

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BANK MARKAZI, AKA THE CENTRAL :

4 BANK OF IRAN, :

5 Petitioner : No. 14-770

6 v. :

7 DEBORAH PETERSON, ET AL. :

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9 Washington, D.C.

10 Wednesday, January 13, 2016

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:03 a.m.

15 APPEARANCES:

16 JEFFREY A. LAMKEN, ESQ., Washington, D.C.; on behalf
17 of Petitioner.

18 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of
19 Respondents.

20 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
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22 States, as amicus curiae, supporting Respondents.

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1 P R O C E E D I N G S

2 (10:03a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 14-770, Bank Markazi v.
5 Peterson.

6 Mr. Lamken.

7 ORAL ARGUMENT OF JEFFREY A. LAMKEN

8 ON BEHALF OF THE PETITIONER

9 MR. LAMKEN: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 For nearly 200 years, Congress never enacted
12 a statute that purported to limit the effect to one and
13 only one specified case pending before Article III
14 courts disclaiming any reach beyond that solitary
15 monetary dispute.

16 JUSTICE GINSBURG: Mr. Lamken, is it one
17 case? I mean, this is a consolidation for purposes of
18 reaching assets -- it's a consolidation of some 19
19 cases?

20 MR. LAMKEN: No, Your Honor, it is not a
21 consolidation of 19 cases. It began when the Peterson
22 plaintiffs filed a turnover action. Other parties were
23 interpleaded. Other parties intervened. But it has
24 been one case with one caption, ruled upon by one judge
25 with one decision.

1 JUSTICE GINSBURG: Is there -- are there
2 any --

3 JUSTICE KENNEDY: Well, suppose there were
4 three unrelated cases.

5 MR. LAMKEN: Pardon?

6 JUSTICE KENNEDY: Suppose there were three
7 unrelated cases. Would the statute pass?

8 MR. LAMKEN: Yes. So if Congress had
9 identified three unrelated cases and -- and said that
10 for these unrelated cases --

11 JUSTICE KENNEDY: Yes, it specifies them by
12 number and so forth.

13 MR. LAMKEN: By number.

14 We believe that the result would be the
15 same. That Congress crosses the threshold from
16 legislation to adjudication when attempts to pass a law
17 which has no effect and no existence apart from
18 specified cases pending before the Supreme --

19 JUSTICE KENNEDY: I -- I inadvertently
20 interrupted Justice Ginsburg, but in the -- in the 19
21 cases here, you don't find that principle?

22 MR. LAMKEN: No, Your Honor. There aren't
23 19 cases here. There's one case here.

24 There was no --

25 JUSTICE GINSBURG: One case for purposes of

1 executing, but there are -- there are 19 judgments
2 involving thousands.

3 MR. LAMKEN: That -- that's correct. There
4 are 19 underlying judgments, but only one execution.

5 JUSTICE GINSBURG: Are there -- are there
6 any in this category, that is, cases litigated to
7 judgment for terrorist acts, that are not in this
8 package of 19 cases?

9 MR. LAMKEN: I don't know whether there are
10 any others that -- where they were denied intervention
11 here. But the point, I think the fundamental point is
12 that no future case that's identically situated, no
13 other case except this one case will be subject to this
14 rule.

15 JUSTICE KAGAN: What if there were 19 cases,
16 Mr. Lamken, and Congress specified them all?

17 MR. LAMKEN: Yes. Yes. I think the answer
18 would be the same. Would be the same. And that is
19 that, when Congress dictates the outcome from a limited
20 category of cases with one liable party --

21 JUSTICE KAGAN: Well, I guess what I'm
22 asking --

23 MR. LAMKEN: -- that some kind of
24 prospectus --

25 JUSTICE KAGAN: I guess what I'm asking is

1 what that means, "a limited category." Is the number
2 irrelevant if Congress specifies them? I mean, Congress
3 could specify a hundred. Congress could --

4 MR. LAMKEN: I think -- I think it would be.
5 When Congress is not willing to make the law applicable
6 generally to categories of cases but singles out
7 particular pending cases to alter the course of
8 proceedings --

9 JUSTICE ALITO: Is it the -- is it the use
10 of the case name in the -- or the number in the statute
11 that is the offending characteristic?

12 I imagine that a -- a -- a creative drafter
13 could draft a statute that makes no reference to a
14 particular case or to particular cases but could put so
15 many limitations on the scope of the law that, in fact,
16 it applies only to one case or to a small number of
17 cases exactly the ones that Congress wants to target.

18 Congress does that; is it different?

19 MR. LAMKEN: Right. I -- I think, Your
20 Honor, if Congress so limits and so cabins it that, in
21 effect, it has limited the law to one and one case only,
22 it's inexplicable, except as an effort, to limit it to
23 one case and one case only. That would fall within our
24 rule as well.

25 And the principle underlying that is that

1 Congress enacts laws; it doesn't adjudicate specific
2 cases.

3 JUSTICE SCALIA: You know, we -- we had a
4 case. I don't remember the case name. I think it dealt
5 with *Lampf*, which -- which -- in which our Court had
6 come to a surprise decision which shortened what
7 everybody thought had been the statute of limitations
8 for certain securities actions. Congress passed a law
9 trying to reverse our decision. It said anybody who had
10 filed the security action prior to the date of this
11 decision would be allowed to refile and proceed to
12 judgment. We went through a lot of trouble to say that
13 Congress can't do that because it is reversing the
14 outcome of a court judgment. It would have been so easy
15 to decide that case by saying, my Lord, it's just
16 referring to particular cases.

17 MR. LAMKEN: Well, in fact, the statute at
18 issue in *Plaut* that -- that reversed *Lampf* was a
19 generally applicable case to all pending cases. Its
20 problem is it went too far and addressed cases which had
21 gone final. And this Court held its authority to
22 adjudicate cases includes the power to conclusively
23 decide them, so it went too far. But it was a generally
24 applicable statute to all pending cases.

25 This is the exact opposite. In fact, if

1 this suit were dismissed on a technicality, and
2 identically-situated plaintiffs filed a new one, or
3 these plaintiffs filed a new one and it got a different
4 caption, 8772 would not apply.

5 JUSTICE KENNEDY: What about the Robertson
6 case? Is -- isn't that the case involving the timber?

7 MR. LAMKEN: Yes. So Robertson is also a
8 generally applicable statute. That statute said that
9 for the five statutory provisions that were at issue in
10 the cases, you could comply with those or you could
11 comply with two new provisions, and that would be
12 sufficient for the timber harvesting.

13 But that rule applied not only to those
14 cases, but to any additional cases --

15 JUSTICE KENNEDY: Well, as Justice Alito
16 indicated, actually it named cases by -- didn't it
17 reference the case by number?

18 MR. LAMKEN: And the court said it
19 referenced the case by number to identify the statutes
20 that were the basis of the suit. And, in fact,
21 Subsection (g) of that statute specifically contemplated
22 additional suits challenging timber harvesting, and the
23 new rule, which said Subsections (b) (3) and (b) (5) are
24 good enough -- you don't have to comply with the other
25 five statutes -- would apply to those new lawsuits as

1 well.

2 JUSTICE SCALIA: Where do you get the notion
3 that Congress can only act by generality? It acts all
4 the time on individual matters. I mean, certainly, you
5 know, grants certain privileges and certain monies on
6 the basis of individual cases.

7 MR. LAMKEN: Justice Scalia, our principle
8 is not that Congress can't act on a certain bridge, a
9 single parcel of land, a single set of presidential
10 papers. It's that Congress cannot limit its legislation
11 to one and only one case such that it dictates the
12 outcome.

13 JUSTICE SCALIA: Why is that? So long as it
14 is not overturning a judgment that the court has made in
15 that case, as it did in *Lampf* or whatever the name --
16 was it *Plaut*? I don't think it was *Plaut*.

17 MR. LAMKEN: *Plaut* wrote it.

18 JUSTICE SCALIA: I -- I wrote it. I just
19 don't remember.

20 (Laughter.)

21 Do you know how many cases I've written?

22 (Laughter.)

