²⁶ and it may not “retroactively comman[d] the federal courts to reopen final judgments.”²⁷ But the Court rejected Bank Markazi’s argument that *United States v. Klein*,²⁸ a decision from the late nineteenth century, forbade Congress also from “prescrib[ing] rules of deci-

¹⁸ The Bank did retain two arguments: that its case was a nonjusticiable political question and that § 8772 violated U.S. treaty obligations to Iran. *See supra* note 13. The district court rejected the first argument on the merits and rejected the second on the ground that § 8772 displaced any treaty obligations the United States might have. *See Bank Markazi*, 136 S. Ct. at 1321 n.13; *see also* *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (noting that where federal law conflicts with a treaty, the most recent enactment governs).

¹⁹ *See Bank Markazi*, 136 S. Ct. at 1321–22. The Bank also raised constitutional objections under the Bill of Attainder, Ex Post Facto, Equal Protection, and Takings Clauses; those claims were rejected below and not pressed in the Supreme Court. *See id.* at 1322 n.14.

²⁰ *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518(KBF), 2013 WL 1155576, at *31 (S.D.N.Y. Mar. 13, 2013) (quoting *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993)).

²¹ *Peterson v. Islamic Republic of Iran*, 758 F.3d 185, 193 (2d Cir. 2014).

²² *Bank Markazi v. Peterson*, 136 S. Ct. 26 (2015) (mem.) (granting certiorari).

²³ Justice Ginsburg wrote for a six-member majority including Justices Kennedy, Breyer, Alito, and Kagan. Justice Thomas joined in all but Part II-C of the opinion, where the Court described the special and prominent role of the political branches in matters of foreign affairs.

²⁴ *Bank Markazi*, 136 S. Ct. at 1322–23 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)).

²⁵ *Id.* at 1323 (alteration in original) (quoting Brief of Amici Curiae Former Senior Officials of the Office of Legal Counsel in Support of Respondents at 3, *Bank Markazi*, 136 S. Ct. 1310 (No. 14-770)).

²⁶ *Id.* (quoting *Plaut*, 514 U.S. at 218).

²⁷ *Id.* (alteration in original) (quoting *Plaut*, 514 U.S. at 219).

²⁸ 80 U.S. (13 Wall.) 128 (1872).

sion to the Judicial Department . . . in [pending] cases.”²⁹ Relying on “[m]ore recent decisions,”³⁰ the Court concluded that *Klein* constrained neither Congress’s power to amend the law nor its power to make laws retroactively applicable to pending cases.³¹ And, it reasoned, § 8772 did no more than that: it simply “changed the law by establishing new substantive standards, entrusting to the District Court application of those standards to the facts (contested or uncontested) found by the court.”³² The Court challenged Bank Markazi’s assertion that the law dictated the outcome of a single case,³³ arguing that § 8772 really applied to sixteen different (but consolidated) suits spanning more than 1000 plaintiffs.³⁴ But even accepting the Bank’s characterization, the Court saw no problem with “particularized legislative action.”³⁵

That sufficed to resolve the case. But the Court continued for another two pages to “stress, finally, that § 8772 is an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper.”³⁶ It invoked *Dames & Moore v. Regan*³⁷ — a 1981 decision approving the President’s order to nullify attachments of Iranian assets and suspend pending claims against Iran in U.S. courts — as support for the proposition that “Congress and the President have, time and again, as exigencies arose, exercised control over claims against foreign states and the disposition of foreign-state property in the United States.”³⁸ The Court further noted that, before Congress passed the FSIA, “the Executive . . . regularly made case-specific determinations whether

