

# *PATCHAK V. ZINKE*, SEPARATION OF POWERS, AND THE PITFALLS OF FORM OVER SUBSTANCE

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## INTRODUCTION

The inherent importance of the separation of powers in our constitutional system of governance has been recognized since its founding. James Madison noted that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>1</sup>

The separation of powers in our system of government is designed to protect individuals.<sup>2</sup> The Article III branch of government—the courts—determines when the principle of separation of powers has been violated.<sup>3</sup> In 2014, Congress passed the Gun Lake Trust Land Reaffirmation Act,<sup>4</sup> which stripped Article III courts of jurisdiction over any actions relating to a specific piece of land: the Bradley Property. Congress’ passage of the Gun Lake Act and its ultimate decision to remove federal jurisdiction over “Bradley Property” cases raises the issue of separation of powers because it was passed on the heels of a 2012 Supreme Court decision granting Patchak<sup>5</sup> prudential standing to challenge the fact that the Secretary had taken the

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1. THE FEDERALIST No. 47 (James Madison).

2. See *Bond v. United States*, 564 U.S. 211, 222 (2011) (“The structural principles secured by the separation of powers protect the individual as well.”).

3. See *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed . . . is a responsibility of this Court as ultimate interpreter of the Constitution.”).

4. Pub. L. No. 113-179, 128 Stat. 1913 (2014) [hereinafter “Gun Lake Act”].

5. Patchak was a resident of a property near the Bradley Property.

Bradley Property.<sup>6</sup> Congress' Gun Lake Act took jurisdiction of a case from federal courts on an issue the federal courts had already decided, but the D.C. circuit held that the act did not violate separation of powers principles.<sup>7</sup>

This commentary will proceed by describing (1) how the bright-line rules established in previous separation of powers cases compel the Court to rule in favor of the government, and (2) why more functionalist rules should replace the formalist rules currently guiding the courts in separation of powers cases because they would better safeguard individual liberties. Therefore, while the Court will most likely find no violation of its separation of powers doctrine in *Patchak v. Zinke*, it *should* consider the destructive implications of its current doctrine, and ultimately find a separation of powers violation.

### I. FACTUAL AND PROCEDURAL BACKGROUND

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the Gun Lake Tribe) is a Native American tribe situated in western Michigan.<sup>8</sup> Though the tribe has a rich history of interacting with the United States government since the 18<sup>th</sup> century, the Department of the Interior did not formally recognize the tribe until 1999.<sup>9</sup> Following its formal recognition by the government, the Gun Lake Tribe petitioned for a tract of land in Michigan, known as the Bradley Property, to be put into the trust of the Indian Reorganization Act (the "IRA").<sup>10</sup> This would allow the Tribe to construct a casino on the Bradley Property.<sup>11</sup> The Bureau of Indian Affairs approved the petition in 2005, and the Gun Lake Casino opened on the Bradley Property in February 2011.<sup>12</sup>

David Patchak is an American citizen who lives near the Bradley Property.<sup>13</sup> In August 2008, Patchak filed a lawsuit against the Secretary of the Interior and the Assistant Secretary of the Interior

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6. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 228 (2012) ("The QTA's reservation of sovereign immunity does not bar Patchak's suit. Neither does the doctrine of prudential standing.").

7. *Patchak v. Jewell*, 828 F.3d 995, 999 (D.C. Cir. 2016).

8. *Id.*

9. *Id.*

10. *Id.* The IRA "authorizes the Secretary of the Interior (Secretary) to acquire property for the purpose of providing lands for Indians." *Match-E-Be-Nash*, 567 U.S. at 211.

11. *Patchak*, 828 F.3d at 999–1000.

12. *Id.*

13. *Id.* at 1000.

for the Bureau of Indian Affairs under the Administrative Procedure Act (APA).<sup>14</sup> He sued on the grounds that he would be injured by the construction of the casino because it would “irreversibly change the rural character of the area, increase traffic and pollution, and divert local resources away from existing residents.”<sup>15</sup> Patchak also argued that because the Tribe was not formally recognized until after the IRA was enacted, the Secretary improperly put the Bradley Property into trust for the Tribe.<sup>16</sup>

While Patchak’s lawsuit against the Department of the Interior was pending, the Supreme Court in *Carcieri v. Salazar*<sup>17</sup> held that the IRA “limits the [Interior] Secretary’s authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934.”<sup>18</sup> Here, the Gun Lake Tribe was not under federal jurisdiction until 1998.<sup>19</sup> Thus, on its face, Patchak’s suit had merit: the Secretary putting the Bradley Property into trust for this tribe violated the principle underlying the Court’s decision in *Salazar*.