23 So long as it doesn't overturn the judgment
24 of the court, you have to be relying on the fact that it
25 cannot act individually. Is it magic that it -- that

1 the individualized law that it enacts happens to affect
2 a particular case? Why is that magic?

3 MR. LAMKEN: I think the principle is not
4 whether it happens to affect a particular case.
5 Congress can regularly -- well, often the problems will
6 come to Congress's attention because of cases, and it
7 may enact a law even thinking about that case. But what
8 Congress can't do is limit its law so that it applies to
9 that case and that case only.

10 JUSTICE KENNEDY: Because it violates
11 what -- what principle? At -- at -- at the end of the
12 day, I suppose maybe bill of attainder if there's a real
13 intent to punish. Maybe equal protection might work.

14 But I take it you're relying on separation
15 of powers?

16 MR. LAMKEN: Yes. And Article III, because
17 it's the rule of the courts to decide individual cases.

18 JUSTICE BREYER: What do we do about all of
19 the -- what used to be when I worked in the Senate
20 Judiciary Committee? Every year we would get dozens,
21 maybe hundreds, past dozens of private bills. There
22 were bills for one person, and moreover, at least some
23 of them, to my recollection, involved that one person
24 saying I tried to sue. Maybe the case is still there,
25 but I was met with a statute of limitations defense, for

1 example. I'd like the money. And we'd vote yes, give
2 him the money, he deserves it, if he does.

3 MR. LAMKEN: And I think the history of
4 private bills actually proves our point, because the
5 private bills, the vast majority, as you point out,
6 don't affect a specified case at all. They just simply
7 say you're entitled to your --

8 JUSTICE BREYER: Well, considering the ones
9 that do --

10 MR. LAMKEN: Even the -- even the --

11 JUSTICE BREYER: -- very often the person
12 sued. He was met with some kind of defense, and he
13 thought, and Congress might have thought maybe he should
14 have the money. This is a technical defense.

15 MR. LAMKEN: Exactly. And in the context of
16 suits against the government --

17 JUSTICE BREYER: Yes --

18 MR. LAMKEN: -- traditional context, the
19 government has -- the Federal government has expansive
20 authority to waive its defenses, to relinquish its
21 claims, to expand or contract --

22 JUSTICE BREYER: I understand you --

23 MR. LAMKEN: -- or in that context, and in
24 that context alone, the government -- the Federal
25 government has extraordinary power to determine --

1 JUSTICE BREYER: Well, what -- now -- now,
2 suppose it's a private person on the other side. I can
3 easily imagine circumstances where to take the money
4 from private B and give it to private A might -- for
5 example, a property without due process. It might
6 violate some other provision. But if it doesn't violate
7 some other provision, what in the separation of powers,
8 unsaid principles, distinguishes between taking \$10 from
9 the government and giving it to the private person, or
10 taking \$10 from Joe Smith and giving it to the private
11 person, assuming there's nothing unfair about that?

12 MR. LAMKEN: Setting aside other
13 constitutional provisions, Justice Breyer, the
14 difference is this: Congress has full power to waive
15 the United States defenses, to relinquish its own
16 claims, to contract or expand its immunity. But when it
17 comes to a suit between two private parties, the
18 government can't waive one of those party's defenses.
19 And courts --

20 JUSTICE BREYER: Because?

21 MR. LAMKEN: Pardon?

22 JUSTICE BREYER: Because I think --

23 MR. LAMKEN: Those aren't the government
24 rights. And from --

25 JUSTICE BREYER: Oh, oh. The defense -- the

1 defense happened to be -- that worked -- an obscure
2 provision in a court of claims act, that the government
3 through Congress had once put in, and they decided it
4 would be unfair to apply it now to this person, and so
5 they repeal it in respect to that person. And there's
6 never going to be another like him. Okay?

7 Now, don't play. What I don't want you to
8 do is play on the potential unfairness, because there
9 are other parts of the constitution there. Assume it's
10 fair to do that. What stops it.

11 MR. LAMKEN: I think the answer is when it
12 comes to deciding individual cases, particularly
13 individual cases between private parties, that is the
14 domain of the courts, and not Congress.

15 JUSTICE KAGAN: Could Congress do it --

16 MR. LAMKEN: But from the --

17 JUSTICE KAGAN: Could Congress do it the day
18 before a lawsuit is filed? In other words, Congress
19 knows that a lawsuit is going to be filed on a
20 particular subject and just creates the rule for that
21 lawsuit, but the lawsuit hadn't actually been commenced
22 yet?

23 MR. LAMKEN: So long as this law is of
24 general applicability -- it's going to apply to laws for
25 the future, then it is not going to be --

1 JUSTICE KAGAN: Suppose it weren't.
2 Supposed it was like Congress amends the law so that
3 assets held in Clearstream Citibank account is subject
4 to execution by Deborah Peterson, before Deborah
5 Peterson brought suit.

6 MR. LAMKEN: Right. And I think that's
7 potentially a harder case for us. But when Congress
8 legislates and the legislation can have no effect but on
9 a lawsuit, I think that that would be covered by the
10 judicial --

11 JUSTICE SCALIA: There's no lawsuit.
12 There's no lawsuit yet.

13 MR. LAMKEN: Yes. From the time of the
14 framing, State courts with comparable constitutions
15 repeatedly concluded that it violates separation of
16 powers for their legislatures to enact a law which had
17 an effect on one case and one case only. And that
18 included, for example, lifting the statute of
19 limitations for one case and one case only, because they
20 had said --

21 JUSTICE SCALIA: By "one case," you mean
22 not -- not one filed case?

23 MR. LAMKEN: Yes.

24 JUSTICE SCALIA: For -- for one -- one --

25 MR. LAMKEN: Yes.

1 JUSTICE SCALIA: -- person?

2 MR. LAMKEN: For one expected controversy
3 and person, correct. And that is cases like Holden v.
4 James and Jones v. Perry.

5 And the point of the matter is -- and the
6 holding for those cases is Congress, or in that case the
7 State legislature -- crosses the line from legislation
8 when, instead of enacting a law that has law apart from
9 a single lawsuit, dictates the outcome of that lawsuit.

10 JUSTICE SCALIA: Well, there's no lawsuit
11 yet. If you limited it to lawsuit, I'd understand what
12 you're saying. But you're appealing to a much more
13 general proposition, which is that Congress cannot act
14 individually. It must enact general laws. And I just
15 don't agree with that.

16 MR. LAMKEN: Well, Justice Scalia, to be
17 clear, our principle is not that it can act -- must act
18 general laws in the sense that you can't law -- enact a
19 law for one bridge, or one parcel of land, or one set of
20 assets. It is that it cannot enact something that acts
21 on one case and one case only, purports to have no
22 effect, no --

23 JUSTICE SCALIA: I don't -- no. I'm sorry.

24 MR. LAMKEN: Okay. But even if there's -- I
25 mean, even if one were to disagree with me and think

1 that Holden v. James in 1812, the Massachusetts Supreme
2 Court got it wrong. Even if one were to disagree, in
3 this case, we have a pending case. And then I'll
4 just --

5 CHIEF JUSTICE ROBERTS: Sorry, Mr. Lamken.
6 I don't understand the fixation on how many cases we're
7 talking about. I thought -- I mean, I understand the
8 argument. But at least I think perhaps the more
9 significant concern is what Congress is doing in that
10 one case, which is you have a body of law that tells you
11 when you can attach funds and when you can't, and
12 instead of letting the court decide, that Congress comes
13 along and says those funds can be attached. They could
14 do that in two cases. They could do it in ten. They
15 could do it in every case involving Iran. That doesn't
16 seem terribly significant to me. What seems significant
17 is what they are doing in that case.

18 MR. LAMKEN: I think that certainly
19 exacerbates the problem. When Congress does not merely
20 say new law for this particular case, but says new law,
21 plaintiffs win. That is certainly, certainly, across
22 the line. And that is effectively what Congress did
23 here. It enacted a law that said that plaintiffs were
24 able to attach these assets if two conditions are met.
25 But those conditions were clearly met before the law was

1 enacted. There was only one possible outcome.

