TAKING A STEP BACK: DO SANCTIONS UNDER IEEPA REQUIRE JUST COMPENSATION?

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I. INTRODUCTION

The executive branch's powers over private property under the International Emergency Economic Powers Act (IEEPA)[1] and its predecessor, the Trading with the Enemy Act (TWEA),[2] have received significant attention from foreign affairs legal scholars since *Dames & Moore v. Regan*[3] was handed down in 1981.[4] In *Dames & Moore*, the Supreme Court upheld the president's power under IEEPA to suspend U.S. creditors' claims against the Iranian government in order to secure the release of American hostages taken in the wake of the Iranian Revolution.[5]

One issue from *Dames & Moore*, and related cases, is whether certain presidential powers under IEEPA or TWEA amount to takings under the Fifth Amendment's Just Compensation Clause.[6] While the *Dames & Moore* Court sidestepped this question on justiciability grounds,[7] the issue reemerged in later cases when the president invoked IEEPA to settle private parties' claims against foreign states[8] or to freeze individuals' assets by designating those private parties "Specially Designated Nationals" (SDNs).[9] Even in

1. 50 U.S.C. §§ 1701–06.

2. 50 U.S.C. §§ 4301–36, 4338–41.

3. 453 U.S. 654 (1981).

4. *See* discussion *infra* Part II.

5. *Dames & Moore*, 453 U.S. at 686–88.

6. *See* U.S. CONST. amend. V [hereinafter "the Just Compensation Clause"] (stating that private property shall not "be taken for public use, without just compensation"). This clause is also sometimes referred to as the "Taking Clause" or the "Takings Clause"; the terms are interchangeable for this Note's purposes. *See, e.g.*, *infra* note 15.

7. *Dames & Moore*, 453 U.S. at 688–90.

8. *See, e.g.*, E-Sys., Inc. v. United States, 2 Cl. Ct. 271 (1983); *see also* discussion *infra* Part III(B).

9. *See* discussion *infra* Part III(B). An SDN broadly refers to an individual or company designated by the U.S. Department of Treasury that is either "owned or controlled by, or acting for or on behalf of, targeted countries" or encompasses "individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific." *Specially Designated Nationals*

purely domestic contexts, separating valid regulations from takings is a complex issue.[10] Moreover, the Supreme Court has signaled an interest in vigorously policing the line between regulation and taking to the benefit of property owners and at the expense of governments at all levels.[11] This signal from the Supreme Court, along with the general complexity of takings law, raises the question of the status of SDN designation under contemporary takings law. Are temporary asset freezes under IEEPA or related sanctions regimes best understood as takings?

This Note argues that a taking theoretically occurs when the president uses IEEPA to freeze an SDN's assets, so long as the SDN in question can demonstrate certain contacts with U.S. territory.[12] Further, it argues that cases reaching the opposite outcome have been motivated by pragmatic concerns around hampering sanctions policy, rather than a commitment to doctrinal cogency about what constitutes a taking. The argument that a taking occurs is far from clear-cut, however, in light of how complicated takings jurisprudence is generally. Nonetheless, the fact that takings are *never* found in the SDN area suggests that national security deference principles are a primary motivator in courts' decision-making. This result has the sensible consequence of keeping the courts out of delicate issues of diplomacy, but, under scrutiny, it does not square with the courts' most recent takings jurisprudence.

This position has two key implications. First, if courts uphold SDN designations by invoking deference principles motivated by the practical considerations involved in staying out of foreign affairs, we might expect courts similarly to continue validating the president's powers to settle even U.S. citizens' claims against foreign governments when a national security issue is at stake. Put another way, although *Dames & Moore* itself avoided the Just Compensation Clause, its long-term legacy might be that just compensation is unavailable when national security issues are raised regarding a taking claim in the foreign affairs context. This possibility

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and Blocked Persons List (SDN) Human Readable Lists, U.S. DEP'T OF THE TREASURY (Dec. 28, 2022), https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists [https://perma.cc/7YXC-ACDY]. Although legal entities may also be designated as SDNs, the term "he" is used throughout this Note to refer to a singular SDN for syntactical purposes.

10. *See, e.g.*, Rachelle Alterman, *The U.S. Regulatory Takings Debate Through an International Lens*, 42/43 URB. LAW. 331 (2010/2011).

11. *See* discussion *infra* Part II(A).

12. Contacts are necessary to trigger constitutional protections for non-citizens generally. *See* discussion *infra* Part IV(A)(2).

is notable because it undercuts dicta from earlier cases that suggest the opposite outcome, at least in cases where the U.S. government suspends or settles claims of U.S. persons against foreign governments.[13] Second, a normative implication is that a doctrinally consistent regulatory takings jurisprudence is irreconcilable with the high premium that courts place on national security deference. Courts can choose one or the other and retain a plausible basis for saying that their determinations are speaking law and not just drawing value judgments;[14] the SDN context teaches us that they cannot do both.

This Note proceeds as follows. Part II reviews the relevant literature on the subject, drawing from commentary evaluating the doctrinal and normative status of *Dames & Moore*. Given the developments in takings law since many seminal pieces on the subject were written, this Part posits that whether SDN designation can require just compensation requires updated analysis. Part III provides historical background on the relevant doctrines on takings during wartime, under treaties, and under relevant sanctions laws generally. Part IV discusses the significant legal issues with an SDN's takings claim and states the core argument of the Note: proceeding one-by-one through these issues, certain SDNs (i.e., those with enough jurisdictional ties to the United States) have reasonable claims to receive just compensation. However, courts are likely to rely on national security deference principles to avoid this outcome, even if only on conclusory grounds. Part V concludes and discusses implications of this argument.

13. *See* discussion *infra* Part III(A).

14. A formalist insistence that "speaking law" is necessarily distinct from judges' personal value judgments is a commitment of some legal policy organizations, at least nominally. *See, e.g.*, *About Us*, THE FEDERALIST SOC'Y, https://fedsoc.org/about-us [https://perma.cc/H98X-4EPG] ("[I]t is emphatically the province and duty of the judiciary to say what the law is, not what it should be." (paraphrasing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))); *Robert A. Levy Center for Constitutional Studies*, THE CATO INSTITUTE, https://www.cato.org/robert-levy-center-constitutional-studies [https://perma.cc/JPD4-EZDD] ("[E]ncouraging the judiciary to neither make nor ignore the law but rather to interpret and apply it through the natural rights tradition inherited from the Founders."). To the degree that these commitments are more than cosmetic taglines, the tension between just compensation principles and national security deference ought to be worrisome to these organizations' memberships.