In Patchak’s suit, the Gun Lake Tribe intervened as a defendant, and both the United States and the Gun Lake Tribe as co-defendants claimed that Patchak lacked prudential standing to bring the case.<sup>20</sup> The district court held that Patchak lacked prudential standing;<sup>21</sup> however, the Supreme Court held that Patchak had standing and remanded the case back to the district court for further proceedings.<sup>22</sup>

With the Supreme Court’s ruling on Patchak’s prudential standing in *Salazar* serving as a backdrop, on September 26, 2014, President Obama signed into law the Gun Lake Act.<sup>23</sup> The Gun Lake Act, in

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14. 5 U.S.C. §§ 702, 705 (2012); *Patchak*, 828 F.3d at 1000.

15. *Patchak*, 828 F.3d at 1000.

16. *Id.*

17. *Carcieri v. Salazar*, 555 U.S. 379 (2009).

18. *Id.* at 382.

19. *Patchak*, 828 F.3d at 999.

20. *Id.* at 1000.

21. *Patchak v. Salazar*, 646 F. Supp. 2d 72, 78 (D.D.C. 2009).

22. *Match E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 228 (2012).

23. *Patchak*, 828 F.3d at 1000; see Pub. L. No. 113–179, 128 Stat. 1913, Sec. 2(a)–(c) (2014), which reads as follows:

IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

short, stated that all claims relating to the Bradley Property must be dismissed.

After the Gun Lake Act was passed, both parties filed motions for summary judgment.<sup>24</sup> The district court ruled that Patchak's suit pertained to the Bradley Property, and therefore the Gun Lake Act stripped the court of jurisdiction to consider Patchak's claim.<sup>25</sup> The court also rejected Patchak's arguments that the Gun Lake Act violated constitutional separation of powers principles.<sup>26</sup> The district court granted summary judgment in favor of the co-defendants and dismissed the case.<sup>27</sup>

Patchak appealed the decision of the district court to the D.C. Cir. Court of Appeals. The court of appeals upheld the decision of the district court, rejecting the argument that the Gun Lake Act violated constitutional separation of powers principles.<sup>28</sup> The Supreme Court granted Patchak's petition for writ of certiorari on a limited basis.<sup>29</sup>

## II. LEGAL BACKGROUND

While many Supreme Court cases have dealt with separation of powers issues, several directly address Congress's ability to change substantive law.

### A. *United States v. Klein*

In *United States v. Klein*,<sup>30</sup> the Court confronted a bill Congress passed in 1863 that stated that no Civil War pardon should be

NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act, relating to the land described in subsection (a) shall not be maintained in a Federal court and shall be promptly dismissed.

RETENTION OF FUTURE RIGHTS.—Nothing in this Act alters or diminishes the right of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band.

24. *Patchak*, 828 F.3d at 1001.

25. *Id.*

26. *Patchak v. Jewell (Patchak II)*, 109 F. Supp. 3d 152, 159 (D.D.C. 2015).

27. *Id.* at 165.

28. *Patchak*, 828 F.3d at 1001–03 (holding that Congress did not impermissibly direct the result of pending litigation or otherwise “encroach upon the judiciary” in enacting the Gun Lake Act).

29. *Patchak v. Zinke*, 828 F.3d 995 (D.C. Cir. 2016), *cert. granted*, 137 S. Ct. 2091 (May 1, 2017) (No. 16-498). Patchak raised various claims in his arguments in the district and circuit level cases. However, because the Supreme Court granted cert limited to only one question, the other issues raised will not be discussed here.

30. 80 U.S. 128 (1871).

admissible as proof of loyalty.<sup>31</sup> Additionally, “acceptance of a pardon without disclaiming participation in the rebellion would serve as conclusive evidence of disloyalty.”<sup>32</sup> Congress also sought to remove federal jurisdiction from pardon cases, and “directed the Court of Claims and the Supreme Court to dismiss for want of jurisdiction any claim based on a pardon.”<sup>33</sup> Klein had received a pardon, and challenged the statute as violating the separation of powers.<sup>34</sup> The Court ruled that Congress violated the separation of powers, as it “impair[ed] the effect of a pardon,” a power given “[t]o the executive alone.”<sup>35</sup> Thus, the statute in *Klein* violated the separation of powers “not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe.”<sup>36</sup> In other words, Congress was not authorized to pass the law to begin with.

