THE SEARCH FOR MEANING IN *REPUBLIC OF IRAQ v. BEATY*

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I. INTRODUCTION

In *Republic of Iraq v. Beaty*,[1] the Supreme Court is asked to determine whether a Presidential waiver has restored Iraqi sovereign immunity that had been previously removed by the Antiterrorism and Effective Death Penalty Act (AEDPA). In deciding the case, the Court must address two questions: first, did the Emergency Wartime Supplemental Appropriations Act (EWSAA) grant the President authority to waive 28 U.S.C. § 1605(a)(7) and, second, did either the EWSAA or the National Defense Authorization Act (NDAA), by explicitly granting the authority to restore Iraq's sovereign immunity, apply to pending cases? In answering these questions, the Court must also elucidate its approach to statutory interpretation, particularly the level of deference given to Congressional intent as discerned via legislative history and Executive interpretations.

II. FACTS

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA),[2] revising part of the Foreign Sovereign Immunity Act (FSIA) by revoking the sovereign immunity of states in suits for monetary damages based on allegations of state-sponsored terrorism.[3] Codified at 28 U.S.C. § 1605(a)(7), the AEDPA provided that a U.S. national could sue an agent of a foreign state for personal

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1. Republic of Iraq v. Simon, 529 F.3d 1187 (D.C. Cir. 2008), *cert granted*, 129 S. Ct. 894 (mem.) (U.S. Jan. 9, 2009) (Nos. 08-539 and 07 -1090) (consolidating the case with Republic of Iraq v. Beaty, 129 S. Ct. 893 (mem.)).

2. Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1242–43 (1996).

3. 28 U.S.C. § 1605(a)(7) (2000) (repealed).

injury from terrorism-related crimes if the state had been designated as a sponsor of terrorism at the time of the alleged acts.[4]

Shortly after the passage of the AEDPA, and following the first Gulf War, Kevin Beaty, William Barloon, their wives and other detainees sued Iraq under § 1605(a)(7) because they had been taken hostage and tortured by the Saddam Hussein regime.[5] After the plaintiffs won their suit, in early 2003, Beaty's and Barloon's children also filed suit against Iraq for the emotional damage they suffered during their fathers' captivity.[6] That same year, in a different suit, Robert Simon filed similar claims against Iraq for having been taken hostage and tortured during the Gulf War.[7]

In March 2003, the United States invaded Iraq and Congress passed the Emergency Wartime Supplemental Appropriations Act (EWSAA).[8] A few months later the President declared the § 1605(a)(7) exception to sovereign immunity inapplicable to Iraq per Section 1503 of the EWSAA,[9] enacted during the Gulf War, which had permitted suspension of certain sanctionor terrorism-related provisions for Iraq.[10] In 2008,[11] Congress passed the National Defense Authorization Act for Fiscal Year 2008 (NDAA), of which Section 1083(a) repealed the § 1605(a)(7) exception and replaced it with a new exception, 28 U.S.C. § 1605A expanding individuals' ability to recover against states that sponsor terrorism.[12] In order to protect the Iraqi reconstruction effort, however, Congress added Section 1083(d) to the NDAA,[13] which permitted the President to waive the other

4. *Id.* These offenses included torture and hostage taking if the foreign official was acting within the scope of his or her office, employment, or agency. The plaintiff must have also given the state a chance to first arbitrate the claim. *Id.*

5. Daliberti v. Republic of Iraq, 146 F. Supp. 2d 19, 20–24 (D.D.C. 2001).

6. Beaty v. Republic of Iraq, 480 F. Supp. 2d 60, 64 (D.D.C. 2007).

7. Simon v. Republic of Iraq, 529 F.3d 1187, 1189 (D.C. Cir. 2008).

8. Pub. L. No. 108-11, at 1, 117 Stat. 559, 559 (2003).

9. Pres. Determ. No. 2003-23, 68 Fed. Reg. 26459 (May 7, 2003).

10. *Id.* ("The President may suspend the application of any provision of the Iraq Sanctions Act of 1990 . . . *Provided further*, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism . . . ." (emphasis added)).

11. After the circuit court decision in *Beaty v. Iraq* but before the appellate arguments for *Simon v. Iraq*.

12. Pub. L. No. 110-181, Section 1083, 122 Stat. 3, 338–45 (2008). The NDAA established a federal cause of action allowing punitive damages and replacing § 1605(a)(7) with a new § 1605A. Section 1083(c)(1) stated that regarding application to pending cases, "The amendments made by this section shall apply to any claim arising under section 1605A."