²⁹ *Bank Markazi*, 136 S. Ct. at 1323 (second alteration and omission in original) (quoting *Klein*, 80 U.S. (13 Wall.) at 146). *Klein* sought to claim proceeds from the sale of property seized during the Civil War under an 1863 statute allowing such claims if a person could demonstrate ownership and “that he had never given aid or comfort to the rebellion.” *Klein*, 80 U.S. (13 Wall.) at 139. To establish his loyalty, *Klein* relied on a pardon from President Lincoln and on the Supreme Court’s earlier decision in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870), holding that a presidential pardon constituted “a complete substitute for proof that [the recipient] gave no aid or comfort to the rebellion,” *id.* at 543. See *Klein*, 80 U.S. (13 Wall.) at 142–43. Congress, unhappy at the thought of insurrectionists reclaiming seized property, passed a law mandating that no pardon be admissible to show loyalty, that accepting a pardon without any disclaimer be treated as conclusive proof of *disloyalty*, and that any claims based on pardons be dismissed. *Id.* at 143–44. The Supreme Court held the law unconstitutional, both because Congress infringed on the judicial power by “prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it,” *id.* at 146, and because it infringed on the executive power by “impairing the effect of a pardon,” *id.* at 147.

³⁰ *Bank Markazi*, 136 S. Ct. at 1323.

³¹ *Id.* at 1323–24.

³² *Id.* at 1326.

³³ See *id.*

³⁴ *Id.* at 1326–27.

³⁵ *Id.* at 1327 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995)).

³⁶ *Id.* at 1328 (citing *Zivotofsky II*, 135 S. Ct. 2076, 2090–91 (2015)).

³⁷ 453 U.S. 654 (1981).

³⁸ *Bank Markazi*, 136 S. Ct. at 1328 (citing *Dames & Moore*, 453 U.S. at 673–74).

sovereign immunity should be recognized, and courts accepted those determinations as binding.”³⁹ The Court thus concluded that, in passing § 8772, Congress had “acted comfortably within the political branches’ authority over foreign sovereign immunity and foreign-state assets.”⁴⁰

The Chief Justice dissented.⁴¹ In his view, Congress “unconstitutional[ly] interfere[d] with the judicial function” by itself deciding the outcome of a single pending case.⁴² Section 8772, he reasoned, was akin to the sort of colonial-era legislative interference with state courts that Article III sought to curb.⁴³ Congress had not “establish[ed] any generally applicable rules”; it had merely “decid[ed] this particular case.”⁴⁴ Such an “outcome-determinative” and “explicitly limited” law, he argued, was unprecedented.⁴⁵ Relying principally on *Klein*, the Chief Justice concluded that § 8772 impermissibly intruded upon the Article III judicial power.⁴⁶ The two “factual determinations” purportedly left for the court to adjudicate, he argued, were a charade: both were undisputed when Congress passed § 8772.⁴⁷

The Chief Justice also disagreed with the majority’s reliance on *Dames & Moore*. That decision, he noted, had sought to confine itself to the facts then before the Court.⁴⁸ But even assuming *Dames & Moore* had modern relevance, the Chief Justice argued, it did not reach so far as the majority would stretch it: the *Dames & Moore* executive action moved claims from Article III courts to a separate tribunal but did not specify how they were to be resolved, and thus was “not [an] exercise[] of judicial power.”⁴⁹ As a result, “no comparable history sustain[ed] Congress’s action here, which seeks to provide relief to respondents not by transferring their claims in a manner only the political branches could do, but by commandeering the courts to make a political judgment look like a judicial one.”⁵⁰ And he cited *Medellín v. Texas*,⁵¹ noting parenthetically that the *Medellín* Court had “refus[ed] to extend the President’s claims-settlement authority beyond the ‘narrow set of circumstances’ defined by the ‘systematic, unbroad-

³⁹ *Id.*

⁴⁰ *Id.* at 1329.

⁴¹ Justice Sotomayor joined Chief Justice Roberts in dissent.

⁴² *Bank Markazi*, 136 S. Ct. at 1332 (Roberts, C.J., dissenting).

⁴³ See *id.* (citing John F. Manning, Response, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1663 (2001)).

⁴⁴ *Id.* at 1333.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1333–34.

⁴⁷ *Id.* at 1335; see also *supra* note 15.