#### *B. Robertson v. Seattle Audobon Society*

In *Robertson v. Seattle Audobon Society* (“*Audobon*”)<sup>37</sup>, the petitioners challenged a United States Forest Service action that harvested timber in areas the petitioners alleged were protected by federal statutes.<sup>38</sup> In response, Congress passed § 318 of the Department of the Interior and Related Agencies Appropriations Act.<sup>39</sup> Subsection (b)(6)(A) of the Act stated that compliance with that specific statute was sufficient for the statutory requirements of the statutes alleged to have been violated in *Audobon*.<sup>40</sup> The

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31. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1324 (2016).

32. *Id.*

33. *Id.* at 1324.

34. *Klein*, 80 U.S. 131–32.

35. *Id.* at 147.

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

37. *Robertson v. Seattle Audobon*, 503 U.S. 429 (1992).

38. *Id.* at 432.

39. *Id.* at 433.

40. Pub. L. No. 101–121, 103 Stat. 701, 745–50 (1989). Subsection (b)(6)(A) reads: “[T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audobon Society et al., v. F. Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc. et al., v. F. Dale Robertson*, Civil No. 89-99 . . . and the case *Portland Audobon Society et al., v. Manuel Lujan, Jr.* Civil No.87-1160-FR.”

petitioners objected “because it purported to direct the results in two pending cases, [and therefore] violated Article III of the Constitution.”<sup>41</sup>

The Supreme Court rejected this argument, stating “that subsection (b)(6)(A) replaced the legal standards underlying the two original challenges with those set forth in subsections (b)(3) and (5), without directing particular applications under either the old or the new standards.”<sup>42</sup> The Court rejected the argument that subsection (b)(6)(A) did not modify old requirements, as it deemed compliance with new requirements as sufficient to meet old requirements.<sup>43</sup> The Court read subsection (b)(6)(a) instead as a “modification” of the statute in question.<sup>44</sup>

The Court held that the Act, even with its reference to the specific case at hand, did nothing to direct any findings of fact or applications of law to fact.<sup>45</sup> This was because the statute still required a judicial determination that the management of the areas was done “according to subsections (b)(3) and (b)(5).”<sup>46</sup> Because Congress did not *direct a specific result* in this case, and because Congress changed the law without directing any particular result, the Act did not violate any separation of powers principles.

### C. *Bank Markazi v. Peterson*

In *Bank Markazi v. Peterson*,<sup>47</sup> respondents, victims of Iran-sponsored terrorism, brought suit against Iran under 28 U.S.C. § 1605A.<sup>48</sup> After they had obtained judgment against Iran, however, the respondents faced practical and legal difficulties in enforcing the judgment against Iran.<sup>49</sup> To lessen these difficulties, and to ensure that the assets in the particular *Bank Markazi* case could be seized, Congress passed § 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012.<sup>50</sup> The Act provides that if a court makes specific findings, “a financial asset . . . shall be subject to execution . . . in order

41. *Audobon*, 503 U.S. at 435–36.

42. *Id.* at 437.

43. *Id.* at 439.

44. *Id.* at 440.

45. *Id.*

46. *See id.* at 439 (“Section 318 did not instruct the courts whether any particular timber sales would violate subsections (b)(3) and (b)(5).”).

47. 136 S. Ct. 1310 (2016).

48. *Id.* at 1317, 1319.

49. *Id.* at 1317–18.

50. *Id.* at 1318.

to satisfy any judgment to the extent of any judgment to the extent of any compensatory damages awarded against Iran for damages for person injury or death caused by” certain acts of terrorism.<sup>51</sup> Another section of the Act states that the assets specific to the action in *Bank Markazi* were “available for execution.”<sup>52</sup>

Thus, while the case was pending, the Act ensured a certain result would come about. This did not violate any constitutional principles of separation of powers, the Court ruled, as Congress “changed the law by establishing new substantive standards, entrusting to the District Court application of those standards to the facts (contested or uncontested) found by the court.”<sup>53</sup> Congress may direct courts to apply new legal standards to undisputed facts, even if the legislation is meant to be outcome-altering.<sup>54</sup> The Supreme Court noted how a court must determine the presence of three factors before allowing the seizure of an asset.<sup>55</sup> Congress, therefore, did not establish a rule of decision; rather, it established a new legal standard.<sup>56</sup>