13. *Id.*

provisions within Section 1083 with respect to Iraq, including the new § 1605A exception to sovereign immunity.[14]

III. LEGAL BACKGROUND

Prior to the litigation in the cases consolidated before the Court in *Iraq v. Beaty*, the courts had developed a general jurisprudence on how to interpret the retroactive application of various statutes. In *Landgraf v. USI Film Products*[15] the Supreme Court held that when a statute affects not simply jurisdiction but also substantive rights, including a statute that "impairs rights a party possessed when he acted," it cannot be read retroactively absent clear Congressional intent.[16] Therefore, when Congress has not plainly defined the scope of the provision with respect to pending cases the courts must determine whether it affects only jurisdiction or substantive rights as well.[17]

In *Hamdan v. Rumsfeld*,[18] however, the Supreme Court held that retroactivity is usually not an issue for statutes that merely confer or remove jurisdiction because jurisdictional statutes "[take] away no substantive right but simply [change] the tribunal that is to hear the case."[19] Therefore, jurisdictional statutes, said the Court, presumably apply to pending cases.[20] But despite this presumption, the Court relied on the "normal rules of construction, including a contextual reading of the statutory language"[21] and preceding legislative history.[22] Where other provisions in the same section of the statute contained explicit language evidencing Congress's intent that the statute apply to cases pending before the statute's enactment, the Court found the

14. Pres. Determ. No. 2008-9, 73 Fed. Reg. 6571 (Jan. 28, 2008).

15. Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

16. *See id.* at 280 (holding the Civil Rights Act of 1991 did not apply to conduct prior to its enactment).

17. *See id. (*"When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.").

18. Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Justice Roberts did not participate in this decision.

19. *Id.* at 576–77.

20. *Id.* at 577.

21. *Id.*

22. *Id.* at n.10, 580, 584.

lack of such language in the jurisdiction-stripping provision demonstrated Congress's intent that it not apply to pending cases.[23]

The Court has previously examined the retroactive application of the FSIA in *Republic of Austria v. Altmann*,[24] where it held that the presumption against applying statutes retroactively was merely "a presumption, rather than a constitutional command."[25] Though there was no clear Congressional language, the *Landgraf* analysis proved unsatisfactory to the Court because the FSIA "defies . . . categorization" as to whether it affects only jurisdiction or substantive rights.[26] Specifically, the Court noted that prior cases had stated that the FSIA was a statute that codified foreign sovereign immunity rules "'as an aspect of *substantive* federal law.'"[27] The Court went on to determine that foreign immunity questions "reflect[] current political realities and relationships" and found it appropriate to follow history "by deferring to the 'decisions of the political branches . . . on whether to take jurisdiction.'"[28] Noting that one of Congress's stated purposes was "eliminating political participation in the resolution of such claims,"[29] the Court found that Congress intended to apply the statute to conduct occurring before its enactment.[30] The Court's holding followed Justice Scalia's approach in his *Landgraf* concurrence, and did not focus on the distinction between jurisdiction and the impairment of rights but rather on what the "relevant activity that the rule regulates" was.[31]

After the Supreme Court's decision in *Altman*, the D.C. Circuit decided *Acree v. Republic of Iraq*,[32] holding that the EWSAA (of which Section 1503 had permitted suspension of certain sanctionor terrorism-related provisions for Iraq) did not authorize the President

23. *See id.* at 582–84 (deciding that the courts continued to have jurisdiction over pending habeas cases).

24. Republic of Austria v. Altmann, 541 U.S. 677 (2004).

25. *Id.* at 692–93.

26. *Id.* at 694.

27. *Id.* at 695 (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 496–97 (1983) (emphasis added)).

28. *Id.* at 696.

29. *Id.* at 679.

30. *Id.* at 697.

31. *Id.* at 698.

32. Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2003)

to suspend the former § 1605(a)(7) with regard to Iraq.[33] Reading Section 1503 of the EWSAA as a whole and in the context of the entire statute, the court held it did not encompass § 1605(a)(7) because Section 1503 was "aimed at legal provisions that present obstacles to assistance and funding for the new Iraqi Government and was not intended to alter the jurisdiction of the federal courts under the FSIA."[34] Notably, in terms of predicting the outcome of the current case before the Supreme Court, current Chief Justice Roberts, a D.C. Circuit Judge at the time, disagreed with the majority's holding, finding instead that Presidential Determination 2003-23 "ousted the federal courts of jurisdiction in cases that relied on that exception to Iraq's sovereign immunity."[35] Then-Judge Roberts's interpretation was rooted in his interpretation that "'[a]ny other provision' should be read to mean 'any other provision,' not, as the majority would have it, 'provisions that present obstacles to assistance and funding for the new Iraqi Government.'"[36] He emphasized his view that the EWSAA represented "*the first time* [Congress] confronted the prospect that a friendly successor government would, in its infancy, be vulnerable under Section 1605(a)(7) to crushing liability for the actions of its renounced predecessor."[37] Roberts also found that the recent *Ciccipio-Puleo v. Islamic Republic of Iran*[38] decision had determined that § 1605(a)(7) was merely a jurisdictional provision affecting no substantive rights and thus was "not impermissibly retroactive with respect to pending cases."[39]

IV. HOLDING

In *Beaty v. Iraq*[40] the D.C. District Court, though considering the question prior to the enactment of the NDAA and the subsequent presidential waiver of Section 1083, ruled that Iraqi sovereignty had

33. *Id.* at 48 (dismissing the case because under *Ciccipio-Puleo v. Islamic Republic of Iran*, 370 F. 3d 41 (D.C. Cir. 2004), the claimants needed to state a cause of action under a specific source of law, such as a state tort law claim).

34. *Id.* at 51.

35. *Id.* at 60 (Roberts, J, concurring in part and concurring in the judgment).

36. *Id.*

37. *Id.* at 61.

38. Ciccipio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004) (holding that § 1605(a)(7) creates no private right of action against the state, therefore requiring plaintiffs to file claims under a source of law other than § 1605(a)(7)).

39. *Acree,* 370 F.3d at 65.

40. Beaty v. Iraq, 480 F. Supp. 2d 60 (D.D.C. 2007).

not been restored by a Presidential waiver under the EWSAA.[41] The court held that whether the plaintiffs had stated an actionable claim of relief under § 1605(a)(7) was answered by *Ciccipio-Puleo v. Islamic Republic of Iran*,[42] and the plaintiffs re-filed their complaint under various state tort law claims.[43] The court then looked to the language of § 1605(a)(7) and found the plaintiffs met all the requirements for jurisdiction under that provision.[44]

The district court then had to decide whether—even if the case was nonjusticiable as preempted by the President's restoration of sovereign immunity, as a political question, or as contravening the foreign-affairs preemption or act-of-state doctrines[45]—the court lacked subject-matter jurisdiction.[46] Before the court could address the impact of the first Presidential Determination, Determination 2003-23, on the court's jurisdiction, the D.C. Circuit ruled in *Acree v. Republic of Iraq*[47] that the EWSAA did not give the President authority to waive § 1605(a)(7) for Iraq.[48] The district court, forced to uphold *Acree*, lamented that were it free to reach the question itself, it would instead follow Judge Roberts's persuasive argument that the plain language of the statute did indeed grant presidential authority to waive § 1605(a)(7).[49]

In determining whether the case presented a political question, the Court would not permit an end-run around *Acree*[50] and therefore dismissed Iraq's justiciability challenge and other subject matter jurisdiction challenges.[51] In an unpublished *per curiam* opinion, the D.C. Circuit upheld the decision, saying only that Iraq's sovereign

41. *Id.* at 70 (rejecting Iraq's argument that the plaintiffs failed to state a claim upon which relief could be granted, that federal courts lacked subject-matter jurisdiction, and that the claims were nonjusticiable or preempted because of their potential to undermine foreign policy).

42. *See Ciccipio-Puleo*, 353 F.3d at 1032 (stating that the FSIA created no private right of action).

43. *Beaty*, 480 F. Supp. 2d at 93–99 (finding the state law-based intentional infliction of emotional distress claim valid).

44. *Id.* at 69.

45. *Id.* at 70–90.

46. *Id.* at 69.

47. Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004).

48. *Id.* at 48.

49. *Beaty*, 480 F. Supp. 2d at 70.

50. *Id.* at 76.