⁴⁸ See *Bank Markazi*, 136 S. Ct. at 1337 (Roberts, C.J., dissenting).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 552 U.S. 491 (2008).

ken, executive practice, long pursued to the knowledge of the Congress and never before questioned.”⁵²

Bank Markazi's most direct consequences are its thin reading of *Klein* and its recognition of a congressional power to tailor legislation to specific pending cases.⁵³ Less obvious, though, are the case's potential implications for the President and for future intrusions on Article III. The Court's reliance on *Dames & Moore* and its failure to specify what “[a]dd[ed] weight”⁵⁴ the foreign affairs context lent to its Article III analysis raise unanswered questions about executive unilateralism and how courts should approach Article III issues where foreign affairs are involved.

First, the Court's *Dames & Moore* analysis may support an argument for future Presidents to do by executive order what Congress did in § 8772. The majority's citations to *Dames & Moore* to support § 8772 were a stretch. At issue in *Dames & Moore* were suspensions of pending claims by U.S. nationals against the Iranian government, pursuant to an executive agreement with Iran. The Court upheld those suspensions in light of “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned” that supported claim settlement by executive agreement.⁵⁵ As Chief Justice Roberts noted in dissent in *Bank Markazi*, “no comparable history sustain[ed] Congress's action here.”⁵⁶

But the *Bank Markazi* Court generalized from *Dames & Moore*'s reliance on a history of foreign claim settlement to the abstraction that “Congress and the President have, time and again, as exigencies arose, exercised control over claims against foreign states and *the disposition of foreign-state property* in the United States.”⁵⁷ True enough — but prior dispositions of foreign-state property, whether by Congress or the President or both combined, never raised Article III issues of the kind presented in *Bank Markazi*. The Court's argument, essentially, was that (1) the political branches had controlled the disposition of foreign-state property before, (2) § 8772 controlled a disposition of foreign-state property, and therefore (3) § 8772 was analogous

⁵² *Bank Markazi*, 136 S. Ct. at 1337 (Roberts, C.J., dissenting) (quoting *Medellin*, 552 U.S. at 531 (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981))).

⁵³ See, e.g., Yishai Schwartz, *Bank Markazi v. Peterson: Implications for Separation of Power*, LAWFARE (Apr. 26, 2016, 11:31 AM), <https://www.lawfareblog.com/bank-markazi-v-peterson-implications-separation-power> [<https://perma.cc/64SF-UVXF>] (assessing the Court's treatment of *Klein*).

⁵⁴ *Bank Markazi*, 136 S. Ct. at 1317.

⁵⁵ *Dames & Moore*, 453 U.S. at 686 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).

⁵⁶ *Bank Markazi*, 136 S. Ct. at 1337 (Roberts, C.J., dissenting).

⁵⁷ *Id.* at 1328 (majority opinion) (emphasis added) (citing *Dames & Moore*, 453 U.S. at 673–74, 679–81).

to the sort of actions described in *Dames & Moore* that enjoyed “longstanding” historical support coupled with a “history of congressional acquiescence.”⁵⁸ With this clever sleight of hand, the Court cited a history of claim settlement by executive agreement to support the (ever so slightly) different practice of directing — pursuant to a few perfunctory factual determinations — execution on particular assets to satisfy a judgment.

So understood, *Bank Markazi* may reasonably be read to support *Dames & Moore*-style executive action with regard to subjecting assets to execution. In describing what Congress had done in § 8772, the Court never claimed that *only* Congress could accomplish this task. The Chief Justice believed § 8772 to be an exercise of *judicial* power,⁵⁹ and the Court rejected that characterization. And the Court did rely, in Parts II-A and II-B of its opinion, on a number of cases providing support for a *legislative* power to change the substantive law governing a pending case, including where the change is limited to a single case.⁶⁰ But those parts never characterized § 8772 as an *exclusively* legislative function; they merely characterized it as a *permissible* one. The Court brushed away the Chief Justice’s concerns about extending *Dames & Moore* with a footnote explaining that the risk of *Dames & Moore* becoming a “license for the broad exercise of unilateral executive power” was “nonexistent here,” as § 8772 had been passed by Congress.⁶¹ But similar attempts by the *Dames & Moore* Court to limit its own decision to its facts proved unavailing,⁶² and future executive branch lawyers interpreting the scope of presidential authority will reasonably cite *Bank Markazi* for its broader implications.⁶³ In seasons of partisan gridlock,⁶⁴ unilateralism may become an attractive

⁵⁸ *Dames & Moore*, 453 U.S. at 678–79.