2 JUSTICE ALITO: Based on what you said this
3 morning, I don't really understand the -- excuse me --
4 the limiting principle of your argument. You've said
5 that the number of cases is not determinative, there
6 could be a great many cases. And you've said that the
7 naming of the -- the cases isn't significant, and it
8 might not even be significant whether the case has been
9 filed yet. So if you put all that together, what is the
10 principle that you're --

11 MR. LAMKEN: So I think for this case, the
12 Court need only rule -- because it was never been -- it
13 wasn't argued below and it wasn't argued in the brief in
14 opposition if it was anything but one case. The Court
15 could rule simply that when Congress singles out one
16 case and one case only, that crosses the line.

17 Apart from that --

18 JUSTICE KAGAN: But that seems silly --

19 MR. LAMKEN: Apart from that --

20 JUSTICE KAGAN: -- Mr. Lamken, and that's
21 why you've been saying that the number doesn't matter,
22 and it doesn't matter whether it's the day before or the
23 day after suit, and it doesn't matter if Congress has
24 specified the docket number because any of those
25 limitations, you would say, well, Congress could do, you

1 know, pretty much the exact same thing except it would
2 be in two cases, or except it would be without the
3 docket number. And your answers suggest how, you know,
4 a little bit nonsensical those distinctions would be.

5 MR. LAMKEN: Let me explain why I wouldn't
6 be concerned and then give you the principle that would
7 govern the remaining cases.

8 I would not be concerned about the limiting
9 principle here because Congress, for 200 years, didn't
10 get near this line because States, for almost 200 years,
11 have had the exact same principles. And yet, there's no
12 history, no debate, no series of cases determining
13 did -- did their legislatures cross the line.

14 The rule that I would give to address that
15 is, simply put, if it's not listing particular cases,
16 then Congress isn't going to cross the line so long as
17 it doesn't dictate the outcome for a set of cases where
18 there's only one liable party and it's unwilling -- and
19 it's willing to make it a perspective in effect.

20 But if Congress dictates the outcome, and
21 there's only one liable defendant, and Congress is
22 unwilling to make that perspective, that's dictating
23 outcomes of cases. It is not legislation as we
24 understand it.

25 The framing generation certainly understood

1 that that's something that purported to act on one case
2 and one case only, or a handful of specified cases
3 crossed the line from legislation to judicial decision
4 making and violated our -- and violated the separation
5 of powers.

6 This Court likewise should understand that
7 when Congress purports to act on one case, and if that
8 case is dismissed and they're identical plaintiffs, file
9 the identical suit, and it gets a different case number,
10 yet the law doesn't apply, that law has no existence
11 apart from dictating an outcome in a case --

12 JUSTICE KAGAN: Why doesn't it make a
13 difference that this is in the area of foreign affairs?
14 I had thought that our cases were pretty clear that the
15 political branches -- especially the executive, so I
16 concede that there's a difference there -- but that the
17 political branches have a great deal of power in this
18 area, even when it comes to very particular
19 controversies.

20 MR. LAMKEN: Right. And I think the
21 government's examples prove exactly why Congress crossed
22 the line here. Now, I'm going to start with sovereign
23 immunity, foreign sovereign immunity, and the history of
24 the executive determining sovereign immunity and the
25 courts universally respecting it. And that's because

1 sovereign immunity was a matter of comity, grace, and
2 international politics. And the courts would respect
3 the executives' determinations because they did not want
4 to embarrass the executive or create an international
5 incident by assuming jurisdiction where the executives
6 told them not to.

7 But State law and the UCC are not matters of
8 grace, comity, or international politics. They are
9 matters of law for the courts to decide.

10 JUSTICE KENNEDY: Well, perhaps -- perhaps
11 they are when the assets are held by a country as to
12 which we have very delicate relations with matters
13 particularly involving dangerous acts allegedly
14 perpetrated by that country.

15 MR. LAMKEN: Justice Kennedy, I don't think
16 the executive branch would submit to the courts a
17 suggestion of State law because foreign affairs
18 principles were at issue, and expect the States --

19 JUSTICE KENNEDY: Any suggestion --

20 MR. LAMKEN: A suggestion of State law as
21 opposed to a suggestion of immunity, because the State
22 law is something that has existence apart from what the
23 executive believes the right --

24 JUSTICE BREYER: The State law is what would
25 apply, perhaps, in the absence of a congressional

1 statute. So the President goes to Congress and says,
2 what I would like is you to agree with me about this.
3 We've frozen \$14 billion worth of assets of a country
4 with which we are not friendly. There are some people
5 who would like some of that money. We would like to
6 take the assets which are currently being held in the
7 14th floor of the Howard Building in Chicago and use
8 that. Why? We want to use that because we've worked
9 out that that's the best way to pay people we think
10 should be deserving money, and we don't care about the
11 foreign country in respect to those. But our foreign
12 relations are such that we don't want to get the others
13 involved. Now what's wrong with that?

14 MR. LAMKEN: Justice Breyer, if I understand
15 the hypothetical, the executive's authority to implement
16 the law --

17 JUSTICE BREYER: No. I'll -- the
18 hypothetical is meant to say just what Justice Kennedy
19 brought up, which is the President, particularly when he
20 acts together with Congress, is given the foreign
21 affairs power to a very great extent of the United
22 States of America. And that foreign affairs power could
23 often involve, for reasons of foreign policy, unfreezing
24 a refrigerator and not unfreezing the stove.

25 So I don't -- I don't know foreign affairs,

1 but I do know that the President, together with
2 Congress, certainly must have very broad power to decide
3 what assets shall or shall not be kept frozen and not
4 kept frozen.

5 MR. LAMKEN: So if the President were given
6 the power to confiscate and distribute these assets,
7 which frankly he has not, if he were given that power,
8 that would exacerbate the separation of powers problem,
9 because the executive branch and the political branches
10 should take accountability for seizing the assets,
11 confiscating them, distributing them. But they cannot,
12 cannot attempt to give it an air of judicial legitimacy
13 by commandeering one case and one case only, like --

14 JUSTICE KAGAN: Suppose there's -- suppose
15 Iran were holding a great many American hostages, and
16 Iran said, we'll release these hostages if you stop
17 execution in a suit like this. And suppose Congress
18 thought that that was a good deal and -- and said
19 exactly that.

20 MR. LAMKEN: Right. And that is the other
21 authority that the Federal government invokes, which is
22 this Court has said is very circumscribed, which is the
23 claims settlement authority, which is the government can
24 settle the claims of its own nationals if there is an
25 international agreement or a court which it is

1 attempting to implement. But you can't extrapolate from
2 that to the ability to settle the claims, eliminate the
3 claims and defenses of a foreign national when there is
4 no settlement agreement or anything of that sort.

5 This is unprecedented in foreign relations
6 otherwise for a statute to say in this case and this
7 case only, here's the result.

8 JUSTICE KAGAN: I'm not quite sure I
9 understood that answer, and -- and you're -- you're
10 suggesting that if Congress has a good reason to
11 extinguish these claims, then Congress can do it, but if
12 not, not.

13 MR. LAMKEN: No. I think the answer is that
14 the -- the example given, I believe, was the President
15 wanting to do this. But Congress did not reflect in the
16 statute --

17 JUSTICE KAGAN: No. I said Congress passes
18 a statute that basically --

19 MR. LAMKEN: Yeah.

20 JUSTICE KAGAN: -- affects this deal.

21 MR. LAMKEN: Yeah. And if Congress acts on
22 these assets, it has authority to do that. The one
23 thing it can't do is say, this case, this case only, no
24 other case, because that's just not law. That's an
25 adjudication.

1 JUSTICE KENNEDY: Well, your -- your answers
2 seem to be that if the President does something, that he
3 has more power, more authority than when the President
4 acting with Congress does something. I would think it
5 would be just the opposite.

6 MR. LAMKEN: Well, Your Honor, I think
7 the -- the -- if Congress delegates the power to the
8 President, that's one thing. If Congress purports to,
9 for example, in sovereign immunity, in 200 years there's
10 no incident that I know of where Congress has said, in
11 this case and this case only, we've determined whether
12 there should be sovereign immunity. Typically that
13 is --

14 JUSTICE KENNEDY: I assume that the
15 President signed this legislation. This wasn't a veto
16 override.

17 MR. LAMKEN: No. The President signed a
18 very large piece of legislation which included this
19 piece of it. But I think the point of the matter is, if
20 the political branches want to confiscate assets and
21 distribute them, they should take accountability for
22 that.