As long as Congress establishes legal standards by which the Court shall abide, and does not compel findings or results under old law,<sup>57</sup> a specific pending case may be specifically mentioned in the statute and legislation may be particularized to a specific case.<sup>58</sup>

### III. HOLDING

The D.C. Circuit Court of Appeals upheld the district court’s ruling that the Gun Lake Act did not violate constitutional separation of powers principles.<sup>59</sup> The court of appeals held that Patchak’s argument that the Act violated constitutional separation of powers principles must fail because the Gun Lake Act changed the substantive law applicable to Patchak’s claims.<sup>60</sup> The court concluded that the Act, through Section 2(a), “has ‘changed the law,’”<sup>61</sup> and “provides a new legal standard we are obliged to apply: if an action

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51. *Id.* at 1318–19.

52. *Id.* at 1319.

53. *Id.* at 1326.

54. *Id.* at 1325.

55. *Id.* at 1326.

56. *Id.* at 1325–26.

57. *Id.* at 1326.

58. *Id.* at 1327.

59. *Patchak v. Jewell*, 828 F.3d 995, 999 (D.C. Cir. 2016).

60. *Id.* at 1003.

61. *Id.* (citation omitted).

relates to the Bradley Property, it must promptly be dismissed. Patchak’s suit is just such an action.”<sup>62</sup>

#### IV. ARGUMENTS

##### A. *Petitioner’s Arguments*

Petitioner’s arguments are divided into two sections: (1) the Gun Lake Act is unconstitutional; and (2) the Court must guard against separation of powers violations.

Regarding the constitutionality of the Gun Lake Act, Petitioner first argues that Section 2(b) of the Act did not amend any underlying substantive or procedural laws, contrary to Court precedent.<sup>63</sup> Petitioner argues that the *Klein* Court held that Congress had “‘passed the limit which separates the legislative from the judicial power,’ when it ‘directed’ that courts ‘shall forthwith dismiss’ pending cases without altering applicable legal standards.”<sup>64</sup> Petitioner states that “Section 2(b) of the Gun Lake Act did precisely what this Court said was impermissible in *Klein*: it ‘infringed the judicial power . . . because it attempted to direct the result without altering the [applicable] legal standards.’”<sup>65</sup> Without amending the underlying substantive or procedural laws in the specific case at hand, Petitioner argues, Congress violated the separation of powers and “stand[s] apart from those [cases] where the Court rejected separation of powers challenges to statutes which amended existing laws, and left the courts to apply new legal standards to the cases before them.”<sup>66</sup>

Next, Petitioner argues that Congress’s historical practices support the view that the Act is unconstitutional.<sup>67</sup> Petitioner notes that the Court in *Zivotofsky v. Kerry* “put significant weight upon historical practice [of Congress]” in separation of powers cases.<sup>68</sup> Finding only one other act similar to it in Congressional history, the Act ruled unconstitutional in *Klein*,<sup>69</sup> Petitioner argues that the lack of historical

62. *Id.*

63. Brief for Petitioner at 12, *Patchak v. Zinke*, NO. 16-498 (U.S. July 12, 2017) [hereinafter Brief for Petitioner].

64. *Id.* at 16 (citation omitted).

65. *Id.* at 17 (citation omitted).

66. *Id.*

67. *Id.* at 18.

68. *Id.*

69. *United States v. Klein*, 80 U.S. 128 (1871).

practice, specifically in the context of separation of powers, demonstrates the unconstitutionality of the Act.<sup>70</sup>

Petitioner also rejects the court of appeals' conclusion that Section 2(a) has substantively changed the law.<sup>71</sup> Though Section 2(a) does state that the statute was enacted “[t]o reaffirm that certain land *has been* taken into trust,” the legal implications of this section are unclear.<sup>72</sup> Petitioner argues the intent of Section 2(a) is ambiguous, and it is not clear if Section 2(a) is meant to take the land into trust, or merely as an ex-poste endorsement of the Secretary's decision.<sup>73</sup> If it does take the land into trust, what would be the impact on the APA claim<sup>74</sup>—subsequent to the Supreme Court's decision that Petitioner's APA claim may proceed?<sup>75</sup> Petitioner then notes that “[a]bsent a clear statement of that intent, we do not give retroactive effect to statutes burdening private interests.”<sup>76</sup> However, the judicial system cannot decide the legal ramifications and interpretations of Section 2(a), as Section 2(b) removes from the judiciary the ability to decide the issue.<sup>77</sup> Therefore, Congress “exercised the judicial power reserved for the federal courts by Article III.”<sup>78</sup>