⁵⁹ *Bank Markazi*, 136 S. Ct. at 1337 (Roberts, C.J., dissenting).

⁶⁰ *See, e.g., id.* at 1324 (majority opinion) (citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)); *id.* at 1325 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218, 226 (1995); *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 441 (1992)); *id.* at 1327–28 (citing *Plaut*, 514 U.S. at 239 n.9; *Reg’l Rail Reorganization Act Cases*, 419 U.S. 102, 158–61 (1974); *Pope v. United States*, 323 U.S. 1, 9–14 (1944); *The Clinton Bridge*, 77 U.S. (10 Wall.) 454, 462–63 (1870); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 430–32 (1856); *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1156, 1164–71 (10th Cir. 2004); *SeaRiver Mar. Fin. Holdings Inc. v. Mineta*, 309 F.3d 662, 667, 674–75 (9th Cir. 2002); *Nat’l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001)).

⁶¹ *Id.* at 1328 n.28.

⁶² *See id.* at 1337 (Roberts, C.J., dissenting).

⁶³ *Cf.* Jack Goldsmith, *The Supreme Court, 2014 Term — Comment: Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 114 (2015) (“[E]xecutive branch lawyers, who are governed by different principles and incentives than judges, won’t read the [*Zivotofsky II*] decision narrowly. They will read it generously in favor of the President in resolving everyday foreign policy disputes between the political branches.”).

⁶⁴ *See* Josh Blackman, *The Supreme Court, 2015 Term — Comment: Gridlock*, 130 HARV. L. REV. 241 (2016) (describing the role of partisan gridlock in prompting unilateral executive action).

option where foreign assets are of particular importance to the executive branch.⁶⁵

Importantly, *Bank Markazi* does not support a broader power of future Executives to order execution on particular assets in contravention of congressional will. That scenario would place the President within the third of the three categories of executive action described by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*⁶⁶ — where the President acts against the will of Congress. In Category III, the President must possess *exclusive* authority over the subject in order to prevail over Congress.⁶⁷ The *Dames & Moore* Court declined to specify where, precisely, the President's actions fell, but they were clearly well outside Category III.⁶⁸ And the Supreme Court has never recognized an exclusive executive power to “effect[] a change in . . . substantive law”⁶⁹ governing pending suits; in fact, it has expressly rejected such a power.⁷⁰ Still, outside Category III — that is, in any case where Congress is unwilling to take a stand or unable to muster a majority, and where no existing treaties or legislation contravene the President's

⁶⁵ Cf. Tom C.W. Lin, *Financial Weapons of War*, 100 MINN. L. REV. 1377, 1399–412 (2016) (surveying the ways in which nations engage in “financial warfare,” *id.* at 1399).

⁶⁶ 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). Justice Jackson's famed *Youngstown* concurrence set forth three categories of executive action: where “the President acts pursuant to an express or implied authorization of Congress,” *id.* at 635 (Category I); where “the President acts in absence of either a congressional grant or denial of authority,” *id.* at 637 (Category II); and where “the President takes measures incompatible with the expressed or implied will of Congress,” *id.* at 637 (Category III).

⁶⁷ See *id.* at 637 (characterizing presidential power in Category III as “at its lowest ebb” and consisting only of “[the President's] own constitutional powers minus any constitutional powers of Congress over the matter”); see also, e.g., *Zivotofsky II*, 135 S. Ct. 2076, 2084 (2015) (“To succeed in this third category, the President's asserted power must be both ‘exclusive’ and ‘conclusive’ on the issue.” (quoting *Youngstown*, 343 U.S. at 637–38)).