51. *Id.* at 70–90 (dismissing some claims for which the court lacked jurisdiction due to the President's waiver for Iraq and dismissing other claims under political question, foreign-affairs preemption, and act-of-state doctrines).

immunity "has not been restored under the Emergency Wartime Supplemental appropriations Act" as held in *Acree*.[52]

Despite the addition of the NDAA (which expanded the sovereign immunity exception but explicitly granted Executive power to exempt Iraq from the new exception) and the President's subsequent waiver of the NDAA's applicability to Iraq, the D.C. courts continued to find the case justiciable. The D.C. Circuit in *Simon v. Iraq*[53] addressed whether the NDAA repealed § 1605(a)(7), removing jurisdiction over Simon's tort claim, while the presidential waiver under Section 1083 prevented re-filing under the new § 1605A.[54]

In analyzing whether the courts retained jurisdiction over the § 1605(a)(7) cases, the D.C. Circuit Court observed the line drawn in *Hamdan* and *Landgraf* between statutes that affect only jurisdiction and thus are presumed to apply to pending cases, and statutes that alter substantive rights and thus cannot be applied retroactively absent clear Congressional intent.[55] Rather than determining whether substantive rights were implicated by the NDAA, the Court instead found that the language of Section 1083 and the "text and structure of the NDAA" provided enough guidance for their interpretation.[56] The NDAA's reference to cases "filed under this section"[57] literally meant those filed under § 1605A, and not the pre-amendment § 1605(a)(7); likewise the amendment's application to claims "arising under section 1605A" did not apply to pending claims.[58] Additionally, the fact that the NDAA granted plaintiffs sixty-days—following either the enactment of the NDAA or the entry of judgment, during which time their § 1605(a)(7) cases could be re-filed under § 1605A—meant courts still had jurisdiction to enter judgment on pending cases after the NDAA's enactment.[59] Furthermore, *Acree* had already held that the earlier EWSAA did not authorize the President to suspend §

52. Beaty v. Republic of Iraq, No. 70-7057, 2007 U.S. App. LEXIS 27256 at *1 (D.C. Cir. Nov. 21, 2007).

53. Simon v. Iraq, 529 F.3d 1187 (D.C. Cir. 2008).

54. *Id.* at 1190.

55. *Id.* at 1189–91 (overturning the district court's ruling that the suit was untimely and refusing to find a non-justiciable question).

56. *Id.* at 1191.

57. Pub. L. No. 110-81, Section 1083(c)(1) ("The amendments made by this section shall apply to any claim arising under section 1605A [of this statute] . . . .").

58. *Simon*, 529 F.3d at 1191–92.

59. *Id.* at 1192–93.

1605(a)(7) for Iraq.[60] Combined with the provisions surrounding Section 1083, the Court found Section 1083(d)(1) merely granted the President the power to render inapplicable to Iraq those parts of the NDAA to which he had objected in the bill's first codification, and that the NDAA applies only to suits under § 1605A.[61]

V. ANALYSIS

At the heart of *Iraq v. Beaty* is a relatively straight-forward question of statutory construction: whether either the EWSAA or the NDAA allow the President to render § 1605(a)(7) inapplicable to Iraq. The Court's decision, however, could add fuel to either side of the enduring debate regarding the deference courts give to Congressional intent and Executive foreign policy determinations.

If the Court upholds *Acree v. Republic of Iraq* and the lower courts' interpretations of the EWSAA and NDAA, then subsequent courts may find themselves with more leeway to interpret statutes and Executive determinations in ways which may seem contrary to their texts. If the Court instead finds that the D.C. Circuit has misinterpreted the statutes, it would direct the judiciary to give more deference to the text of foreign-policy-related laws and their interpretation by the President.

A. Arguments

Beaty, Simon, and the other respondents highlight the reasoning of the *Acree* court and the decisions of the D.C. courts below—collectively holding that neither the EWSAA nor the NDAA granted the President the authority to restore Iraqi sovereign immunity—to argue that the text of the EWSAA is ambiguous while that of the NDAA is not, that Congress did not intend to allow the removal of jurisdiction initially under the EWSAA and intended to do so only prospectively under the NDAA, and that there is no real danger of harming U.S. foreign policy by deciding existing suits.