Petitioner argues that the act was not jurisdictional.<sup>79</sup> Congress must make clear its intent to adopt a jurisdictional statute; Petitioner asserts that the Act does not state that it is jurisdictional, and that the legislative history “corroborates that the statute is not jurisdictional.”<sup>80</sup> Even if it were jurisdictional, Section 2(b) of the Act would violate the separation of powers principle.<sup>81</sup> Petitioner cites *Klein* to support his proposition, stating that the Court held Congress violated the separation of powers when it passed a statute stating that the Court “shall have no further jurisdiction of the cause, and shall

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70. Brief for Petitioner, *supra* note 63, at 18.

71. *Id.* at 19.

72. *Id.* at 19–20.

73. *Id.* at 20.

74. The APA claim is that the Department of the Interior improperly put the land into trust for the Gun Lake Tribe.

75. *Id.*

76. *Id.* (citing *Johnson v. United States*, 529 U.S. 694, 701 (2000)).

77. *Id.* at 20–21.

78. *Id.* at 22.

79. *Id.*

80. *Id.* at 23.

81. *See id.* at 24 (“Respondents failed to identify any decision from this Court holding that Congress's general power to alter the jurisdiction of the federal court precludes finding a particular jurisdiction-stripping statute violates separation of powers principles.”).

dismiss the same for want of jurisdiction.”<sup>82</sup> Thus, Petitioner asserts, “an intrusion on the judicial power disguised as an exercise of authority over federal court jurisdiction still constitutes a separation of powers violation.”<sup>83</sup>

Petitioner goes on to argue that he has been deprived of his individual rights, which structural separation of powers principles were designed to safeguard.<sup>84</sup> By mandating that Petitioner’s case be “promptly dismissed,” Congress “stripped Petitioner of his individual right to have his claim adjudicated by a neutral judge, free of political interference.”<sup>85</sup> The separation of powers was designed “to guarantee that the process of adjudication itself remain impartial.”<sup>86</sup>

Petitioner argues that the Court must guard against such separation of powers violations, because “[s]light encroachments create new boundaries from which legions of power can seek new territory to capture.”<sup>87</sup> The Court therefore must “ensure that the other branches” confine itself to its proper role.<sup>88</sup> Doing so is “a responsibility of this Court.”<sup>89</sup>

### *B. Respondents’ Arguments*

Respondents first argue that Congress can withdraw jurisdiction over pending suits.<sup>90</sup> They explain that “[t]he power of Congress to define and limit the jurisdiction of the inferior federal courts includes the authority to withdraw previously given and to subject pending cases to the new jurisdictional limitation.”<sup>91</sup> Respondents ultimately argue that Section 2(b) does just that: it withdraws the jurisdiction of

82. *Id.* at 24–25 (citing *United States v. Klein*, 80 U.S. 128, 143 (1871)).

83. *Id.* at 25.

84. *Id.* at 26.

85. *Id.* at 28.

86. *Id.* at 26 (citing *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982)).

87. *Id.* at 29 (quoting *Stern v. Marshall*, 564 U.S. 462, 502–03 (2011)).

88. *Id.* at 28 (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, J., dissenting)).

89. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

90. See Brief for Respondent at 16, *Patchak v. Zinke*, NO. 16-498 (U.S. Sept. 11, 2017) [hereinafter Brief for Respondent]. “As the Court has explained, jurisdiction that has been conferred ‘may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall.’” *Id.* (citing *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922)).