⁶⁸ See *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (“Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.”); see also William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 74 (1988) (“The inference [of legislative approval] is even stronger in the foreign affairs arena, where the executive has special competence; the Court will routinely infer legislative approval of executive practices, where ‘Congress has consistently failed to object to [such interpretations or practices] . . . even when it has had an opportunity to do so.’” (second alteration and omission in original) (quoting *Dames & Moore*, 453 U.S. at 682 n.10)).

⁶⁹ *Dames & Moore*, 453 U.S. at 685.

⁷⁰ See *Medellín v. Texas*, 552 U.S. 491 (2008). In *Medellín*, President Bush had issued a memorandum purporting to require states to enforce in their criminal courts a judgment handed down by the International Court of Justice (ICJ). The Supreme Court inferred from the non-self-executing nature of the relevant treaties that Congress had implicitly prohibited the President from unilaterally transforming a non-self-executing ICJ decision into binding federal law. *Id.* at 527. And the Court rebuffed the President's attempted reliance on foreign claims-settlement authority, declining to expand “[t]he Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement.” *Id.* at 532.

action — *Bank Markazi* arguably authorizes the President to subject foreign assets to execution on his own.⁷¹

Second, the Court left unclear how future courts should factor the foreign affairs context into other types of Article III questions, such as trial by military commission. The Court intimated that the foreign affairs context lent “[a]dd[ed] weight” to its determination that § 8772 did not encroach upon Article III.⁷² But it left unclear what weight, precisely, the foreign affairs context added: Could it justify minor encroachments on Article III where foreign affairs issues are at stake? Did it serve as a thumb on the scale to avoid finding any Article III violation where the lines were unclear? Or was it merely window dressing for a conclusion already reached?

If the foreign affairs context’s “added weight” was more than window dressing, it could arguably justify augmented jurisdiction for military commissions to try offenses not recognized under the international law of war. Article III has traditionally been understood to limit the type of offenses that may be tried by military commissions.⁷³ The Court has invalidated tribunals established unilaterally by the President to try citizen-civilians while civilian courts remained open,⁷⁴ as well as Congress’s effort to suspend the writ of habeas corpus for alien enemy combatants detained at Guantánamo.⁷⁵ Meanwhile, it has upheld the power of congressionally authorized military commissions to try “offenses committed by enemy belligerents against the law of

⁷¹ Here, there is an argument that unilateral executive action *would* be in Category III. Although the FSIA probably would not suffice to register congressional disapproval, *cf. Dames & Moore*, 453 U.S. at 684–85 (rejecting argument that FSIA embodied congressional disapproval of executive claim settlement), a treaty could. *Bank Markazi* argued to the district court that § 8772 “violate[d] U.S. treaty obligations to Iran.” *Bank Markazi*, 136 S. Ct. at 1321 n.13. The court rejected that claim without deciding whether there truly was any treaty violation, since § 8772 “displace[d] ‘any’ inconsistent provision of law, treaty obligations included.” *Id.* at 1322 n.13. Iran is currently pursuing its treaty claims in the ICJ. See Elena Chachko, *Iran Sues the U.S. in the ICJ — Preliminary Thoughts*, LAWFARE (June 18, 2016, 8:09 AM), <https://www.lawfareblog.com/iran-sues-us-icj—preliminary-thoughts> [<https://perma.cc/G9KL-GC93>]. If, in fact, § 8772 violates treaty obligations to Iran, a unilateral presidential order along the same lines would likely fall under Category III. *Cf. Medellín*, 552 U.S. at 527.

⁷² *Bank Markazi*, 136 S. Ct. at 1317.

⁷³ See generally Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 957 (2015) (identifying and critiquing exceptions, including military commissions, to the general rule that federal adjudication be conducted by Article III courts). Although they exercise adjudicatory power that resembles the power exercised by Article III courts, military commissions are non-Article III bodies. See *id.* at 945–48.