The text of Section 1503 of the EWSAA must be looked at, according to Respondents and the *Acree* court, in light of its context

60. *Id.* at 1193.
61. *Id.* at 1194.

and the other provisions around it.[62] In the EWSAA the reference to the Iraq Sanctions Act of 1990 "indicates that the section is concerned with eliminating statutory restrictions on aid and exports needed for Iraq's reconstruction, and not with principles of sovereign immunity or the jurisdiction of U.S. courts."[63] Thus, the Respondents assert that the provision sought to remove funding obstacles for reconstruction, and the term "any provision" should be read in light of that purpose—a purpose that does not encompass jurisdiction.[64] The EWSAA's context also includes Congress's intent as demonstrated in Section 1083(c)(4) of the NDAA: "Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act . . . has ever authorized, directly or indirectly . . . the removal of the jurisdiction of any court of the United States."[65] In keeping with *Hamdan v. Rumsfeld*, Respondents also argue that Section 1083 removes jurisdiction without providing any alternative forum for the suits against Iraq, and thus, should not be applied to pending cases without express statutory language to that effect.[66] The absence of such language evidences Congress's intent that the statute apply only to prospective cases. As for the damage to reconstruction efforts and the financial stability of Iraq, alleged by Petitioners to be important foreign policy goals of the United States, Respondents point out that Section 1083 has no adverse effect. Respondents argue "[b]luntly: no more claims will ever be filed against Iraq for the torturing of U.S. soldiers and citizens" and those cases can be settled for nothing of material significance to Iraq.[67]

Petitioners urge the Court to overturn *Acree* and reverse the lower courts' decisions, arguing that the relevant text of the EWSAA and the NDAA is unambiguous and should be interpreted as such—that in the realm of foreign affairs the President's inherent authority

62. Brief in Opposition at 26–27, Republic of Iraq v. Simon, No. 08-539 (U.S. Nov. 24, 2008).

63. *Id.* at 27.

64. *Id.* at 27–29.

65. Brief In Opposition at 9–11, Republic of Iraq v. Beaty, No. 70-1090 (U.S. Apr. 23, 2008).

66. *Id.* at 17–19.

67. *Id.* at 7; *see also id.* at 10–12 (observing that when the President waived § 1605A for Iraq as of January 2008, only six or seven cases existed, (including *Simon*, another case joined with Simon on appeal and *Acree*) with likely damages of approximately $1 billion, which is a financial burden Iraq is able to bear with its "projected . . . budget surplus of nearly $80 billion").

should be given deference and that to allow pending suits to proceed will damage U.S. foreign policy with regard to Iraq.

According to Iraq, the text of EWSAA Section 1503 should be interpreted broadly. Echoing the words of then-Judge Roberts's concurrence in *Acree*, Petitioners argue that the President's authority to waive "any provision" with respect to Iraq be given its plain, broad meaning—"any" means "any"—to include § 1605(a)(7).[68] This interpretation is consistent with prior decisions giving "any" a broad reading in the absence of contrary legislative history.[69] Thus, unlike the *Acree* court's interpretation of the statute, Petitioners argue that there is no evidence of legislative intent to limit the provision to purely financial obstacles for assisting Iraq. The provision's terms are not restricted by reference to money but rather by the fact that any laws the President determines shall no longer apply to Iraq must "'appl[y] to countries that have supported terrorism.' That perfectly describes former Section 1605(a)(7)."[70] Even using the potential motive of lifting financial burdens, the United States argues that for Iraq, "Section 1605(a)(7) is a statute that, to use the words of the *Acree* majority, 'present[s] obstacles to funding for the new Iraqi Government'" because of the potential costs of liability.[71] Moreover, subsequent legislative history cannot be used to interpret a prior act of Congress, meaning that Section 1083(c)(4) of the NDAA has no bearing on the effect of the EWSAA.[72]

Petitioners also argue that Section 1083 of the NDAA should be read to apply to pending cases. According to their argument, this section strips jurisdiction, not substantive rights, and thus applies to pending cases; to say that plaintiffs were left with no alternative forum incorrectly confuses "Congress's action in repealing and replacing former Section 1605(a)(7)" (the new § 1605A encompassing every case cognizable under the original), "with the President's action

68. Brief for Petitioners at 23, Republic of Iraq v. Beaty, Nos. 07-1090 & 08-539 (U.S. Feb. 19, 2009) [hereinafter *Petitioner's Brief*].