23 It is a terrible lesson for the American
24 public to say that my sure outcome is not to go to the
25 courts and litigate my case there, but to go to the --

1 JUSTICE GINSBURG: Mr. Lamken, can you tell
2 me about -- I mean, when we set up the Iran U.S. Claims
3 Commission, there were a lot of suits pending that had
4 to be stopped. And that legislation told the courts,
5 you have no choice; you must dismiss these cases.

6 MR. LAMKEN: Yeah. And I think that was
7 Dames and Moore. And that authority under Dames and
8 Moore has been carefully circumscribed to cases where
9 the United States has a settlement agreement or an
10 international accord, and it is implementing the accord
11 by settling the claims of its own nationals. But this
12 is an effort to change the law in favor of its own
13 nationals when there is no international settlement.
14 That circumscribed authority doesn't apply.

15 JUSTICE KENNEDY: Well, suppose -- suppose
16 the -- the executive and the President determines that
17 if you have this legislation, then a settlement will be
18 easier down the road. We're going to flex our muscles;
19 we're going to bring these people to the bargaining
20 table. You can't do that?

21 MR. LAMKEN: If they want to act on the
22 assets, if they want to act on anything -- a particular
23 race -- that is one thing, but it is quite another to
24 take one case and one case only and purport to dictate
25 the outcome.

1 If there are no further questions, I'd like
2 to reserve the remainder of my time for rebuttal.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Olson.

5 ORAL ARGUMENT OF THEODORE B. OLSON
6 ON BEHALF OF THE RESPONDENTS

7 MR. OLSON: Thank you, Mr. Chief Justice,
8 and may it please the Court:

9 Mr. Lamken's entire case is summed up by the
10 one single pending case. I counted over 25 times that
11 that phrase appeared in Petitioner's brief.

12 Now I hear today that it's not one case;
13 it's -- it could be multiple cases. It's a particular
14 outcome. It's a particular property.

15 What Congress did in Section 8772 is act
16 pursuant to its core constitutional authority by
17 legislating changes in substantive laws. And Petitioner
18 admits multiple times in its brief, at page 26, 27, 52,
19 53, and reply brief pages 3, 5, 18, that substantive law
20 was changed in this case. And the substantive law that
21 was changed by Congress respected the execution of
22 assets of a foreign sovereign judgment debtor.

23 The judiciary determined in 19 cases that
24 there was liability in -- in these cases by clear and
25 convincing evidence that Iran sponsored terrorist

1 acts --

2 CHIEF JUSTICE ROBERTS: Well, the issue
3 doesn't have to do with liability. It has to do with
4 the authority to execute --

5 MR. OLSON: Yes, it does.

6 CHIEF JUSTICE ROBERTS: -- which is a --
7 which is a separate matter.

8 MR. OLSON: Yes, it is a separate matter.

9 But my point is -- and the -- the cases that
10 are involved in this litigation are at pages 2a and 2b
11 of the red brief appendix. There were 19 cases in which
12 liability was determined, damages were determined, and
13 then consolidated for the purpose of --

14 JUSTICE KENNEDY: Well -- well, suppose --
15 suppose it were one case. Suppose there were two
16 pending cases -- a private person, private Jones v.
17 Smith -- two separate cases under Federal law where
18 there's a statute of limitations. Could Congress say,
19 In Jones v. Smith the statute of limitations is hereby
20 repealed?

21 MR. OLSON: Yes, Your Honor. And I think
22 this is the Plaut case to which Justice Scalia --

23 JUSTICE KENNEDY: No. The Plaut case was
24 a -- was altering a judgment after the fact. This is
25 before the case is resolved.

1 MR. OLSON: The legislation in the Plaut
2 case involved specific pending pieces of litigation,
3 some of which had not been reduced to a judgment; some
4 of them had been reduced to a judgment, but that
5 judgment had not been final in the sense that the
6 appeals were not exhausted; and one case in which the
7 appeals had been exhausted, and that judgment was final.

8 This Court found that that violated the
9 separation of powers, but that the change of the statute
10 of limitations and the opinion for the Court in that
11 case by Justice Scalia points out specifically that
12 Congress can legislate to change an element of a cause
13 of action, to change a rule of evidence that's an
14 impediment to the plaintiff recovering, and can change
15 the statute of limitations. And in footnote 9 of that
16 case, the Court points out there's nothing -- there's no
17 problem with particularized --

18 JUSTICE KENNEDY: No. No, you're --
19 you're -- you're correct that there was a substantial
20 discussion about cases that had not been reduced to
21 final judgment. But in my hypothetical, the Congress
22 has two different rules: One for Smith v. Jones, the
23 other for Doe v. Roe. Statute of -- otherwise the --
24 the case is the same.

25 In your view, they can do that.

1 MR. OLSON: Yes. In my view. And my
2 opponent does not dispute the fact that Congress can
3 change the rule of decision by changing the substantive
4 law while a case is pending. The courts have the
5 obligation to apply -- this goes back to the Schooner
6 Peggy case in 1801.

7 JUSTICE GINSBURG: In -- in answer to -- to
8 Justice Kennedy's question, there might be a problem,
9 but not separation of powers. I mean, there could be an
10 equal protection issue.

11 JUSTICE KENNEDY: Or delimiting.

12 CHIEF JUSTICE ROBERTS: Well, what if --

13 MR. OLSON: Yes.

14 May I answer?

15 CHIEF JUSTICE ROBERTS: Sure.

16 MR. OLSON: Yes. And we point that out in
17 the brief that there -- to the extent that there are
18 violations of individual rights, the bill of -- the
19 framers of the Constitution put provisions in the
20 Constitution to deal with that kind of situation,
21 Ex Post Facto Clause, the Bill of Attainder Clause, the
22 Due Process Clause, which incorporates principles of
23 equal protection for the Federal government.

24 CHIEF JUSTICE ROBERTS: What if, Mr. Olson,
25 Congress passed a law that said, you know, there are a

1 lot of challenges to the statutory interpretation under
2 a particular statute, say the Health Care Act, and it
3 said in any case involving a challenge to the statutory
4 interpretation of the Secretary of HHS of that act, once
5 it finds jurisdiction, the Court will enter judgment
6 agreeing with the Secretary's purpose.

7 MR. OLSON: I think that comes somewhat
8 closer to the Klein case, where the Court was talking
9 about an -- an area where the Supreme Court, this Court,
10 in -- in the McCardle case and the other case that's
11 mentioned in that -- in that decision, where the --
12 where Congress was directing a result that was
13 inconsistent with decisions that this Court had already
14 made with respect to the pardon power. So --

15 CHIEF JUSTICE ROBERTS: Well -- well, but --
16 I mean, this Court has a lot of decisions about how to
17 interpret statutes. And what Congress is saying in my
18 hypothetical is, well, that's good for you; we want you
19 to adopt the Secretary's interpretation in every case
20 involving it.

21 MR. OLSON: In -- in pending cases, that
22 would be much like the Robertson case where there were
23 two pending cases involving property --

24 CHIEF JUSTICE ROBERTS: But by -- by saying
25 that, you're saying it's okay.

1 MR. OLSON: I'm saying that it's okay --
2 I -- I -- I believe it's okay, under the circumstances,
3 because what the -- this Court said in Robertson in a
4 unanimous opinion was that that -- that that type of
5 legislation is, to the extent it is changing the
6 underlying substantive law, that is permissible.
7 Congress may do that.

8 Now, the --

9 CHIEF JUSTICE ROBERTS: I think that's a
10 little surprising. In other words, Congress can pass a
11 statute and then say whenever the statutory
12 interpretation of the executive branch is challenged,
13 you, Court, will enter judgment in favor of the
14 Secretary.