II.
NORMATIVE AND DOCTRINAL ASSESSMENTS OF TAKINGS JURISPRUDENCE IN FOREIGN AFFAIRS SINCE *DAMES & MOORE*

A. The Unresolved Doctrinal Problem

Analysts of Supreme Court foreign affairs cases have observed tension between the Court's takings jurisprudence and its pattern of deference to the political branches—particularly, the executive—in the foreign affairs context.[15] Foreign affairs deference is sometimes justified by the argument that the executive is preeminent among the various branches in the foreign affairs arena.[16] Regardless of how courts precisely justify their deference characterization, they are often hesitant to intervene in cases implicating foreign affairs (e.g., Fifth Amendment takings) for fear of overstepping.[17]

The Iranian Hostage Crisis of 1979 gave rise to several cases that dealt with the tension between foreign affairs deference and a robust takings jurisprudence. Most notably, *Dames & Moore* raised the question of whether the president could constitutionally settle U.S. citizens' private claims against Iran as a condition for the release of hostages.[18] In engaging with Iran to secure the release of the hostages, President Carter took the following actions: he blocked the removal or transfer of Iranian government assets within U.S. jurisdiction, granted a general license authorizing proceedings to be brought against Iran, signed an executive agreement terminating all legal processes and nullifying all claims against Iran, and

15. *See* David M. Meezan, Note, *Forgotten Rights: Taking Claims and the International Emergency Economic Powers Act*, 21 VT. L. REV. 591, 591 (1996) ("Navigating between judicial deference to the Executive's foreign affairs power and the various courts' takings analyses is akin to maneuvering around Scylla and Charybdis."); *see also id.* at 598–603 (discussing the impact of *Dames & Moore* in this area); John R. Cooke, Dames & Moore v. Regan–*Rights in Conflict: The Fifth Amendment Held Hostage*, 31 AM. U. L. REV. 345, 345 (1982) ("A conflict has existed between two fundamental constitutional doctrines—the foreign relations power of the Executive and the fifth amendment protection of private property—since the beginning of the nineteenth century.").

16. Cooke, *supra* note 15, at 345 ("The judiciary has been reluctant to confront the issue [of when and how takings law applies in the foreign affairs context] because of an overriding concern about the possibility of hindering the executive branch in the exercise of its foreign affairs power.").

17. *Id.* at 345 ("[T]he courts have invoked doctrines, such as foreign sovereign immunity, that preclude adjudication on the merits. As a result, the domestic plaintiff seeking to pursue his claim against a foreign sovereign has often been denied his day in court.").

18. *Dames & Moore v. Regan*, 453 U.S. 654, 659–62 (1981).

transferred those assets to a newly established Iran-United States Claims Tribunal.[19] President Carter also directed "persons holding blocked Iranian funds and securities to transfer them to the Federal Reserve Bank of New York for ultimate transfer to Iran," invoking his powers under IEEPA.[20] Chief Justice Rehnquist wrote for the Court to uphold these actions as valid uses of his IEEPA powers, but held that the issue of whether the settlement or nullification of U.S. citizens' claims counts as a taking was not yet ripe for review.[21]

Analysts have interpreted *Dames & Moore*—both as to takings and as to the president's statutory authority to enter into the Iranian Hostage agreement—as an inherently unique response to an inherently unique situation.[22] This uniqueness justifies speculation on how best to interpret what *Dames & Moore* stands for and what degree of precedential force subsequent courts ought to give it. On the one hand, the case might exemplify judicial deference in an instance where the court *had* to stand behind the government's actions for fear of upending an emergency agreement whose violation would have extraordinary diplomatic and life-or-death consequences.[23] Even beyond pragmatic considerations, some see the underlying judicial motive to avoid the takings issue as the result of "an unvoiced skepticism that the attachments on Iranian property were valid in the first place."[24] Some analysts have therefore speculated that the pre-judgment attachments may not have been compensable under the Fifth Amendment because Iran had not waived

19. *Id.* at 662–65.

20. *Id.* at 669.

21. *Id.* at 688–90; *cf.* Anthony J. Colucci III, Dames & Moore v. Regan*: The Iranian Settlement Agreements, Supreme Court Acquiescence to Broad Presidential Discretion*, 31 CATH. U. L. REV. 565, 589 (1982) (critiquing the Court's approach on this issue).

22. Colucci, *supra* note 21, at 589 ("It cannot be denied that the Iranian settlement agreements manifest the culmination of a unique situation. This may best explain the Supreme Court's analysis in *Dames & Moore*. . . . Yet, favorable historical presupposition was the mainstay of the argument that the President had authority to suspend pending federal litigation.").

23. Shlomo Cohen, Karen Goodyear Krueger, Marian E. Lindberg, Michael E. Martin & Jocelyn F. Samuels, *The Iranian Hostage Agreement Under International and United States Law*, 81 COLUM. L. REV. 822, 876 (1981) (noting that, although "[t]he United States and Iran were not in a state of war prior to resolution of the hostage problem," the fact that "the Iranian crisis represented a central, national concern of great magnitude" indicates that "the same [deferential] considerations that underlie the realistic attitudes of the courts in times of war should be equally applicable here").

24. Lee R. Marks & John C. Grabow, *The President's Foreign Economic Powers After* Dames & Moore v. Regan*: Legislation by Acquiescence*, 68 CORNELL L. REV. 68, 83 (1982).

sovereign immunity.[25] Their interpretation pairs well with *Belk v. United States*, a companion takings case that arose out of the Iranian Hostage Crisis.[26] Though the president in *Belk* had "bargained away" the potential tort claims of the hostages in order to ensure their release, the Court upheld this as a constitutional use of presidential powers.[27] Some might thus see the *Dames & Moore* decision as one motivated by judicial deference to the practical expertise of the political branches in sensitive, diplomatic areas, a similar concern to that underpinning the political question doctrine.[28]

On the other hand, the unique circumstances undergirding *Dames & Moore* may signal that its deferential outcome is an exception rather than a rule. For instance, Justice Roberts' dissent in *Bank Markazi v. Peterson* wrote that *Dames & Moore* "confine[d] itself to the facts then before the Court" in recognizing the president's power to shift claims out of Article III courts to an international tribunal.[29] Though Roberts discussed *Dames & Moore* in the context of what it implied for distinguishing political judgments from judicial ones,[30] this discussion of *Dames & Moore* might still be telling of a judicial attitude that the case was an aberration. And if *Dames & Moore* is to be read as an aberration, it should stand as no roadblock to future plaintiffs in similar circumstances seeking just compensation. In other words, the case's unique context could mean it was a one-off decision to avert crisis, not an attempt to set doctrine for later cases.

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25. *Id.* at 83 ("Under these circumstances, the Court may have felt that the prejudgment attachment of assets belonging to the Iranian sovereign would be nullified by the courts in any event. Nonetheless, . . . nothing in the Court's reasoning serves analytically to distinguish prejudgment attachments of private property from . . . property belonging to a foreign sovereign.").

26. 12 Cl. Ct. 732 (1987), *aff'd*, 858 F.2d 706 (Fed. Cir. 1988).

27. *See* Kevin D. Hughes, *Hostages' Rights: The Unhappy Legal Predicament of an American Held in Foreign Captivity*, 26 COLUM. J.L. & SOC. PROBS. 555, 579–80 (1993).

28. Tim Gebert, *The Principles of Just Compensation for International Takings*, 4 J. INT'L L. & PRAC. 389, 390 (1995) ("*The concern of having the judiciary hearing cases raises the question that if the courts were to validate these kind of actions, it would frustrate America's foreign policy agenda.* But this raises the issue of 'institutional competence,' or which branch of government is in the best position to assess compensation." (emphasis added) (quoting Phillip R. Trimble, *Foreign Policy Frustrated*–Dames & Moore, *Claims Court Jurisdiction and a New Raid on the Treasury*, 84 COLUM. L. REV. 317, 320 (1984))). For a discussion of how this deference principle interacts with the political question doctrine, see Trimble, *supra*, at 343–44.

29. *The Supreme Court, 2015 Term—Leading Cases*, Bank Markazi v. Peterson, 130 HARV. L. REV. 307, 311 (2016).