69. *Id.* at 23–24 (citing Ali v. Fed. Bureau of Prisons, 128 S. Ct. 831, 835 (2008) and Harrison v. PPG Indus., Inc., 446 U.S. 578, 589 (1980)).

70. *Id.* at 25.

71. Brief for the United States as Amicus Curiae at 12, Iraq v. Beaty, Nos. 07-1090 & 08-539 (U.S. Dec. 5, 2008) (recommending the Court grant certiorari) [hereinafter *Amicus Brief for the United States*].

72. *Petitioner's Brief*, *supra* note 68, at 35; Reply Brief for Petitioner at 5–6, Republic of Iraq v. Beaty, No. 70-1090 (U.S. May 5, 2008).

in waiving [this] replacement."[73] Unlike the statutory provisions in *Hamdan v. Rumsfeld*, Petitioners argue this is not a case of several provisions explicitly applying to pending cases while the relevant provision makes no mention of such application.[74] The provision's text contains no explicit language contrary to "the usual rule that jurisdictional repealers apply to pending cases."[75] The Respondents' claims are thus included in the President's restoration of Iraqi sovereignty and are no longer justiciable.

In addition to the statutes, Petitioners argue the President has inherent authority "to compromise the claims of U.S. nationals to further foreign policy interests."[76] Executive authority should be given broad deference regarding foreign policy because of the difficulty of anticipating the Executive's foreign policy needs.[77] Here both Section 1503 of the EWSAA and Section 1083 of the NDAA were interpreted by the President, but the D.C. courts "erred in failing to accord any deference to his construction of that provision."[78]

B. Disposition

To understand how the current Court is likely to resolve the question of whether Iraq's immunity has been restored for cases pending when the EWSAA and NDAA were enacted, it is crucial to look at the three approaches taken in recent cases regarding retroactive application of statutes.

Justice Scalia reiterated his famous disdain for referring to legislative history in *Landgraf v. USI Film Products* precisely because it "converts the 'clear statement' rule into a 'discernible legislative intent' rule," and undermines the plain meaning of the text.[79] When

73. Reply Brief for Petitioners at 10, Republic of Iraq v. Simon, No. 08-539 (U.S. Dec. 10, 2008).

74. *Id.* at 11.

75. *Petitioner's Brief*, *supra* note 68, at 42.

76. Petition for a Writ of Certiorari at 21, Republic of Iraq v. Beaty, No. 70-1090 (U.S. Feb. 19, 2008).

77. *Petitioner's Brief*, *supra* note 68, at 30.

78. *Amicus Brief for the United States*, *supra* note 71, at 15; *see also Petitioner's Brief*, *supra* note 68, at 34, 52 (arguing that the failure to accord deference to the President's interpretations and to allow the suits to continue directly jeopardizes U.S. foreign policy by financially burdening reconstruction and by risking similar suits against American forces in Iraq).

79. Landgraf v. USI Film Prod., 511 U.S. 244, 287 (1994) (Scalia, J., concurring in the judgment) (finding the statute non-retroactive because of the absence of a clear textual statement to indicate that it should be retroactive).

determining the retroactive application of a statute in the face of ambiguous text, he focuses on the nature of the activity covered by the statute, emphasizing the language of the statute as the foundation of this inquiry. If the statute deals with primary conduct, the term Scalia uses to refer to "substantive rights," the presumption is against retroactive application. If the statute is merely procedural, *i.e.* jurisdictional, it is presumptively retroactive because the "*plain import* of a statute repealing jurisdiction is to eliminate" jurisdiction over pending cases too.[80] In fact, "applying a jurisdiction-eliminating statute . . . to prevent any judicial action" after the statute's enactment is not retroactive application at all, as it does not affect any substantive rights.[81]

In joining Justice Scalia's *Hamdan* dissent, Justice Alito appears to agree with Scalia's overall approach. Though Justice Roberts has not participated in the Court's prior cases dealing with the retroactive application of jurisdictional statutes,[82] his dissent in *Acree* placed an emphasis on the plain meaning of the EWSAA's text similar to Scalia's approach, finding that because the EWSAA provision was merely jurisdictional it could be presumed to apply retroactively.[83]