15 MR. OLSON: Well, what I think the --
16 your -- your hypothetical included two components.

17 One where the Congress of the United States
18 passed a statute saying that hereinafter this particular
19 law will be interpreted in this particular way. That is
20 a change in the substantive law which, in the Miller
21 case --

22 CHIEF JUSTICE ROBERTS: Not in a particular
23 way. They don't care. They don't think this clause
24 ought to be interpreted this way. They are just saying
25 whenever it is challenged, you, Court, adopt the

1 Secretary's interpretation.

2 MR. OLSON: Then --

3 CHIEF JUSTICE ROBERTS: We don't know what
4 the interpretation is going to be. We just trust the
5 Secretary --

6 MR. OLSON: Well --

7 CHIEF JUSTICE ROBERTS: -- more than we
8 trust the courts.

9 MR. OLSON: Unfortunately, I guess, I know
10 some might say that Congress does that all the time, by
11 providing authority in administrative officials to
12 interpret the statute. And then this Court, under
13 various different provisions that you've decided, say
14 that we will accord deference to that -- under various
15 circumstances --

16 CHIEF JUSTICE ROBERTS: But there's a
17 difference between causing -- affording deference and
18 entering a judgment.

19 MR. OLSON: I -- if --

20 CHIEF JUSTICE ROBERTS: Let's make it even
21 clearer: The -- the -- the Court has issued its
22 decision saying it agrees with the Plaintiff's
23 interpretation, but the mandate hasn't issued yet, and
24 Congress says, boy, we don't like that decision. They
25 pass a law saying in that case, this is the

1 interpretation you should adopt.

2 MR. OLSON: I -- I -- I believe that as long
3 as that case is pending and is not final, allow the
4 Plaut case. And the statute of limitations, we don't
5 like -- Congress doesn't like the interpretation or the
6 application of a particular statute of limitations;
7 Congress can say we're changing the statute of
8 limitations, in a sense, by saying just as you said.

9 CHIEF JUSTICE ROBERTS: Well, they don't
10 say, "We're changing."

11 What we say, "We want you to enter judgment
12 in this case in favor of the Secretary."

13 MR. OLSON: Well, I think that you now moved
14 it further, to the point where the Congress is
15 directing, with respect to a particular case, the
16 outcome between A and B.

17 But to the extent -- and this is Robertson.
18 So the -- and -- and that argument was made, and that
19 argument was sort of adopted in the Ninth Circuit. But
20 this Court unanimously reversed the Ninth Circuit in
21 that case.

22 The same -- essentially the same argument
23 was made -- if you look at the briefs and look at the
24 Robertson decision, the same argument was made there
25 that was being made here. And --

1 CHIEF JUSTICE ROBERTS: And just so you
2 understand what I'm concerned about.

3 You know, there are places in the world
4 where courts function just the way our courts do, except
5 every now and then, when there's a case that the -- the
6 strong man who runs the country is interested in because
7 a crony is one of the parties or whatever, and he picks
8 up the phone and he tells the court, You decide this
9 case this way. And I don't care what you thought the
10 law was, decide it this way.

11 MR. OLSON: Yes.

12 CHIEF JUSTICE ROBERTS: I'm not sure I see
13 what the difference is here.

14 MR. OLSON: Well, I do. I -- I respectfully
15 feel that there are many differences.

16 Here, what Congress did -- and my opponent
17 concedes that the substantive law of foreign sovereign
18 immunity from execution was changed substantively. And
19 what you said in the Miller case and -- and repeating
20 what was said in the Robertson and the Plaut case, is
21 that if the substantive law is being changed, there's no
22 problem under Klein. There's not a separation of --
23 separation of powers problem.

24 And so to the extent that -- and I agree
25 with you, that this system that we have wouldn't

1 tolerate Congress directing an outcome of a specific
2 case: A must win and B must lose. And there might be
3 implications with respect to the Due Process Clause, the
4 Bill of Attainder Clause, if -- if it would involve some
5 sort of punishment, or ex post facto issues in -- in --
6 in the criminal context.

7 JUSTICE SCALIA: What about the Equal
8 Protection Clause?

9 MR. OLSON: The --

10 CHIEF JUSTICE ROBERTS: This law applies
11 only to me. Everybody else, it comes out differently.

12 MR. OLSON: Yes. So to the extent that
13 the --

14 CHIEF JUSTICE ROBERTS: Don't you think
15 there -- don't you think there can be an equal
16 protection --

17 MR. OLSON: The Federal Constitution imports
18 equal protection principles in the Due Process Clause;
19 that is correct. But what we have here, we have
20 multiple cases where the judicial function was, first of
21 all, to decide liability in individual cases. And
22 liability was determined by clear and convincing
23 evidence that the government of Iran sponsored terrorism
24 that killed and maimed American citizens. And then
25 there was a decision by the judiciary in 19 different

1 cases that there were damages to be awarded.

2 JUSTICE BREYER: Is that the ground? I'd
3 like you to perhaps repeat, but I think pursue what the
4 chief justice was bringing up. The example that I
5 thought of is imaginary. The SEC has a rule, and it
6 says a winning plaintiff in a 10b-5 case cannot attach
7 assets that are in a trust that the defendant has
8 commingled the assets with his wife who's not a
9 defendant. Can you imagine that rule? I'm just
10 trying -- it's something like a Spendthrift trust or
11 what I'm trying to do is get a Spendthrift trust in the
12 Federal context. Now, Congress passes a law, and it
13 says in case 1, 2, 3, 4, 5, the petitioner can reach the
14 mingled assets. Okay. Period. Constitutional? If
15 not, why not?

16 MR. OLSON: That presents more significant
17 difficulties that are closer to the line that the Chief
18 Justice is pursuing --

19 JUSTICE BREYER: What?

20 MR. OLSON: To the extent -- to the extent
21 that this is Robertson, to the extent that that court
22 can interpret that under these circumstances, the law,
23 with respect to attaching the trusts or commingling of
24 assets, will be thus. And that's the interpretation
25 that this Court or another court can give to it.

1 JUSTICE KENNEDY: When you say it's closer
2 to the line, what line? That's what we're trying to
3 ask.

4 MR. OLSON: The line of directing an outcome
5 in a particular case with respect -- and this is Klein,
6 where the Supreme Court was directing the outcome, the
7 interpretation -- where Congress was directing the
8 interpretation of the meaning and significance given to
9 a pardon where the court had already decided in a final
10 decision what the outcome of that case --

11 JUSTICE BREYER: Well, I thought your answer
12 to the hypothetical -- have you got the hypothetical in
13 mind? All we have is a statute that says in case 1, 2,
14 3, you can, in effect, reach the assets, winning
15 plaintiff in the two 10b-5s of the Spendthrift trust.
16 And that's all it says. It doesn't work for the future.
17 It doesn't work elsewhere for the past. It works for
18 this case.

19 Now, that might violate several things. But
20 I want to know what, and does it violate something, and
21 does it violate this principle that they are bringing up
22 about not deciding for a particular case?

23 MR. OLSON: Well, I -- and I think there is
24 no not deciding for particular case principle embedded
25 in the separation of powers concept. There is an

1 instruction to the judiciary to decide a case a certain
2 way that the Court talked about in the Plaut case, but
3 that is not involved. And the Court in Plaut in that
4 footnote to which I referred said that there is no
5 constitutional impediment to Congress legislating for a
6 class of --

7 JUSTICE BREYER: Now, can I do this? Can I
8 say perhaps, the case I just gave you, Spendthrift
9 trust, legislation for this one plaintiff, maybe they
10 can't do that. But if we're talking about Spendthrift
11 trusts in Iran, they can, because that's the foreign
12 affairs power and because the President and Congress
13 both agree that that's an appropriate exercise of the
14 foreign affairs power.

15 MR. OLSON: Yes. And that's -- I think the
16 government will address that in more detail. But we did
17 discuss in our brief that the power of the President
18 and -- this is -- this is the power of the President and
19 Congress working together. Congress passed the statute.
20 The President signed the statute. The President blocked
21 the assets. By the way, these assets are in the United
22 States illegally. There's already been fines imposed
23 with respect to the laundering of these funds that put
24 them in the United States. This is a case involving the
25 execution of assets of a foreign sovereign in the United

1 States who could hardly imagine a case where the power
2 of the executive and Congress working together with
3 respect to foreign policy and terrorism have.