91. *Id.*

the federal court, and it is thus “a valid exercise of Congress’s power to define and limit the jurisdiction of the federal courts.”<sup>92</sup>

Respondents reject Petitioner’s contention that the jurisdictional nature of a statute must be clearly stated, as the Court has accepted less direct language to be “clear” in the past.<sup>93</sup> They note that the Court has found that the phrase “an appeal may not be taken to the court of appeals” without a certification of appealability, is “clear jurisdictional language.”<sup>94</sup> Respondents equate this language with that in the Gun Lake Act, which states that any action relating to the Bradley Property “shall not be filed or maintained” in a federal court.<sup>95</sup> Thus, “[t]he provision falls squarely within this Court’s precedent acknowledging Congress’s authority to define the jurisdiction of the inferior federal courts.”<sup>96</sup>

Additionally, according to Respondents, Section 2(b) withdraws the United States’ general waiver of sovereign immunity in the APA for any action relating to the Bradley Property. Respondents first note that the APA is a general waiver by the United States allowing the government to be sued for actions by administrative agencies.<sup>97</sup> However, the United States “may ‘withdraw the consent at any time.’”<sup>98</sup> Here, Respondents characterize Section 2(b) as a “broad grant of immunity from lawsuits pertaining to the Bradley Property.”<sup>99</sup>

In addressing whether the Act violates constitutional separation of powers principles, Respondents note three limitations on what Congress may do. Congress may not (1) interpret and apply law to a certain case; (2) give the Executive the ability to review the decisions of Article III courts; or (3) reverse a final judgment of an Article III court or direct the court to reopen a case.<sup>100</sup>

Respondents contend that the Gun Lake Act changes the law applicable to pending cases, rather than directing a result in this certain case.<sup>101</sup> Respondents distinguish this case from *Klein*, upon

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92. *Id.* at 19.

93. *Id.*

94. *Id.* at 21 (quoting *Gonzales v. Thaler*, 565 U.S. 134 (2012)).

95. *See id.* at 11 (“[T]he Court has previously concluded that statutory provisions similar to Section 2(b) of the Gun Lake Act stated a jurisdictional limitation.”).

96. *Id.* at 23.

97. *Id.*

98. *Id.* at 25 (citing *Lynch v. United States*, 292 U.S. 571, 581 (1934)).

99. *Id.* at 27 (citation omitted).

100. *Id.* at 28.

101. *See id.* at 29–30 (“As Chief Justice Marshall explained in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), ‘if subsequent to the judgment and before the decision

which Petitioner rely, by explaining that in *Klein*, the Court dealt with a statute in which Congress directed the result of the case without altering the legal standards “governing the effect of a pardon—standards Congress was powerless to prescribe.”<sup>102</sup> Unlike the Gun Lake Act, where Congress was authorized to change jurisdiction, in *Klein*, Congress was not even authorized in the first instance to construe for courts how a pardon might be interpreted in terms of evidence of loyalty or disloyalty.<sup>103</sup> Respondents also note that *Klein* does not prevent Congress from “amend[ing] the law in a way that makes the outcome virtually certain in a specific case, as long as Congress does not institute a rule of decision that le[aves] the court no adjudicatory function to perform.”<sup>104</sup>

Section 2(b) does not institute a rule of decision. Instead, it prescribes a new legal standard for courts to apply: if the action relates to the Bradley property, the suit must be dismissed.<sup>105</sup> Petitioner’s reliance on the fact that the Senate and House reports stated that the Act made no “changes in existing law” is misplaced, as the language “merely indicates that enactment of the Gun Lake Act did not require the actual amendment of any already-existing statute.”<sup>106</sup> Petitioner’s reliance on the fact that the Act did not amend any generally applicable statute is also misplaced, as the Court has stated in the past that such a change is not necessary.<sup>107</sup>

Additionally, Section 2(b) does not direct a particular outcome under existing law. Again seeking to distinguish *Klein*, Respondents note that federal courts are left to apply on their own whether a suit is related to the Bradley Property.<sup>108</sup> This is unlike *Klein*, where Congress was directing the federal courts to apply facts in a certain way to ensure a certain party would have a favorable outcome in the case.<sup>109</sup> Because the Gun Lake Act states that a suit must promptly be dismissed, the Act ensures that no party receives a judgment on the

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of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.”).

102. *Id.* at 32 (quoting *United States v. Klein*, 80 U.S. 128, 148 (1871)).

103. *Id.*

104. *Id.* at 29.

105. *Id.*

106. *Id.* at 35.

107. *Id.*

108. *Id.* at 36.

109. *Id.*

merits.<sup>110</sup> Congress, then, is not directing the courts to decide a case one way or another.