30. Bank Markazi v. Peterson, 578 U.S. 212, 249–51 (2016) (Roberts, C.J., dissenting).

The ambiguity on this point has left several commentators unable to conclude how doctrinally informative the holding in *Dames & Moore* is. In the first instance, its treatment of the separation-of-powers issue has been seen to signal "further uncertainty for the private litigant" in the absence of clearly delineated boundaries between judicial and executive authority to settle claims in foreign affairs cases.[31] Another analyst speculates that *Dames & Moore* "could lead to an expansion of the President's foreign relations power at the expense of [F]ifth [A]mendment protection of private property," but that it "provides little guidance for the future."[32]

To complicate matters further, the Supreme Court has relatively recently shown a desire to limit all levels of governments' regulatory powers more vigorously via the Just Compensation Clause, specifically under regulatory—or de facto—takings theories.[33] Generally, a de facto taking occurs where a court finds the government to have taken private property for public use—either by regulation or otherwise—without a formal appropriation proceeding (i.e., condemnation). The Supreme Court has more readily found these in the years since *Dames & Moore* and in contexts wholly unrelated to foreign affairs. For instance, in *Lucas v. South Carolina Coastal Council*, the Supreme Court held that a taking had occurred where a local regulation deprived a land developer of the ability to build on his tracts of land, since that interfered with "all economically beneficial uses" of the property.[34] Further, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court held that a physical invasion of property in accordance with a regulatory scheme—even a minimal one—constitutes a taking that may require just compensation.[35] Most recently, in *Cedar Point Nursery v. Hassid*,[36] the Supreme Court found that a California labor law requiring agricultural employers to allow union organizers onto their property for certain hours required just compensation because the state government had effectively appropriated the business's common-law right to exclude others from its property.[37] Altogether, the Court seems to be

31. Colucci, *supra* note 21, at 589–90.

32. Cooke, *supra* note 15, at 347.

33. For a definition of "de facto taking," see De Facto *Taking Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/d/de-facto-taking/ [https://perma.cc/B4Y4-H874]. The term "de facto taking" is used interchangeably with "regulatory taking" in this article. The author apologizes for the confusing nomenclature used in this area.

34. 505 U.S. 1003, 1018 (1992).

35. 458 U.S. 419, 435–39, 441 (1982).

36. 141 S. Ct. 2063 (2021).

37. *Id.* at 2072.

moving toward high-level protection for property owners who grapple with domestic regulation.

It is important to note that this general development in takings jurisprudence—both within and outside the foreign affairs context—takes place amid ambiguity around what exactly qualifies as a regulatory, or de facto, taking.[38] Early in American history, property for takings purposes was understood to refer exclusively to particularized, real property. Through the 20th century, however, the Supreme Court expanded this definition to encompass an "abstraction of property rights" in a less tangible sense.[39] In particular, regulatory takings jurisprudence largely hearkens to the opaque Holmesian formulation that a taking has occurred when a regulation "goes too far."[40] The Court eventually provided greater clarity in *Penn Central Transportation Co. v. City of New York*, where it established a balancing test that evaluates the "economic impact of the regulation," the extent of interference with "investment-backed expectations," and the "character of the governmental action."[41] The *Penn Central* test, however, leaves open hard questions of if or how exactly courts ought to balance the above factors.[42] As such, the regulatory takings analysis is often described as a gray area where predicting outcomes is difficult.[43]

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38. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 302 (2d ed. 1996) ("The line between regulation and taking remains fluid.").

39. Jesse A. Lynn, *Caveat Lessor? The Takings Clause and the Doctrine of Mission Inviolability:* 767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations, 76 B.U. L. REV. 399, 409 (1996).

40. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see also* Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n, 141 S. Ct. 731, 731–32 (2021) (Thomas, J., dissenting) (disagreeing with the Court's denial of certiorari on the grounds that it should clarify the line between regulatory taking and valid regulations).

41. 438 U.S. 104, 124 (1978).

42. Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 FED. CIR. B.J. 677, 678 (2013) ("Despite *Penn Central*'s preeminence as the test for regulatory takings, three and one-half decades have not been long enough for the Supreme Court to mold the test into a workable standard. Consequently, regulatory takings law is in disarray, guided by little more than muddled and incoherent, if not incomprehensible, rhetoric.").

43. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) ("[T]he predominant characteristic of this area of law is a welter of confusing and apparently incompatible results. The principle upon which the cases can be rationalized is yet to be discovered by the bench: what commentators have called the 'crazy-quilt pattern of Supreme Court doctrine' has effectively been acknowledged by the Court itself, which has developed the habit of introducing its uniformly unsatisfactory opinions in this area with the understatement that 'no rigid rules' or 'set formula' are available to determine where regulation ends and taking begins." (footnotes omitted)). Although there is much more one could say about the com-

Taking the *Dames & Moore* literature together with Supreme Court precedent on just compensation issues, how does the Court's shift regarding regulatory takings affect foreign affairs law, and how should we construe *Dames & Moore* today? Analysts have presented mixed opinions on the influence of domestic takings jurisprudence in the foreign affairs context. On the one hand, since the end of the *Lochner* era[44]—i.e., the early 20th-century period in which the Supreme Court used due process principles to strike down progressive economic regulations—it has been hard for some to imagine the Court reviewing foreign relations regulations or international agreements on economic subjects with particular stringency.[45] In other words, even if the Court continues to find takings in an increasing number of domestic regulations, *Lochner* is still considered bad law; as such, it might be an overstatement of the Court's recent turn in takings jurisprudence to say that international economic regulations are lined up on the proverbial chopping block. The Court has not spoken firmly on the subject, either with respect to foreign affairs generally[46] or with respect to the president's powers under IEEPA in particular.[47] More particularly, there were many cases immediately after *Dames & Moore* involving individual claims against foreign governments that were settled or submitted to arbitration pursuant to an authorizing agreement, but in none of these

plexities of regulatory takings generally, there is not enough space in this Note for a full treatment.

44. *See generally* Lochner v. New York, 198 U.S. 45 (1905). For a discussion of *Lochner*'s impact, overturn, and enduring relevance to constitutional law generally, see Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

45. HENKIN, *supra* note 38, at 290–91 ("Foreign relations legislation or regulations, or international agreements, are surely no more vulnerable to [*Lochner*-style] objections than domestic prohibitions or regulations that adversely affect the economic rights of one or of many."). Although this discussion takes place on the backdrop of substantive due process principles, affording a high degree of protection for property interests naturally implicates the Just Compensation Clause as well.

46. *See, e.g.*, Cooke, *supra* note 15, at 346 ("[C]ourts have avoided examining the constitutional restrictions on the exercise of the foreign relations power by denying a forum for domestic litigants. Consequently, the development of fifth amendment guarantees in litigation between a domestic plaintiff and a foreign state have lagged behind corresponding guarantees in similar suits between domestic parties.").

47. Meezan, *supra* note 15, at 624 ("Discussing the IEEPA applications of the Court's recent, libertarian takings jurisprudence inevitably begs the question of why that analysis has not been applied by courts hearing IEEPA takings claims.").

cases was the authorizing agreement invalidated as a taking.[48] The above suggests that authorization under IEEPA—paired with background deference principles—will cause the Supreme Court not to find takings in this area going forward.[49]

Other analysts have taken the Just Compensation Clause's "larger relevance"[50] as a sign that new regulatory takings case law changes the equation, i.e., that courts will more readily find takings to occur under IEEPA. As early as 1996, the renowned scholar Louis Henkin rhetorically asked whether future litigants whose legal claims were settled by the U.S. government could recoup the difference between their claims' value and whatever the political branches make available in an international tribunal.[51] Additionally, some have speculated that the Court's holding in *Lucas* could change the analysis of government actions that frustrate contract rights, to which executive actions taken pursuant to IEEPA are no exception.[52] The same author argues that this could feasibly be taken to "overrule the narrow takings holding in *Dames & Moore v. Regan*."[53]

In sum, commentary on *Dames & Moore* suggests that takings jurisprudence and national security deference principles are generally in tension with one another, which neither *Dames & Moore* nor surrounding cases clearly resolve in the foreign affairs arena.