4 CHIEF JUSTICE ROBERTS: I suppose this
5 applied to us as well, right? Congress can tell us how
6 to rule on cases pending before us? You know, they have
7 a committee every year at the start of the term. They
8 say, well, what cases are up there? They read the
9 briefs. And they say, well, we think this one should
10 come out this way. And they pass a law telling us, in
11 case number 15185, the Supreme Court will enter
12 judgment, or, you know, more specifically directed to
13 the pending matter.

14 MR. OLSON: I think that there is probably a
15 point where if the Congress is directing the court to
16 decide a case a certain way, irrespective -- and what
17 you said in the Miller case --

18 CHIEF JUSTICE ROBERTS: Well, it doesn't
19 have to say the petitioner wins. It sees what the
20 question presented is, and then they say in any case in
21 which, and then read the question presented, you can
22 attach the funds or you can recognize Puerto Rico as a
23 sovereign or whatever else the case involves.

24 MR. OLSON: Well, Mr. Chief Justice, what
25 you said in Miller, quoting the Robertson case and

1 quoting the Plaut case, is whatever the precise scope of
2 Klein -- because I think that's what you're referring
3 to -- later decisions have made clear that its
4 prohibition does not take hold when Congress amends
5 applicable law.

6 JUSTICE KAGAN: Does that mean, Mr. Olson,
7 if I could, you're conceding that Congress could not
8 say, we have a particular case, Smith v. Jones, Smith
9 ought to win? Congress cannot say that, right?

10 MR. OLSON: Well -- and yes. That would
11 also implicate due process and possibly a takings and
12 other --

13 JUSTICE KAGAN: No, just under the straight
14 separation of powers argument, that would be
15 adjudicating if Congress said Smith wins in this case?

16 MR. OLSON: I think that unless the Court
17 feels that what Congress is really doing is changing the
18 underlying statute, the substantive provision that
19 ordains that result --

20 JUSTICE KAGAN: I was giving you a simple
21 hypothetical. I thought that you already answered this,
22 but maybe not. Congress says, we see this case, Smith
23 versus Jones. Smith wins.

24 MR. OLSON: I agree with you, but --

25 JUSTICE KAGAN: That's no good.

1 CHIEF JUSTICE ROBERTS: Agree with her what?

2 MR. OLSON: Agree that that would implicate
3 concerns about separation of power, just directing a
4 judgment. But to the extent --

5 JUSTICE KAGAN: So if that's right, now
6 Congress takes a look at this case and says, we can't
7 just say Smith wins. And then we just -- we take a look
8 at the case and we say, oh, if you just tweaked the law
9 in this particular way, Smith would win. So we tweak
10 the law in this particular way for this case only. But
11 we don't say Smith wins. We just say we're tweaking the
12 law in this particular case for this case only. Is that
13 all right?

14 MR. OLSON: Yes. Because in the Plaut case
15 the Court talks about the fact that Congress can enact
16 legislation and it -- is it some case or is it --

17 CHIEF JUSTICE ROBERTS: It's not the Plaut
18 -- it's not the Plaut case. It's not even tweaking the
19 law. As in here, it's saying, an issue has arisen in
20 this case of whether or not this and this, and in that
21 case, case number 14 whatever, the answer is this.

22 Now, it makes it clear that Smith wins, but
23 they don't just say that. They say, you're arguing this
24 in this case. In this case you have to rule in favor of
25 Smith and then the judgment.

1 MR. OLSON: You have -- in order to win, you
2 have to have a statute of limitations that comes out
3 this way. And we are legislating with respect to these
4 set -- this set of circumstances that the statute of
5 limitations will be different, and that is Plaut case
6 and --

7 CHIEF JUSTICE ROBERTS: And all this Court
8 has to do is sign on the dotted line?

9 MR. OLSON: Well, Congress has made a
10 determination by using its power to change something
11 that will affect the outcome of a case. Every time
12 Congress passes a statute, it affects the outcome of
13 future cases and pending cases. The Schooner Peggy said
14 that Congress may do that, and that had to do with the
15 Treaty, in connection with the pending case. And until
16 that case is final, Congress can change the substantive
17 law. And if that is the import of Justice Kagan's
18 question, which I take it to be, that is within
19 Congress's power. There's no limiting principle. We
20 heard it today. The single pending case was -- that was
21 mentioned 25 times in Petitioner's brief went out the
22 window. Now it can be, well, two cases, nine cases,
23 seven cases. What is the limiting principle here?
24 There are limiting principles in the Constitution,
25 specific provisions. But we're talking about separation

1 of powers. And what this Court has said repeatedly is
 2 if the legislation can be interpreted as changing the
 3 underlying substantive law, that is not -- whether it's
 4 particularized or not and even if it's a legitimate
 5 class of one, as that footnote in the Plaut case says.
 6 And there have been private bills --

7 JUSTICE SCALIA: It does say that. But why
 8 has the United States never done this before? That's
 9 what troubled me about the case. You know, when 230
 10 years have gone by and never before has the government
 11 done something like this. I wonder, you know, maybe
 12 Congress didn't think it had the power to do it.

13 MR. OLSON: What is -- what is,
 14 Justice Scalia, something like this, as -- as you did
 15 point out in that footnote in the Plaut case, there have
 16 been individual pieces of legislation, special bills
 17 throughout the Court's history. There have been changes
 18 in the copyright laws that are -- benefitted particular
 19 copyright holders or patent holders, or Indian -- claims
 20 to Indian tribes and so forth. There is
 21 particularized --

22 JUSTICE SCALIA: Doesn't name -- doesn't
 23 name a particular case and say for purposes of that
 24 case --

25 MR. OLSON: Well, if you're --

1 JUSTICE SCALIA: -- the law will be thus and
2 such.

3 MR. OLSON: I --

4 JUSTICE SCALIA: Do you have a single case
5 where -- where Congress has ever done that?

6 MR. OLSON: Yeah. I -- what I would say,
7 Your Honor, is that Congress does all the time with
8 respect to particularized legislation favoring a
9 particular individual or not favoring a particular
10 individual. And it can't be a constitutional principle
11 that if you put a case name in -- in the change of the
12 law, all of a sudden it becomes unconstitutional. Or
13 you could do it today but you can't do it tomorrow
14 because someone filed a lawsuit.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 Mr. Kneedler.

17 ORAL ARGUMENT OF EDWIN S. KNEEDLER

18 ON BEHALF OF THE RESPONDENTS

19 MR. KNEEDLER: Mr. Chief Justice, and may it
20 please the court:

21 This Court has held since the days of the
22 Schooner Peggy that Congress may amend the law and make
23 it applicable to pending cases, and the court must give
24 effect to that law. That is what Congress did here, and
25 after the district court made the determinations that

1 triggered the application of this law --

2 JUSTICE KAGAN: But usually when we say
3 that, we're talking about amending the law that has
4 effect beyond the particular pending case. And there we
5 say, yes, absolutely, Congress can amend the law.
6 Congress knew that it would affect these pending cases.
7 No problem because Congress passed something, you know,
8 that was within the scope of its legislative powers to
9 amend law affecting this case and others.

10 When you take out the "and others," that
11 seems to create a different kind of problem, one where
12 Congress is doing our job rather than its own.

13 MR. KNEEDLER: I -- I think not,
14 Justice Kagan. And there's several important principles
15 underlying that.

16 One, the Footnote 9 in -- in this Court's
17 decision in Plaut said that there -- that imposing
18 individual duties or liabilities on a particular person;
19 in other words, a particular law, private law, there's
20 no limitation on that in the U.S. Constitution.

21 Counsel for Petitioner has mentioned various
22 State law decisions that have said special bills are not
23 permitted. This Court's decision in Paramino
24 distinguishes those cases and said, yes, some State
25 constitutions have that, but the Federal Constitution,

1 as a matter of separation of powers, has no limitation
2 on special laws.

3 There may be equal protection issues, bill
4 of attainder issues, or special Article I powers like
5 bankruptcy, where there -- where there's a Uniformity
6 Clause and you can't have a State statute affecting a
7 particular case or dispute.