Finally, Respondent argued that it does not matter that the Supreme Court has previously stated that the petitioner's act "may proceed" because "Congress's subsequent enactment of the Gun Lake Act amended the law applicable to petitioner's claim."<sup>111</sup> The decision that Petitioner's claim may proceed was not a *final judgment* in the case: it was at an "interlocutory stage" of the case and "therefore did not diminish the power of Congress to eliminate jurisdiction over a category of cases that includes petitioner's suit."<sup>112</sup>

## V. ANALYSIS

The Supreme Court's jurisprudence suggests that the Court will affirm the decision of the D.C. Circuit and hold that the Gun Lake Act did not violate any separation of powers principles. In its most recent separation of powers cases, the Court has found no violation of separation of powers principles when Congress has left some fact-finding to the trier of fact and when Congress has not prescribed a rule of decision.<sup>113</sup>

Here, the Court will likely find that there was a change in substantive law. Like the statute in *Bank Markazi*, the Gun Lake Act implemented a new legal standard to be implemented by a presiding court: if a legal suit involves the Bradley Property, it must be dismissed.<sup>114</sup> The Court's language in *Bank Markazi* is applicable here: just as when a court must first determine "if Iran owns certain assets,"<sup>115</sup> the courts here must first determine if a suit is related to the Bradley Property; only then must the suit "be promptly dismissed."<sup>116</sup>

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110. *Id.* at 40.

111. *Id.* at 41.

112. *Id.* at 42 (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 212 (2012)).

113. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1326 (2016) ("In short, § 8772 changed the law by establishing new substantive standards, entrusting to the District Court application of those standards to the facts (contested or uncontested) found by the court . . . § 8772 provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored terrorist attacks will be permitted to execute against those assets.").

114. *See Patchak v. Jewell*, 828 F.3d 995, 1003 (D.C. Cir. 2012) ("More to the point, Section 2(b) provides a new legal standard we are obliged to apply: if an action relates to the Bradley Property, it must promptly be dismissed.").

115. *Bank Markazi*, 136 S. Ct. at 1326.

116. *Gun Lake Act*, Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(b) (2014).

Many of the Petitioner’s arguments fail to persuade. Petitioner relies heavily on a misguided interpretation of *United States v. Klein*.<sup>117</sup> Petitioner asserts that *Klein* stands for the proposition that “an intrusion on the judicial power disguised as an exercise of authority over federal court jurisdiction still constitutes a separation of powers violation.”<sup>118</sup> However, the Court in *Bank Markazi* made it clear that the issue in *Klein* was not that Congress attempted to alter the decision of a case by stripping federal jurisdiction, but rather that Congress was not authorized to interfere with the President’s power to pardon.<sup>119</sup> In other words, *Klein* recognized that Congress in the first instance did not have any constitutional authority to enact legislation on the topic. Here, however, Petitioner is alleging that there are constitutional prohibitions on enacting such legislation.

And, as mentioned, when considering the statutes that were deemed to not be prohibited by separation of powers principles in *Bank Markazi* and *Audobon*, the Court here will likely determine there has been a substantive change in the law applicable to the case at hand. Respondents’ argument in this regard is convincing. As Respondents note, the federal judicial system’s role is to determine in *any* case whether a suit involves the Bradley Property.<sup>120</sup> Congress does not direct a finding that the specific case at hand be found to involve the Bradley Property. That determination is left to the courts. Simply allowing that determination to be left to the courts seems to satisfy the Court that there has in fact been a change to the substantive law.<sup>121</sup> Of course, it also does not matter that Congress passed this statute with this suit in mind, and intended and hoped for a specific ruling.<sup>122</sup> In these types of cases, it satisfies the Court that there has been a change in substantive law, since they have held “[a]pplying laws implementing Congress’ policy judgments, with fidelity to those judgments, is commonplace for the Judiciary.”<sup>123</sup>

117. 80 U.S. 128 (1871).

118. Brief for Petitioner, *supra* note 63, at 25.

119. See *United States v. Klein*, 80 U.S. 128, 147 (1871) (“The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.”).

120. Brief for Respondent, *supra* note 90, at 19.

121. See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1326 (2016) (“In short, § 8772 changed the law by establishing new substantive standards, entrusting to the District Court application of those standards to the facts (contested or uncontested) found by the court.”).

122. See *id.* at 1325 (“In any event, a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts.”).

123. *Id.* at 1326.

Adding strength to this argument is that this suit is against the United States, not an individual person. The United States “may ‘withdraw the consent [to be sued]’ at any time.”<sup>124</sup> Given Congress’s broad power to decide when, where, and whether the United States is consenting to being sued for official acts of government officials, it is hard to see a way in which the Court will find the Act in question violated separation of powers principles. Viewed in the context of sovereign immunity, the Gun Lake Act supplies a standard by which a court may determine that Congress has withdrawn the ability of the United States to be sued.