B. Normative Critiques: Should National Security Overtake Property Interests?

The doctrinal ambiguity that analysts have noted has led to normative critiques of *Dames & Moore*. These can be divided into critiques that it: (1) overstated the importance of deference in foreign affairs; (2) understated relevant property interests; and/or (3) did not shun the takings claims firmly enough.

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48. Cohen et al., *supra* note 23, at 874 ("In none of the many cases [following *Dames & Moore*] in which individual claims against foreign governments have been settled or submitted to arbitration has the authorizing agreement been invalidated as a taking.").

49. Rich Bergovoy, *The Just Compensation Clause and the Iranian Hostage Agreement: Public Ransom at Private Expense*, 2 ANN. REV. BANKING L. 325, 354 (1983) ("Although the Supreme Court has mandated that the Bill of Rights be as strong in foreign affairs as it is in domestic affairs, the IEEPA has in fact eviscerated the strength of the just compensation clause overseas.").

50. HENKIN, *supra* note 38, at 297.

51. *Id.* at 302.

52. Meezan, *supra* note 15, at 617–18.

53. *Id.* at 617 (discussing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

The first set of critiques of *Dames & Moore* is that it overstated the appropriate scope of presidential power out of an ill-conceived conception of deference. While this critique does not directly involve the Just Compensation Clause per se, the implication is that the Court should more actively use constitutional protections to rein in presidential power. On this ground, some analysts critique as both inaccurate and unprecedented the decision's interpretation of Congress's historical acquiescence to the Executive in foreign affairs contexts.[54] Others similarly argue that the Court's failure to "articulate any meaningful limiting principles for executive power in the areas of national security and foreign affairs" has led it to interpret its way through statutes like IEEPA to the conclusion that the president's actions are valid in almost any context.[55] Analysts thus warn that *Dames & Moore* has had the unfortunate legacy of legitimizing executive overreach in the foreign affairs arena.[56]

This critique of foreign affairs deference echoes broader discomfort with the concept of "[f]oreign relations exceptionalism."[57] Foreign affairs legal scholars Ganesh Sitaraman and Ingrid Wuerth, who traced the notion that foreign relations law uniquely warrants deference to the Executive to the early 20th century, argue that such deference is not a "permanent or original part of our constitutional system."[58] Further, in many areas of foreign affairs doctrine (ranging from political question issues to treaty interpretation), modern courts have begun to roll back this foreign affairs exceptionalism.[59]

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54. Marks & Grabow, *supra* note 24, at 69–70; *see also* Cooke, *supra* note 15, at 366–71 (tracing the notion of executive supremacy in foreign affairs matters to United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936)).

55. Rebecca A. D'Arcy, Note, *The Legacy of* Dames & Moore v. Regan*: The Twilight Zone of Concurrent Authority Between the Executive and Congress and a Proposal for a Judicially Manageable Nondelegation Doctrine*, 79 NOTRE DAME L. REV. 291, 295 (2003); *see also id.* ("Given the breadth and malleability of the traditional canons of statutory interpretation, it is almost impossible to imagine a realistic scenario where the Court could not identify a congressional source of authority [for executive action].").

56. Marks & Grabow, *supra* note 24, at 69–70 ("[T]he Court's analysis cannot be limited to the facts. . . . [T]he Court was forced to rely on an unprecedented reading of the President's statutory and constitutional power to conduct foreign affairs. [This] precedent . . . may cause serious mischief in the future and . . . cannot easily be dismissed.").

57. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1900 (2015).

58. *Id.* at 1901.

59. *Id.* at 1903–04 (discussing relatively recent cases that illustrate this trend).

If foreign affairs law should be treated the same as any other area of law, then IEEPA's status as a regulation of international commerce for national security-related objectives should make no difference in assessing whether a taking has resulted from its application. Therefore, we might expect national security concerns to be weighed equally to other government interests when evaluating the strength of a taking claim. One analyst has argued for a similar idea by creating a framework for foreign affairs takings cases in which courts should first consider whether there is a parallel Fifth Amendment protection in the domestic context, and only then whether a unique foreign policy context requires an unusually high degree of deference to the political branches.[60]

Commentators also marshal a variety of arguments for why the Court's takings jurisprudence—including *Dames & Moore*—did not go far enough in protecting private property. One common refrain is that, whatever the inherent value of national security and/or executive deference principles generally, courts misapply them in the takings context.[61] For instance, some argue that wartime is the only context in which the president may confiscate property without compensation.[62] Others more generally argue that deference to the political branches at the expense of the Bill of Rights misapplies the seminal precedent in this area, *United States v. Curtiss-Wright Export Corp.*[63] In the broadest possible terms, Justice Sutherland's opinion

60. Cooke, *supra* note 15, at 388 ("Rather than deferring to the power of the Executive to settle claims, the courts should look to the law developed to protect domestic property rights. Traditional tests should replace judicial restraint."); *see also id.* at 347.

61. Meezan, *supra* note 15, at 603 ("*Dames & Moore* thus left much to be decided and gave . . . little guidance regarding contemporary claims of taking due to operation of the IEEPA. . . . [C]ourts have notoriously misapplied the decision, imputing a general takings immunity . . . as deriving from the subordination of attachments allowed by the Supreme Court.").

62. Thomas J. Reilly, *Freezing and Confiscation of Cuban Property*, 19 STAN. L. REV. 1358, 1363–65 (1967) ("In short, the precedents do not support the existence of a power to confiscate the property of alien nationals in the absence of military hostilities.").

63. HENKIN, *supra* note 38, at 284; United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936); *see also* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 183 (1990) ("The courts have too readily read *Curtiss-Wright* as standing for the proposition that the executive deserves an extra, and often dispositive, measure of deference in foreign affairs above and beyond that necessary to preserve the smooth functioning of the national government."). Although these arguments are not specific to the Just Compensation Clause, the authors' concern with the abuse of national security deference at the expense of civil liberties can be brought directly to bear upon property owners' right to just compensation.

in *Curtiss-Wright*—upholding the president's unilateral power to ban overseas arms sales to Bolivia and/or Paraguay—stands for the notion that the Executive is preeminent in foreign affairs.[64] However, this opinion did not implicate broader structural limits on government power overall, such as individual rights protections. As such, Henkin argues that *Curtiss-Wright* is agnostic on foreign affairs cases involving the Bill of Rights rather than separation-of-powers principles.[65]

A separate line of critique argues that the interests of private parties engaged in international commerce should weigh heavily in any balancing of interests.[66] This critique is concerned in part with the disincentives for private companies to enter into international commerce created by a rule that fails to compensate firms for losses resulting from unpredictable international politics.[67] Meezan argues that the Court creates an arbitrary and constitutionally unfounded distinction in treating real property with a high degree of takings protection while leaving personal property—such as contract rights *a la* the claimants in *Dames & Moore*—with a lower degree of the same.[68] Still another group critiques the *Dames & Moore* Court for brushing aside the reasonableness of international businesses' investment-backed expectations in retaining an interest in

64. *See Curtiss-Wright*, 299 U.S. at 319–20 ("[W]e are here dealing . . . with such an authority plus *the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations*—a power which does not require . . . an act of Congress . . . ." (emphasis added)).