8 The second point is if Congress is able to
9 legislate with respect to a specific dispute, and it's
10 done it, for example, with respect to railroad labor
11 disputes at -- in the Maine Central case, and this
12 Court's decision on Burlington Northern mentioned there,
13 where Congress -- there's a labor dispute, Congress
14 comes along and prescribes the results of that dispute.
15 That's a specific law. It's -- it's okay. It can't --
16 it can't be rendered unconstitutional just because there
17 happens to be a suit pending about it.

18 JUSTICE KAGAN: Mr. Kneedler, do you -- do
19 you agree with what Mr. Olson said, that Congress can't
20 just pick a winner in a particular suit? Congress can't
21 say Smith wins in this case --

22 MR. KNEEDLER: Absolutely. The -- the
23 straightforward principle is whether Congress is
24 amending the law or whether Congress --

25 JUSTICE KAGAN: Okay. But then --

1 MR. KNEEDLER: -- directing a result under
2 existing law.

3 JUSTICE KAGAN: The question that I gave
4 Mr. Olson -- and I -- I'm searching here for an
5 answer -- is -- is what happens if rather than just
6 picking the winner, Congress amends the law, tweaks the
7 law, modifies the law in such a way -- as to only this
8 case -- in such a way that it's absolutely clear that
9 the effect of that will be to pick a winner?

10 MR. KNEEDLER: I think if Congress is
11 amending the law, it can do that. And let -- for
12 example, in the Schooner Peggy, which involved an
13 international treaty in -- in the court of foreign
14 relations, and that's another reason why what Congress
15 did here, I think the court should owe special deference
16 to.

17 But in the Schooner Peggy, if there had been
18 only one -- that was a treaty that required each party,
19 the United States and France, to restore ships to the
20 other nation. There was a pending prize case.

21 If there had been only one ship seized in
22 the -- in the United States, we -- we don't think any
23 principle in Article III would prohibit giving --

24 JUSTICE KENNEDY: But your -- your answer
25 was there's a difference between amending the law and

1 directing a result in the same case. That seems to me
2 different from what Mr. Olson was arguing.

3 MR. KNEEDLER: No. I think --

4 JUSTICE KENNEDY: What -- what is the
5 principle that would prohibit directing the result in a
6 specific case? A separation of powers principle?

7 MR. KNEEDLER: Yes.

8 JUSTICE KENNEDY: So we are -- so -- so if
9 we interpret this matter before us as directing a result
10 in a particular case, the Petitioners prevail?

11 MR. KNEEDLER: If -- if it's directing a
12 result under preexisting law without an amendment. If
13 the Court interprets the law that way, then -- then you
14 would be correct. But Congress amended the law --

15 JUSTICE KENNEDY: I'm -- I'm not -- I'm --
16 you're quite articulate. I'm not sure I follow.

17 MR. KNEEDLER: Well --

18 JUSTICE KENNEDY: All -- all of a sudden now
19 we find that there is a separation of powers of
20 principle; that you cannot direct a result in a
21 particular case. It seems to me that's inconsistent
22 with the argument that your colleague Mr. Olson was
23 making.

24 MR. KNEEDLER: No. I think what Klein --
25 what Klein has come to be understood to stand for is

1 Congress can't direct a result in a case without
2 changing the law. In other words, Congress comes
3 along -- Congress comes along and says, you should
4 find it --

5 JUSTICE KENNEDY: Suppose they --

6 MR. KNEEDLER: -- this way.

7 JUSTICE KENNEDY: Suppose they've changed
8 the law for this particular case?

9 MR. KNEEDLER: It is still an amendment of
10 the law, whether it's for a particular case or a
11 general -- general --

12 JUSTICE KENNEDY: Well, I find that a very
13 odd distinction.

14 CHIEF JUSTICE ROBERTS: You're saying
15 Congress has to be cute about it. They can't say Smith
16 wins. But they can say in the case of Jones v. Smith
17 where the critical issue is this, we can change that in
18 a way so Smith wins. And don't worry about the law
19 generally, because it's just this case.

20 MR. KNEEDLER: But --

21 CHIEF JUSTICE ROBERTS: It's just a cute way
22 of saying Smith wins.

23 MR. KNEEDLER: No. I -- I don't think
24 that's fair, Mr. Chief Justice, because if Congress --
25 if -- if specificity is not a problem before a lawsuit

1 is filed, it doesn't become a problem when -- when a
2 law --

3 CHIEF JUSTICE ROBERTS: It becomes a
4 problem -- with respect, it becomes a problem because
5 our job is to decide cases. And before a lawsuit is
6 filed, there's no case. But when there is a case,
7 Article III says that's our job. Their job is to pass
8 laws; our job is to decide a case. When there's a
9 dispute under one of the laws they pass, that's our job.

10 MR. KNEEDLER: But Congress has amended the
11 law by -- by making assets attachable that would not
12 otherwise have been attachable.

13 JUSTICE BREYER: If you want to be cute,
14 Congress has 4,000 ways of being cute. And I can't
15 quite see this Court trying to police those ways.

16 MR. KNEEDLER: And Congress --

17 JUSTICE BREYER: And -- and indeed, I think
18 I'm right in saying we had hundreds of private bills
19 that were written in all kinds of ways and weren't -- to
20 benefit individuals, and some of them might have been
21 subject to cases and others not. The unusual thing
22 about this case is it refers to a particular docket
23 number.

24 MR. KNEEDLER: It refers to the assets in a
25 particular docket number, and we think that's --

1 that's --

2 JUSTICE BREYER: Can't anyone join? That is
3 to say, if a person today, or if there is some person
4 who has the appropriate judgment, an antiterrorism
5 judgment against Iran, are they perfectly free to join
6 into this case?

7 MR. KNEEDLER: Under the statute, they would
8 be. But I -- if I --

9 JUSTICE BREYER: I would --

10 MR. KNEEDLER: -- could just say what's --
11 what's also critical about this case is the foreign
12 relations context in which it arises.

13 This -- this Court has recognized, for
14 example, the ability of the executive to suggest
15 immunity or nonimmunity in individual cases for foreign
16 sovereign immunity. Those are case-specific
17 determinations, and they affect the case. They may
18 require dismissal of the case, just like the Schooner
19 Peggy required dismissal of the case. The -- the rule
20 of law required it. It wasn't Congress telling the
21 Court to dismiss the case. The rule of law that was to
22 be applied, the change of the law required dismissal of
23 the case --

24 JUSTICE SOTOMAYOR: Mr. Kneedler, why is
25 this different than the Chief Justice's example?

1 MR. KNEEDLER: Because what -- Congress
2 changed the law, and it did not purport to direct a
3 result under existing law. It changed the law of
4 foreign sovereign immunity by removing a possible
5 defense that Central Bank funds were not subject to
6 attachment. It changed -- it changed the law by
7 overriding State --

8 JUSTICE SOTOMAYOR: But for only this case.

9 MR. KNEEDLER: Yes, but -- but --

10 JUSTICE SOTOMAYOR: And only this sovereign.

11 MR. KNEEDLER: But -- as long as Congress is
12 amending the law, there is not a separation of powers
13 problem. Maybe an equal protection problem, there may
14 be a bill of attainder problem, something like that.
15 But in terms -- in terms of the judicial function, the
16 judicial function is the same whether the law is general
17 or whether the law is particular.

18 JUSTICE BREYER: Can we -- would this
19 resolve the case correctly, in your view on your side,
20 were we to say whatever the general principle is, this
21 is a case which is against you. It refers to a case by
22 number, the statute. Before you is the fact that anyone
23 can join, and there are hundreds or dozens of such
24 plaintiffs. And moreover, on the other side, it -- it
25 refers to \$1.75 billion worth of assets in all kinds of

1 different securities and obligations, and now perhaps in
2 cash being held in New York.

3 So whatever we're talking about, though the
4 number suggests a particular case, the facts of the case
5 suggest far more generality than is true of most cases.

6 MR. KNEEDLER: And that is certainly --

7 JUSTICE BREYER: Is that true or not true?

8 MR. KNEEDLER: That -- that is certainly
9 true in this case. It is a pool of assets that, under
10 this Court's decision in James and Moore, emphasizes the
11 need for Congress and the President to be able to take
12 hold of assets, whether it's a small amount or not for
13 two principal reasons: To use as a bargaining chip and
14 also to compensate people who may be injured. And --
15 and frankly, also to sanction.