Though he joined Justice Scalia's *Landgraf* concurrence, Justice Kennedy's approach differs. Agreeing that the text is always the starting point for statutory interpretation, Justice Kennedy finds an even stronger presumption for non-retroactive application in the absence of a clear congressional statement. In addition to following the substantive rights/jurisdiction divide set out in *Landgraf*, Justice Kennedy distinguishes between provisions that confer jurisdiction and those that strip the courts of jurisdiction: the presumption against retroactivity still applies for the creation of jurisdiction and is only vanquished by jurisdiction-ousting statutes.[84] For his Republic of *Austria v. Altmann* opinion this presumption proved dispositive

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80. Hamdan v. Rumsfeld, 548 U.S. 557, 657–65 (2006) (Scalia, J., dissenting) (noting that the majority ignored the President's interpreting the statute to apply to pending cases).

81. *Landgraf,* 511 U.S. at 294; *see also* Republic of Austria v. Altmann, 541 U.S. 677, 703 (2004) (Scalia, J., concurring) (stating that the FSIA limits jurisdiction in U.S. courts only, and thus may affect substantive rights only incidentally by denying viable alternative forums).

82. Justice Roberts did not participate in the *Hamdan*, *Landgraf* or *Altmann* decisions.

83. Acree v. Republic of Iraq, 370 F. 3d. 41, 60–65 (D.C. Cir. 2003) (Roberts, J., concurring in part and concurring in the judgment).

84. *Altmann*, 541 U.S. at 722–23 (Kennedy, J., dissenting) (quoting Lindh v. Murphy, 521 U.S. 320, 342–43, n.3 (1997) (Rehnquist, C.J., joined by Scalia, Kennedy and Thomas, JJ., dissenting)).

because he found the FSIA to be ambiguous and therefore subject to the presumption against retroactivity.[85] In determining whether the statute is clear regarding application to pending cases, Justice Kennedy takes issue with the implication in *Altmann* that deference be given to Executive statements despite their potential to undermine the intent of Congress.[86]

Justice Stevens wrote the majority opinions, in which Justice Ginsburg joined, for *Hamdan*, *Landgraf*, and *Altmann*. Like Justices Scalia and Kennedy, he began his statutory interpretation with the text. When the text proved unclear, however, Justice Stevens demonstrated a willingness to move beyond the provision's text to its context and the nature of the rights at stake. Most importantly, he looked to the surrounding legislative history. In Justice Stevens's analysis, a statute's context appears to include related Executive commentary. So in *Altmann* he expressed concern with the political nature of the FSIA, noting that while the Court did not address the issue of the political question doctrine[87] it nonetheless ought to defer to the political branches' determinations regarding the wisdom of the courts taking jurisdiction in a case.[88] Justice Stevens also relied on the accepted distinction between substantive statutes, which are presumed to be non-retroactive, and jurisdictional provisions, which are applicable to pending cases.

Both the *Acree v. Republic of Iraq* and *Simon v. Republic of Iraq* decisions ostensibly rested on the language of the EWSAA and the NDAA, finding no need to determine whether the authority granted to the President removed substantive or jurisdictional rights. In its own interpretation, however, the court in *Acree* seemed to follow the approach of Justice Stevens in giving a contextual and purposive reading to what might otherwise be clear statutory language.[89] Thus "any provision" came to mean any provision aimed at the purpose of eliminating financial obstacles.[90] In contrast, the *Simon* decision made a Justice Scalia-like refusal to move beyond the pure text of the

85. *Id.* at 721–23.
86. *Id.* at 735–36.
87. *Id.* at 689.
88. *Id.* at 696.
89. *See* discussion *supra* Part III.
90. *See* Acree v. Republic of Iraq, 370 F.3d 41, 60 (D.C. Cir. 2003) (Roberts, J, concurring in part and concurring in the judgment) (discussing his interpretation of "any" to mean "any," without the context added to the word by the majority).

NDAA, finding instead that the clear statutory language applied only prospectively to cases filed under § 1605A.[91]

The real battle will likely be over whether the text of either the EWSAA or the NDAA is ambiguous. It seems that Justice Scalia will agree with Chief Justice Roberts's interpretation in *Acree* that the EWSAA is an unambiguously broad grant of power to the President. Despite Justice Stevens's willingness to consider the statute's purpose and legislative history, demonstrated in *Acree*, he has also been skeptical of questioning Executive interpretations of foreign affairs statutes and the FSIA specifically.[92] Justice Stevens may very well decline to counter the President's interpretation of the EWSAA's scope. And Justice Kennedy has the opposite inclination, as he is skeptical of deferring to Executive statements, which may run counter to Congressional intent.