65. *See* HENKIN, *supra* note 38, at 284–85; *see also* Cooke, *supra* note 15, at 373–74 (not discussing *Curtiss-Wright* explicitly, but identifying a similar deference principle at play in *Dames & Moore* that made its logic circular: by *presuming* that the president had valid claims nullification power under statute, the Court arrived at the result that the Bill of Rights' constraints, such as the Just Compensation Clause, did not apply to his exercise of that power because otherwise, he would not have such power).

66. Cooke, *supra* note 15, at 381 ("Corporations must be assured that their investments will not be subject to the unbridled control of the Executive, or that if their interests are compromised, they will be justly compensated. [Otherwise] . . . the resulting disincentive may hinder the ability of the United States to participate vigorously in international commerce."); *see generally* Meezan, *supra* note 15 (skewing toward property-owners' interests in the balance between property-owners' interests and national security concerns).

67. Cooke, *supra* note 15, at 381.

68. Meezan, *supra* note 15, at 604–05. Although Meezan does not directly address *Dames & Moore* in advancing this claim, presumably plaintiffs similarly situated to those in *Dames & Moore* would be eligible for compensation under his normative framework.

their property.[69] A final analyst points to the idea that small groups of individuals should not be forced to bear the costs of U.S. foreign policy, and that, if they do, they should be compensated for having done so disproportionately.[70]

On the other hand, a minority have argued that *Dames & Moore* was insufficiently deferential. One analyst argues that even allowing a takings claim to be brought undermines the capacity of the United States to conduct foreign policy under IEEPA and related statutes.[71] This, in turn, "threatens to have a significant effect on the foreign policy decisionmaking process generally."[72] Further, this analyst argues that *Dames & Moore* is best seen as a departure from "a tradition of judicial deference to the political branches of government in matters closely involving foreign affairs."[73] He points to Justice Black's concurrence in *Z. & F. Assets Realization Corp. v. Hull* as evidence that precedent favored dismissal of the claims in *Dames & Moore*: the "power to make final determination of the validity or amount of certain international claims rests with the political departments of government alone."[74]

In short, *Dames & Moore* has generated a wide range of normative critiques, the majority of which argue it did not go far enough to protect private property interests via the Just Compensation Clause.

C. The Relevance of Frozen SDN Assets

There are several gaps in the above literature that this Note attempts to address. First, much of the above focuses on the prop-

69. *Id.* at 605–06 (critiquing courts' positions that plaintiffs lack reasonable overseas investment-backed expectations of property protection when they assume friendly relations between countries); *see also* Marks & Grabow, *supra* note 24, at 79–80 (arguing that the *Dames & Moore* Court erred in upholding the executive branch's power to "nullify attachment liens" on the grounds that these property interests had not vested because the distinction between these attachments and other "vested" interests was unsupported).

70. Peter W. Adler, *The U.S.-Iran Accords and the Taking Clause of the Fifth Amendment*, 68 VA. L. REV. 1537, 1561 (1982) ("[A]lthough it was reasonable for the government to suspend claims, that suspension disproportionately burdened a small group of individuals and corporations rather than spread the loss among the public. There is no good reason why courts should force the individuals and corporations who accepted the risk of not recovering on claims against Iran also to suffer losses that benefit the public.").

71. Trimble, *supra* note 28, at 319.

72. *Id.*

73. *Id.*

74. *Id.* at 343 (quoting Z. & F. Assets Realization Corp. v. Hull, 311 U.S. 470, 491 (1941) (Black, J., concurring)).

erty rights of U.S. citizens in the claims-settlement context, but spends less time on the more basic, theoretical question of whether IEEPA requires just compensation more broadly (i.e., whether seizing, destroying, or otherwise inhibiting property of non-U.S. citizens constitutes a taking).[75] Presumably, analysts have not paid much attention to this broader question out of the (correct) belief that courts will not seriously entertain an SDN's just compensation claim when his assets are frozen.[76] This question is nonetheless worth asking to assess whether takings jurisprudence is cogent in the context of foreign affairs. By showing how an SDN should theoretically recover damages—but likely will not, given pragmatic considerations[77]—the implication is that *Dames & Moore*, though perhaps seeming to be a one-off, will likely continue to reflect judicial attitudes around national security-related deference to the political branches in the realm of takings.

Second, much of the literature surveyed above predates the Court's expansion of regulatory takings jurisprudence and therefore fails to account for significant doctrinal evolution. For instance, in 1996, Meezan attributed the disjunction between the Court's deference in foreign affairs and domestic takings cases in part to a distinction between real and personal property under *Lucas*.[78] In the years since, however, the Court has backtracked on the distinct treatment of real versus personal property that Meezan had observed.[79] Additionally, at least one Supreme Court Justice, Clarence Thomas, has signaled an interest in revisiting and clarifying regulatory takings doctrine wholesale.[80] Because the issue has not been addressed since the ascendancy of a conservative, takings-friendly majority on the Supreme Court, it would seem that the takings question under IEEPA is worth revisiting.

Third, this Note adds nuance to the work of Ganesh Sitaraman and Ingrid Wuerth[81] by illustrating an area of foreign affairs law where modern courts have not actually "normalized" their ap-

75. *But see* Meezan, *supra* note 15, at 630–31 (analyzing the constitutional foundations of blocking orders under IEEPA generally and suggesting that courts stop distinguishing between real and personal property under the Just Compensation Clause or provide a better justification for the distinction).

76. *See* discussion *infra* Part III(B).

77. *See* discussion *infra* Part III(A)(1).

78. Meezan, *supra* note 15, at 592, 624–628.

79. *See* Horne v. Dep't of Agric., 576 U.S. 350, 357 (2015) (clarifying that the same just compensation protections apply to personal as to real property).

80. Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n, 141 S. Ct. 731, 731–32 (2021) (Thomas, J., dissenting).

81. *See generally* Sitaraman & Wuerth, *supra* note 57.

proach, nor are they likely to do so: takings law in foreign affairs is shown to be deferential to government interests in ways that are inconsistent with the Court's recent domestic approach. Perhaps this result signals that normalization is less likely to occur where treating foreign affairs issues like domestic ones would produce outsized, real-world consequences for the U.S. government's diplomatic capacity.

III.
RELEVANT DOCTRINAL FRAMEWORKS

This Part provides a high-level overview of the history of takings in the national security context and how that specifically informs the analysis of SDN designation under TWEA, IEEPA, and other sanctions laws. The following Part discusses the core issues that arise when applying these principles to an SDN alleging that the freezing of his assets constitutes a taking.

A. Takings in the National Security Context

The issue of how to apply takings principles in foreign affairs dates to the country's founding, in the contexts of claims nullification via treaty and wartime seizures of property. The early case of *Ware v. Hylton* confronted the issue of whether Virginia could relieve domestic debtors of their obligations to British creditors under its view that the British creditors in question were alien enemies, despite a contrary directive from the Treaty of Paris of 1783.[82] The Court sided with the British creditors on grounds of the Treaty's supremacy over state law.[83] Although the case did not address the Fifth Amendment specifically, Justice Paterson, in his seriatim opinion, declared more broadly that "[n]ational differences should not affect private bargains."[84]

82. 3 U.S. (3 Dall.) 199, 203–04, 207 (1796).