⁷⁴ See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

⁷⁵ See *Boumediene v. Bush*, 553 U.S. 723 (2008). In *Boumediene*, the Court struck down a jurisdiction-stripping provision in the Military Commissions Act of 2006 as an unconstitutional suspension of the writ of habeas corpus. The Court deemed the habeas writ “an indispensable mechanism for monitoring the separation of powers.” *Id.* at 765. But the habeas guarantee is an individual right located in Article I. Different principles may govern structural analyses about whether a military tribunal’s jurisdiction infringes upon the Article III judicial power.

war.”⁷⁶ But it is an open question whether Congress may — without violating Article III — authorize military commissions to try offenses, like conspiracy,⁷⁷ that are not recognized under the international law of war.⁷⁸ True, that sort of Article III intrusion (jurisdictional) is distinct from the one at issue in *Bank Markazi* (resolving specific, pending cases). But both issues involve questions whether Congress has infringed upon Article III territory. And some scholars have argued that “no deference is either afforded or appropriate” in determining whether trying a given offense by military commission infringes upon Article III.⁷⁹ Depending on how much “added weight” foreign affairs contexts lend to Article III analyses under *Bank Markazi*, that conclusion may not be correct.⁸⁰

These are thorny questions, and *Bank Markazi* does not purport to resolve them. The Court disclaimed any opinion about unilateral executive action,⁸¹ and it never revealed how much “weight” the foreign affairs context “added” to its Article III analysis (or whether that weight applies to *all* potential infringements on Article III, or just infringements relating to resolving pending cases). Given courts’ usual reticence to wade unnecessarily into constitutional waters,⁸² and given the Court’s apparently independent conclusion that § 8772 did not violate Article III,⁸³ it is somewhat curious that the majority chose to invoke foreign affairs at all. It remains to be seen what, precisely, that invocation portends.

⁷⁶ *Ex parte Quirin*, 317 U.S. 1, 41 (1942).

⁷⁷ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 595–613 (2006) (plurality opinion) (concluding conspiracy is not a war crime under international law).

⁷⁸ See *Al Bahlul v. United States*, 792 F.3d 1, 3 (D.C. Cir.), *vacated and reh’g en banc granted*, No. 11-1324, 2015 BL 311222 (D.C. Cir. Sept. 25, 2015) (asking whether “Congress violated Article III of the Constitution by vesting military commissions with jurisdiction to try crimes that are not offenses under the international law of war”). For a discussion of Congress’s Article I power to define new offenses against the law of nations, see Alex H. Loomis, *The Power to Define Offences Against the Law of Nations*, 40 HARV. J.L. & PUB. POL’Y (forthcoming 2017).

⁷⁹ Steve Vladeck, *The Difference Between the Article I and Article III Questions in Al Bahlul*, LAWFARE (July 20, 2016, 8:43 AM) (emphasis added), <https://www.lawfareblog.com/difference-between-article-i-and-article-iii-questions-al-bahlul> [<https://perma.cc/UDZ9-5J59>].

⁸⁰ The Courts of Appeals, which lack the Supreme Court’s ability to pick and choose cases, may be eager to seize on the Court’s dicta and defer to the political branches in contentious cases. Cf. Stephen I. Vladeck, *The Exceptionalism of Foreign Relations Normalization*, 128 HARV. L. REV. F. 322 (2015) (arguing that lower courts are more hesitant than the Supreme Court to “normalize” foreign relations law).

⁸¹ See *Bank Markazi*, 136 S. Ct. at 1328 n.28.

⁸² See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (applying the constitutional avoidance canon).

⁸³ Again, the Court characterized its foreign affairs analysis as “[a]dding weight to [its] decision.” *Bank Markazi*, 136 S. Ct. at 1317. And, notably, Justice Thomas reached the conclusion that § 8772 was constitutional without joining the majority’s foreign affairs discussion at all. *Id.* at 1316, 1328–29.