16 This law does both of those things. It --
17 it -- the -- the freezing of these assets is a
18 bargaining chip, and you don't have to bargain -- pay
19 all your chips at one time. A bargaining chip may mean
20 you want to use the -- one bargaining chip, one set of
21 assets this time and hold off on the other ones.

22 The executive and President and Congress
23 need great flexibility in the area of national -- of
24 national affairs.

25 JUSTICE SOTOMAYOR: Does the government have

1 a position on the Respondent's argument that we have an
2 alternative ground to affirm on? And that would be that
3 their -- these assets were -- could be executed under
4 Section 201(a)?

5 MR. KNEEDLER: We have not taken a position
6 on that. That -- that refers tray under a number of
7 issue that were briefed in the court of appeals on -- on
8 that question. So we have not taken a position on that.

9 Here, we're here to defend this act of
10 Congress which we think Congress enacted to address this
11 particular dispute. And if -- if a pending lawsuit
12 would prohibit, would -- would interfere with the
13 flexibility of the executive and Congress to solve a
14 dispute by disposing of assets to pay particular
15 judgments, that's exactly what the Court feared in
16 Dames v. Moore -- the pending lawsuits. Just because
17 one happens to be pending rather than the law or the
18 executive order being adopted before a lawsuit should
19 not be able to tie up the Federal government's control
20 over national --

21 CHIEF JUSTICE ROBERTS: Thank you -- thank
22 you, counsel.

23 Mr. Lamken, you have six minutes remaining.

24 REBUTTAL ARGUMENT OF JEFFREY A. LAMKEN

25 ON BEHALF OF THE PETITIONER

1 MR. LAMKEN: Thank you.

2 I'd like to begin by going back in history
3 to answer Justice Kennedy's question about a law that
4 says we're going to lift the statute of limitations from
5 one plaintiff and one plaintiff only and nobody else.

6 And the answer to that is early in the
7 nation's history, State court after State court said,
8 You cannot do that. It violates separation of powers.

9 And the amazing part is not just that those
10 courts held, but there's no case that can be cited by
11 anyone saying that that is actually consistent with
12 separation of powers from early in the framing, much
13 less a law that goes further and effectively says that
14 not only are you going to lift the statute of
15 limitations, but we're going to change the loss. On
16 this one case, plaintiff wins and defendant loses.

17 That is completely foreign to our legal
18 traditions. It's completely foreign to history. And
19 for 200 years, Congress never once enacted a law like
20 that. That reticence would be amazing if it were not
21 but the fact that Congress understood that that was
22 constitutionally prohibited.

23 JUSTICE ALITO: Well, could it be that
24 Congress just thinks that's very unfair and that's why
25 they haven't done it?

1 MR. LAMKEN: That -- that is one, but it
2 could have been the same thing in Plaut, that for 200
3 years Congress thought it was unfair to get rid of a
4 final judgment and eliminate repose.

5 But the matter of the fact is that the fact
6 that is also unfair, the fact that there may be
7 individual liberty guarantees associated with it,
8 doesn't mean it's not a separation of powers problem.
9 Because separation of powers protects this Court.

10 It doesn't -- and it does -- when it does
11 so, it also has the effect of guaranteeing fairness and
12 individual liberties for individuals.

13 So separation of powers is important even if
14 one would think that the law might be unconstitutional
15 on other grounds.

16 It's this Court's authority to say what the
17 law is and to decide cases, without Congress passing a
18 law saying, for this one case and this one case only.

19 JUSTICE ALITO: You think the issue here is
20 the protection of the judiciary rather than providing a
21 certain element of equal treatment for the people who
22 are the litigants in the case? I would think it would
23 be the opposite.

24 MR. LAMKEN: I -- in this case, I think it
25 is the rule of law. And the rule of law is something

1 that is the integrity, it is the property, it is
2 something that is --

3 JUSTICE BREYER: What's lacking in the
4 integrity if you have an enemy country, let's say.
5 We've had many wars. You freeze a lot of their assets.
6 There are people who would like to get ahold of some.
7 And Congress gives the executive authority or itself
8 goes through and says, we think these people should have
9 this. We think they should have that. They should --
10 others could have the other thing.

11 I mean, maybe it violates equal protection;
12 maybe it violates due process, depending on how they do
13 it. But in principle, what's wrong with exercising the
14 foreign affairs power in that way?

15 MR. LAMKEN: If the political branches give
16 that power to the President, that only exacerbates the
17 separation of powers problem with doing it this way.
18 Because they do that and accept the accountability that
19 goes with it, but they cannot try to give it an air of
20 judicial legitimacy by instead taking and commandeering
21 one case pending before the court and making --

22 JUSTICE SCALIA: You think that two -- one
23 case -- is it one case or 17 cases or 34 cases? What
24 is -- what is your position?

25 MR. LAMKEN: My position is at least for one

1 case and one case only, like this one, it is
2 unconstitutional.

3 JUSTICE SCALIA: 17 would be okay?

4 MR. LAMKEN: The only -- the
5 limiting principle I would put on it: If it dictates
6 the outcome. And there's a limited category of cases
7 against a single --

8 JUSTICE SCALIA: Limited -- limited
9 category. Okay. So a hundred cases --

10 MR. LAMKEN: Single --

11 JUSTICE SCALIA: -- is a limited -- is a
12 limited category, right?

13 MR. LAMKEN: Single defendants --

14 JUSTICE SCALIA: Yes.

15 MR. LAMKEN: -- dictates the outcome.

16 JUSTICE SCALIA: Has to be a single
17 defendant?

18 MR. LAMKEN: Not willing to make -- not
19 willing to make it --

20 JUSTICE SCALIA: If there are a hundred
21 different defendants, it's okay.

22 MR. LAMKEN: No. A hundred different
23 defendants, and it's not --

24 JUSTICE SCALIA: Yes.

25 MR. LAMKEN: -- and it's willing to make

1 it -- yes, I think at some point it crosses the line to
2 mean --

3 JUSTICE BREYER: A single defendant that
4 represents a hundred million people?

5 MR. LAMKEN: At some point, Justice Breyer,
6 the line is between adjudicating a particular case and
7 actually enacting law. And when Congress goes across
8 the line and says, this case and this case only --

9 JUSTICE KAGAN: And when you say, dictates
10 the outcome, what do you mean by that phrase?

11 MR. LAMKEN: I mean when the -- when
12 Congress enacts the law, there's only one conceivable
13 result.

14 And that is exactly this case. When
15 Congress enacted the law, there was one possible
16 outcome. And that sort of law which says, in this one
17 case, here is going to be the result, is entirely
18 foreign to our legal tradition. That kind of law the
19 framers railed against, and the separation of powers was
20 meant to get rid of.

21 If it's --

22 JUSTICE GINSBURG: Mr. Lamken, you --
23 even -- let's assume your argument prevails, your
24 one-case argument prevails. There is still the open
25 question of did TRIA statute, which was decided against

1 you in the district court, right?

2 MR. LAMKEN: Correct.

3 JUSTICE GINSBURG: So that would have to
4 be -- if you succeeded on the issue that you're raising
5 here, would have to be returned.

6 MR. LAMKEN: Yes. That would be an issue
7 for the Court on remand. It's not within the question
8 presented. Wasn't decided by the court below. It
9 involves complex questions of State law that are
10 important, and where the Court hasn't heard from
11 securities bar, which would be affected.

12 So that is something that would -- yes,
13 definitely be an issue for remand.

14 But when it comes to 8772, there's only one
15 result. And that's what -- that's that plaintiff's win.
16 There is nothing in this nation's history -- and the
17 lesson it teaches the populace is: If you want to win
18 your case in court, don't hire a lawyer; hire a
19 lobbyist. Don't seek recourse through judiciary; seek
20 recourse before Congress for your private dispute.

21 This Court should not lend its credibility,
22 it should not lend its judgment, to that lesson, which
23 is anathema to our judicial traditions.

24 Thank you. We ask for the judgment to be
25 reversed.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 11:04 a.m., the case in the
4 above-entitled matter was submitted.)

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