83. *Id.* at 244–45 (opinion of Chase, J.) ("Our Federal Constitution establishes the power of a treaty over the constitution and laws of any of the States; and I have shown that the words of the fourth article were intended, and are sufficient to nullify the law of Virginia, and the payment under it."); *see also id.* at 282, 284 (opinion of Cushing, J.) ("But here is a treaty, the supreme law, which overrules all State laws upon the subject, to all intents and purposes; and that makes the difference.").

84. *Id.* at 255 (opinion of Paterson, J.) (adding that he felt "no hesitation in declaring, that it has always appeared to [him] to be incompatible with the principles of justice and policy, that contracts entered into by individuals of different nations, should be violated by their respective governments in consequence of national quarrels and hostilities").

Nearly a century later, the Court of Claims reviewed takings claims in the French Spoliation Cases.[85] There, the United States had settled claims against France on behalf of the estates of Revolution-era American shipowners, whose ships had been taken by the French revolutionary government in the wake of the execution of Louis XVI.[86] The United States had done so to gain French forgiveness after the United States had breached a Revolution-era treaty with France to support France's war against Great Britain.[87] In dicta from *Gray v. United States*, one of the Spoliation Cases, the court described the release of these claims as takings within the meaning of the Just Compensation Clause.[88] However, the court said the plaintiffs had no remedy because Congress had not apportioned funds to reimburse the taking.[89] The other Spoliation Cases had similar holdings, i.e., that while a taking had occurred, the plaintiffs were without remedy because Congress had failed to provide one.[90] Thus, although the plaintiffs could not be compensated, subsequent takings jurisprudence was left with dicta indicating that the government must compensate property owners for their losses in the treaty realm just as it must in the domestic context. Courts during the 20th century have also periodically affirmed the broader, similar principle that treaties may not violate individual constitutional rights.[91]

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85. HENKIN, *supra* note 38, at 300–02 (discussing the French Spoliation Cases).

86. Gray v. United States, 21 Ct. Cl. 340, 343 (1886).

87. HENKIN, *supra* note 38, at 300.

88. *Gray*, 21 Ct. Cl. at 392–93. This language was subsequently referred to as dicta by the Federal Circuit in *Abrahim-Youri v. United States*, 139 F.3d 1462, 1467 (Fed. Cir. 1997).

89. HENKIN, *supra* note 38, at 300–01.

90. *See, e.g.*, Meade v. United States (*The Meade Case*), 2 Ct. Cl. 224, 275 (1866), *aff'd*, 76 U.S. 691 (1869) (recognizing a similar congressional power to release claims against Spain as *Gray* had found against France); *see generally* The Jane, 23 Ct. Cl. 226 (1888).

91. *See* Lynn, *supra* note 39, at 416; *id.* at 416 n.112 (first citing Perez v. Brownell, 356 U.S. 44, 58 (1958); and then citing Missouri v. Holland, 252 U.S. 416, 419 (1920), for the proposition that treaty-making powers do not permit the government to contravene constitutional restraints generally); *see also Recent Development: Executive Agreement Cannot Withdraw Consent to Be Sued; Just Compensation Clause Given Extraterritorial Operation*, 55 COLUM. L. REV. 926, 928 (1955) ("No treaty or executive agreement has ever been held unconstitutional, but the Court has indicated that neither can accomplish what the Constitution forbids."); Myres S. McDougal & Gertrude C. K. Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 59 YALE L.J. 60, 104 (1949) ("While it is true that there has never been a square holding that the Fifth Amendment, or other prohibitions of the Constitution, are applicable to the substantive provisions

The Supreme Court later confronted a related issue of how to handle wartime takings during the Mexican-American War in *Mitchell v. Harmony*.[92] The Court there held that a taking had occurred where U.S. military officer David Mitchell had seized the property of Manuel Harmony, an American trader in Chihuahua, Mexico.[93] Allegedly, Mitchell had impressed Harmony into service and forced him to bring his wagons, mules, and goods to accompany the U.S. Army's military expedition against his will.[94] The Court found for Harmony on the basis that Mitchell had no authority for the taking in the absence of an "immediate and impending" danger or "necessity urgent for the public service"; there was no evidence, for instance, that the property was in danger of falling into enemy hands or that Mitchell needed it to ward off enemy soldiers.[95] Though such circumstances were not at play, the Court noted more broadly that Harmony would have been entitled to just compensation from the U.S. government even if the taking were justified by wartime necessity.[96] Yet given the absence of an emergency, Mitchell was personally liable for trespass.[97]

The Court further developed its emergency takings jurisprudence in several cases arising out of the Civil War. In *United States v. Russell*, for instance, the United States had taken certain private steam ships for military transportation purposes.[98] The Court held that the taking was lawful, but required just compensation on the grounds that the act of seizure constituted an implied promise to reimburse the owner for the loss.[99] Similarly, in *United States v. Pacific Railroad*, Union soldiers had destroyed certain bridges during the Civil War and later ordered the bridge owner to rebuild them as a function of military necessity.[100] The Court there said that the government had a duty to compensate parties whose property was

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of a treaty, the dicta are relentlessly consistent, and the consensus of opinion unflagging, in affirming this proposition.").

92. 54 U.S. (13 How.) 115, 128 (1851).

93. *Id.* at 132.

94. *Id.* at 129.

95. *Id.* at 134.

96. *Id.* (noting that there are "occasions . . . where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.").

97. *Id.* at 137.

98. 80 U.S. (13 Wall.) 623, 623–24 (1871).

99. *Id.* at 629–30 ("Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.").

100. 120 U.S. 227, 228–31 (1887).

destroyed during the course of war as long as the private party was innocent, i.e., had not defected to the enemy side.[101] The principle thus emerged that military necessity could give the government power to take private property of loyal citizens, but did not bar the recovery of just compensation.[102]

1. 20th Century Changes

20th-century courts continued to apply the principles iterated above—that (1) wartime justified the taking of private property, and (2) infringements upon private property by treaty were no more constitutional than infringements by domestic legislation. However, at times, courts' analyses were impacted by changing diplomatic dynamics and issues arising from an increase in global integration.

For one, courts began addressing the issue of how to approach just compensation claims in the context of the "Constitution abroad." First, there was the issue of non-citizens' entitlement to just compensation. In *Russian Volunteer Fleet v. United States*, the Supreme Court held that a company organized under the laws of pre-Bolshevik Russia was entitled to just compensation as the assignee of an interest in ship construction contracts after the U.S. government had requisitioned a New York corporation (the assignor) to construct two vessels.[103] The Court found that the Russian Volunteer Fleet, though not incorporated under U.S. law, was an "alien friend" because it was a subject of the Russian provisional government.[104] However, takings recovery would be limited to either U.S. citizens or non-citizens like the *Russian Volunteer Fleet* plaintiffs who could establish a territorial connection to the United States (in that case, the contacts were contract-based).[105] In *United States v. Belmont*, by contrast with those who could establish territorial connections to the United States, the Supreme Court denied compensation to a non-U.S. citizen seeking to recover the value of a bank account that had been expropriated by the Soviet govern-

101. *Id.* at 239. The principle that enemies do not deserve just compensation was echoed later in J. Ribas y Hijo v. United States, 194 U.S. 315, 322–23 (1904) (finding that Spanish subjects could not recover compensation for property lost during Spanish-American War because they were deemed enemies); *see also* The Prize Cases, 67 U.S. (2 Black) 635 (1862) (barring recovery of property for enemies of the United States).