The strength of the Government’s arguments in *Patchak*, however, should not be conflated with the integrity of the Act as a piece of legislation. Regardless of prior doctrine, the Court should prohibit the Act due to separation of powers principles.<sup>125</sup>

There are countervailing principles that are causes for concern in this case. First, the Gun Lake Act is unlike the statute in question in *Bank Markazi*. In *Bank Markazi*, there were three factors the court had to apply before determining whether an asset belonged to Iran.<sup>126</sup> Here, however, the Gun Lake Act provides no standards by which a court can determine whether a suit involves the Bradley Property. Congress has instituted a bill with a watered-down version of a change in substantive law. Second, unlike the statutes in *Bank Markazi* and *Audobon*, the statute in question here results in an outright dismissal of the case—there is little or no litigating to be done, and thus little opportunity for a plaintiff’s case to be heard.

But, because Congress has been able to technically enact a change in substantive law, a direct application of Supreme Court precedent will most likely prevent the petitioner from successfully arguing there has been a separation of powers violation. The outright dismissal of Petitioner’s (and perhaps in another case, the respondent’s) claim—not seen in *Bank Markazi* or *Audobon*—will prevent him from

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124. *Lynch v. United States*, 292 U.S. 571, 581 (1934).

125. *See Fair Assessment in Real Estate Ass’n, Inc. v. McNary*, 454 U.S. 100, 125 (1981) (“Subject of course to constitutional constraints, the jurisdiction of the lower federal courts is subject to the plenary control of Congress.”) (Brennan, J., concurring).

126. *See Bank Markazi*, 136 S. Ct. at 1319 (“Before allowing execution against an asset described in § 8772(b), a court must determine that the asset is: ‘(A) held in the United States for a foreign securities intermediary doing business in the United States; (b) a blocked asset (whether or not subsequently unblocked . . . ; and (C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran.’”) (citation omitted).

bringing equitable claims to court. That this case involves sovereign immunity is equally alarming—it might allow Congress to shield itself and government officials from suit in pending litigation whenever the outcome of the litigation appears dire for the government. The principle of separation of powers is a hallmark of our constitutional system, and is meant to safeguard individual liberty.<sup>127</sup> This case, then, should be a call for the Court to drop the formulaic application of rules to separation of powers cases, and instead adopt a functional approach whereby the Court looks at the overall effect a decision might have on the whole system of governance.<sup>128</sup>

Applying formulaic rules in cases that raise fundamental constitutional principles leaves the Court little opportunity to consider the exigencies and unique circumstances of specific fact patterns. “At issue here is a basic principle, not a technical rule.”<sup>129</sup> Enabling Congress to fit its actions into standardized formula will allow Congress to fulfill its “tendency to ‘extend[] the sphere of its activity and draw[] all power into its impetuous vortex.’”<sup>130</sup> The Gun Lake Act is an example of Congress attempting to “extend the sphere of its activity.”<sup>131</sup> While in *Bank Markazi*, Congress articulated three elements that had to be found in order for the rule to apply, the Gun Lake Act provides no such guidance. Standardized rules, rather than functional principles, have thus enabled Congress to find new ways to directly affect the outcome of pending legislation.

## CONCLUSION

*Patchak v. Zinke* provides a perfect opportunity for the Supreme Court to reverse its course and drop the formulaic approach to certain separation of powers issues. Instead, the Supreme Court should adopt a functionalist approach. With formulaic rules in place governing such cases, it is easy for Congress to affect pending legislation in a particular way, especially litigation that implicates the United States. The ease with which Congress can undermine judicial decisionmaking—as shown through *Patchak v. Zinke*—must come to an end.

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127. *See id.* at 1330 (“The separation of powers, in turn, safeguards individual freedom.”) (Roberts, J., dissenting).

128. *See id.* at 1338 (“At issue here is a basic principle, not a technical rule.”) (Roberts, J., dissenting).

129. *Id.* (Roberts, J., dissenting).

130. *Id.* at 1338 (Roberts, J., dissenting) (citing THE FEDERALIST No. 48 (J. Madison)).

131. *Id.* (Roberts, J., dissenting) (citation and alterations omitted).