The crucial holding will then be the application of either the EWSAA (if its clear language so authorized the President to waive the § 1605(a)(7) exception of sovereign immunity for Iraq) or the NDAA (if the EWSAA did not grant the President authority to waive § 1605(a)(7) for Iraq) to pending cases. If the Court determines that the statutes have no clear statement on retroactivity, and must therefore determine whether the EWSAA and NDAA are jurisdictional or substantive, it appears the lower courts' decisions will be overturned. Unlike the FSIA, which the Court has confusingly found to be both jurisdictional and substantive,[93] a waiver for Iraq by the President under either Section 1503 of the EWSAA or Section 1083(d) of the NDAA only removes the ability of a state or federal court to hear a case, and is therefore purely jurisdictional. Under the approaches of both Justice Stevens and Justice Scalia, joined in their various opinions[94] by the other justices, save Kennedy, if the statute is jurisdictional there is no presumption against retroactive application where, as here, there is no clear statement to the contrary. Even Justice Kennedy, with his greater wariness of retroactive application,

91. *See* discussion *supra* Part IV.

92. *See id.* at 689–96 (noting the importance of grace and commity in foreign affairs, and deferring to State Department policy, practice, and statements).

93. *Id.* at 695 (dealing with the FSIA as an act that created jurisdiction).

94. Again, looking at their opinions in *Hamdan*, *Landgraf* and *Altmann*.

has said that statutes removing jurisdiction are not subject to the presumption against their application to pending cases.[95]

The EWSAA provision does not have clear language addressing its application to cases pending when it was enacted, and thus if the Court holds that the President had authority to waive the exception for Iraq, it will probably find this to be a waiver of pure jurisdiction—not involving substantive rights (Scalia's "primary conduct")—that applies retroactively.

If the Court does not read the EWSAA to permit the Presidential waiver of § 1605(a)(7), it will then have to address the somewhat more difficult language of the NDAA with regard to retroactivity. The D.C. Circuit held in *Simon* that the language of Section 1083 was clear enough that its application to cases "arising under" and "filed under" its newly created provisions could be read literally to apply only to prospective claims filed after the NDAA's enactment.[96] The Petitioners argue that this language is not explicit enough to overcome the presumption for retroactive application for jurisdiction-repealing statutes.[97]

Yet this argument ignores the structure of the analysis undertaken in all three Justices' approaches: competing presumptions of retroactivity and non-retroactivity do not come into play until after the text has been determined to be ambiguous. Legislative history and Executive interpretation are only considered if the text is ambiguous. In light of the deference given to a statute's text by all Justices, and particularly Chief Justice Roberts and Justice Scalia, it seems likely that the Court will construe the NDAA's language as demonstrating Congress's intent that the President's waiver for Iraq not apply to pending cases. Again, though, the determination of the EWSAA's applicability will probably render this moot.[98]

VI. CONCLUSION

The Court seems likely to hold that Section 1503 of the EWSAA provision authorized the President to waive the FSIA's § 1605(a)(7) exception to sovereign immunity with regard to Iraq, and in so doing

95. *Id.* at 722–23 (Kennedy, J., dissenting).
96. Simon v. Republic of Iraq, 529 F.3d 1187, 1191–92 (D.C. Cir. 2008).
97. *Petitioner's Brief*, *supra* note 68, at 42.
98. *See* discussion *supra* Part V(B).

that Section 1503 rendered the cases pending at the time of the EWSAA's enactment—including *Acree v. Republic of Iraq*, *Beaty v. Republic of Iraq*, and *Simon v. Republic of Iraq*—nonjusticiable. This ruling would combine the purely textual analysis favored by Justice Scalia with Justice Stevens's more purposive and deferential approach, looking to Congress and the Executive to shine light on the statute's scope and leave only Justice Kennedy dissatisfied. But in applying the EWSAA to pending cases, even Justice Kennedy is likely to concur that a jurisdiction-stripping provision, as in the EWSAA's Section 1503, presumably applies retroactively without a clear statement to the contrary. Therefore, the D.C. Circuit's holdings will probably be overturned, and the cases against Iraq ruled nonjusticiable.