102. *But see The Prize Cases*, 67 U.S. at 671–675 (refusing to extend the same principle to enemies).

103. 282 U.S. 481, 487, 492 (1931).

104. *Id.* at 489, 491–92.

105. 301 U.S. 324, 332 (1937).

ment.[106] The Court also periodically upheld the wartime emergency exception[107] under which enemy citizens would not be allowed to recover.[108]

Courts in this period also broadened what the emergency exception to takings liability entailed. Rather than adhering to the *Mitchell-Russell* approach of requiring just compensation after the fact of a wartime seizure of property, courts began seeing the wartime/emergency exception as an absolute shield against takings liability for the government. For instance, in *United States v. Caltex*, the Court held that no compensation was required after the United States had destroyed an oil company's terminal facilities in Manila at the time of the Japanese attack on Pearl Harbor because the destruction was for the sole purpose of preventing enemy capture.[109] It distinguished *Mitchell* and *Russell* on the grounds that, on the facts of *Caltex*, the "sole objective" was to destroy "property of strategic value to prevent the enemy from using it to wage war the more successfully."[110] It continued by noting that the Just Compensation Clause "is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war," and said that there could be no "rigid rules" to distinguish when compensation is necessary or not.[111] Justice Douglas's dissent, however, stuck to the old rule of saying that emergency allows for the destruction of property, but still requires just compensation after the fact.[112]

The judiciary also periodically clarified that the national security principles undergirding the wartime exception could not let the government sidestep compensating private individuals that would otherwise bear the cost of national security decisions. For instance, in *Causby v. United States*, the Court of Claims found that military planes flying at low altitudes over the plaintiff's chicken farms constituted a taking because the overhead planes rendered the place

106. *Id.*

107. *See* discussion *infra* Part IV(A)(3).

108. *See, e.g.*, Aris Gloves, Inc. v. United States, 190 Ct. Cl. 367, 375–76 (1970) (concluding there was no taking of certain properties in East Germany in the wake of World War II because the area still counted as a war zone); *see also* United States v. Caltex, 344 U.S. 149, 155–56 (1952) (finding no right to compensation with respect to the U.S. military's destruction of a petroleum storage facility in the Philippines during WWII).

109. 344 U.S. at 153–55.

110. *Id.* at 152–53.

111. *Id.* at 155–156.

112. *Id.* at 156 (Douglas, J., dissenting).

unfit for chicken farming.[113] In *United States v. Pewee Coal Co.*, the Supreme Court held that a seizure of a coal company's operations to manage a national strike during WWII constituted a taking.[114] National security interests thus were not understood to impart free rein on the government to force property owners to bear the costs of military or national security operations. This approach has continued into the 21st century as well.[115]

On the other hand, national security interests could override property interests in at least two circumstances. The first is when the United States disposes of property ostensibly for the benefit of the U.S. citizen whose property was taken. The clearest example of this is in *Belk v. United States*, where hostages of the government of Iran were denied recovery after the United States had waived their right to bring tort claims against their captors as a condition of their own release.[116] The second circumstance is when the property in question belongs to a foreign state that has harmed the United States in some way. For instance, in *Weinstein v. Islamic Republic of Iran*, the Second Circuit held that the United States could seize bank assets owned by Iran in order to satisfy damages liability to U.S. citizens killed in an Iran-sponsored terrorist attack.[117]

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113. 109 Ct. Cl. 768, 772 (1948).

114. 341 U.S. 114, 115–17 (1951).

115. *See, e.g.*, Doe v. United States, 95 Fed. Cl. 546, 556 (2010) ("[M]ilitary conduct can give rise to a compensable takings claim when the military has exercised the Government's civil eminent domain authority.").

116. 12 Cl. Ct. 732, 734–35 (1987); *see also* Abrahim-Youri v. United States, 139 F.3d 1462, 1463, 1466–67 (Fed. Cir. 1997) (finding no taking where the U.S. government espoused a claim and proceeded to settle it against Iran on the basis that doing so was for the benefit of the claimant and thus indistinguishable from *Belk*). Similarly, *The National Board of Young Men's Christian Associations v. United States* held that there had been no taking where U.S. soldiers destroyed a YMCA building in Panama in the course of defending it from rioters. 395 U.S. 85, 92 (1969) (saying that holding otherwise would make "governmental bodies . . . liable under the Just Compensation Clause to property owners every time policemen break down the doors of buildings to foil burglars thought to be inside."). This also justified the Executive's power to settle private claims for recovery against the People's Republic of China (PRC) in *Shanghai Power Co. v. United States*, when there was substantial reason to doubt that any sum would be recoverable at all in the absence of such a settlement. 4 Cl. Ct. 237, 245 (1983) ("[P]laintiff's argument that the President sacrificed its claim to obtain normalization with the PRC could well be stood on its head: Without normalization, plaintiff's claim would have remained unsatisfied as it had been for almost three decades.").

117. 609 F.3d 43, 46, 54 (2d Cir. 2010) (finding no taking for freezing assets of state-owned Iranian bank under SDN designation for which it had notice and which was a punishment under IEEPA orders for funding terrorism).

To summarize, this review of general takings principles in the foreign affairs context leaves us today with a couple key doctrinal points. For one, wartime emergencies provide an exception to takings liability, but they do not grant plenary power to use national security as a basis for refusing just compensation. Further, treaties are ostensibly subject to the same just compensation constraints as domestic law, taking relevant dicta for all it is worth. Thus, in the absence of a national security need or emergency, the fact that treaties are international in nature does nothing on its own to shield the U.S. government from takings liability.

B. Takings in the Sanctions Context

The above discussion of takings in the national security context provides the foundation from which courts approach takings in the context of presidential powers under IEEPA, TWEA, and other sanctions laws. Courts have granted these statutes deference similar to that extended to other national security-related legislation. However, courts have interpreted IEEPA to give the president power to settle private citizens' international claims. The Court has left open whether the president's use of this claims settlement power amounts to a compensable taking.

The seminal case in which the Supreme Court upheld the power of the Executive to use freeze orders to effectuate sanctions is *Propper v. Clark*.[118] In *Propper*, the New York Attorney General brought suit for the recovery of royalties and declarations of title against an Austrian arts association in its capacity as receiver for the American Society of Composers, Authors, and Publishers.[119] However, the federally created Alien Property Custodian froze this property pursuant to a freeze order authorized under TWEA against the Austrian organization.[120] The case's central question thus went to the statutory and constitutional authorization for the Alien Property Custodian's freeze order under TWEA, which the court upheld:

> We do not now undertake to say whether every determination of rights concerning blocked property in unlicensed litigation is voidable. We base our determination on the purpose of Congress to prevent shifts in title to blocked assets and the prohibi-

118. 337 U.S. 472 (1949).

119. *Id.* at 474.

120. *Id.* at 475–76.

> tion of the Executive Order against transfers of such a credit as this.[121]

The Court thus upheld the president's block orders as valid under TWEA, but did not address the taking issue directly.[122] Nevertheless, by refusing to strike down TWEA or to find the freeze order invalid, the Court implicitly rejected the idea that just compensation was required.[123]

Propper has subsequently been invoked by later courts to stand for the notion that national security deference and executive primacy in the foreign affairs arena constitutionalize various sanctions programs.[124] In *Sardino v. Federal Reserve Bank of New York*, for instance, the Second Circuit held that a freeze order under Cuban sanctions regulations created pursuant to TWEA did not violate due process principles.[125] There, the Secretary of the Treasury froze Cuban nationals' bank assets as part of the president's policies during the Cold War. Judge Friendly's opinion noted that "[h]ard currency is a weapon in the struggle between the free and the communist worlds" and that only a "strange reading of the Constitution" would say it requires giving a trade license that is ultimately "for the benefit of a government seeking to create a base for activities inimical to our national welfare."[126] National security deference thus came to inform the courts' outlook on the constitutionality of sanctions and the availability of redress for property harms.[127]

The powers of the president under IEEPA received further judicial consideration in the wake of *Dames & Moore*.[128] These cases, however, quite anticlimactically avoided giving a firm rule on takings either way. *Dames & Moore* itself purported to make no holding on the just compensation issue before it.[129] Subsequent courts in related takings claims arising out of the hostage release agreement

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121. *Id.* at 486.

122. *Id.*

123. *See* Sardino v. Fed. Rsrv. Bank of N.Y., 361 F.2d 106, 113 (2d Cir. 1966) (saying *Propper* implies that "if Congress should ultimately choose to apply the blocked assets of Cuban nationals to that purpose, the Fifth Amendment would not stand in its way").

124. *See id.* The *Sardino* court added that *Curtiss-Wright* foreclosed the constitutional objection that TWEA was an unconstitutional delegation of power to the president, given his primacy in foreign affairs. *See Sardino* at 110.

125. *Sardino* at 108–09, 115–16.

126. *Id.* at 112.

127. *See generally* Tole S.A. v. Miller, 530 F. Supp. 999 (S.D.N.Y. 1981), *aff'd*, 697 F.2d 298 (2d Cir. 1982). *Tole S.A.* will be discussed in Part IV(A)(3)(a).

128. *See* discussion *supra* Part II(A).

129. *Id.*

followed suit, dismissing them on justiciability grounds related to ripeness; claims were funneled instead to the Iran-U.S. Claims Tribunal.[130] This state of affairs left open whether the Fifth Amendment would require just compensation under the circumstances arising out of the Iranian hostage crisis.

Later courts that directly addressed the just compensation issue in the context of emergency economic powers have repeatedly held that freeze orders do not constitute takings. For instance, in *Tran Qui Than v. Regan*, the Ninth Circuit found that a shareholder of a South Vietnamese bank had no right to just compensation when the Treasury Department denied his application for a license to unblock funds that it had blocked under TWEA.[131] The court cited *Propper* to support the notion that sanctions necessarily entail "some inconvenience to our citizens and others who, as here, are not involved in any actions adverse to the nation's interest" but that this "inconvenience" is insufficient to show that a taking had occurred.[132] Some years later, in *Paradissiotis v. United States*, a Cypriot citizen with business ties to the Libyan government argued that a taking occurred when the Office of Foreign Assets Control (OFAC) prohibited him from exercising certain stock options in a U.S. company under the Libyan Sanctions Regulations.[133] Paradissiotis contended that he should have received a license from the Treasury Department to exercise his stock options before they expired, and that his proceeds for the transaction should have been kept in an interest-bearing account.[134] Denying his claim, the court held that the sanctions regulations "substantially advance the national security of the United States and that the frustration of contract rights" did not require just compensation.[135] Paradissiotis argued that the sanctions did not serve their purpose of creating a bargaining chip against Libya. The court rejected this position, however, on the grounds that one of the sanctions' purposes was to deprive "actual or potential" enemies of the ability to harm the United States and

130. *See, e.g.*, Charles T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 814 (1st Cir. 1981) (citing ripeness concerns on the just compensation claim); Am. Int'l Grp., Inc. v. Islamic Republic of Iran, 657 F.2d 430, 447 (D.C. Cir. 1981) ("We have no reason to believe that the arbitration panel will not render meaningful relief.").

131. 658 F.2d 1296, 1298–99, 1304 (9th Cir. 1981).

132. *Id.* at 1304 (quoting Propper v. Clark, 337 U.S. 472, 481–82 (1949)).

133. 304 F.3d 1271, 1273 (Fed. Cir. 2002).

134. *Id.* at 1272.

135. *Id.* at 1274 (first citing Chang v. United States, 859 F.2d 893, 896–97 (Fed. Cir. 1998); and then citing 767 Third Ave. Assocs. v. United States, 48 F.3d 1575, 1581 (Fed. Cir. 1995)).

to deny hostile governments access to funds with which to promote harmful activities.[136] More recent courts have denied just compensation claims on similar grounds as well.[137]

In sum, courts have generally held that the president's asset-freeze powers under IEEPA, TWEA, and other sanctions programs are constitutional and violate neither due process principles nor the Just Compensation Clause. This approach is generally rooted in a centuries-old wartime emergency exception to takings protections, whose precise manifestation has evolved over the course of American history. Additionally, the political branches' power to settle or abandon private claims pursuant to agreements with other countries likely requires just compensation, but the issue is not clearly resolved under all circumstances.[138]

IV.
EVALUATING THE TAKINGS CLAIM

This Part discusses the key issues an SDN would likely encounter were he to bring a takings claim while his assets are frozen. Proceeding issue by issue, the plaintiff's claim is theoretically reasonable. However, introducing the broader background principle of national security deference, the claim would fail. This analysis implies the normative critique that the plaintiff *should* succeed in his takings claim under the Supreme Court's regulatory takings jurisprudence, but in practice would not.

A. The Constitution Abroad

The first group of issues an SDN would face in receiving compensation for his designation relate to the "Constitution abroad:" to what extent do constitutional protections apply to him, a non-citizen who may or may not reside within the territorial limits of the United States, and who is regulated by international treaties instead of domestic laws? Although these issues present some obstacles to many just compensation claims under sanctions laws, it is not hard to imagine an SDN with the requisite connections to U.S. territory being able to sidestep them.

136. *Paradissiotis*, 304 F.3d at 1275 (first quoting *Propper*, 337 U.S. at 481; and then quoting Miranda v. Sec'y of the Treasury, 766 F.2d 1, 5 (1st Cir. 1985)).

137. *See, e.g.*, Chichakli v. United States, 141 Fed. Cl. 633, 641 (2019) (comparing applicable facts and law to *Paradissiotis*).

138. *See* discussion *supra* Part II(A).

1. Citizenship

The first issue for the SDN plaintiff is his lack of U.S. citizenship, which arguably means that he is not entitled to constitutional rights. IEEPA only applies to non-U.S. nationals,[139] which might imperil the claimant.[140] Further, some cases that recognize takings claims in the national security context have largely been for U.S. citizens.[141]

That said, lack of citizenship does not in itself bar recovery: the Constitution has a limited application to resident aliens[142] and U.S. citizens abroad.[143] Constitutional protections enjoyed by resident aliens include—but are not limited to—Fifth Amendment procedural due process rights,[144] Fifth and Sixth Amendment trial rights,[145] and Fourteenth Amendment principles of equal protection and due process.[146]

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139. *See* 50 U.S.C. § 1702(a)(1)(B) (granting the president powers over "any property *in which any foreign country or a national thereof has any interest* by any person, or with respect to any property, subject to the jurisdiction of the United States" (emphasis added)).

140. HENKIN, *supra* note 38, at 288–89 (explaining that constitutional rights protections do not apply to foreign governments and "presumably" not to foreign diplomats acting in their official capacity and so there would be "no constitutional obstacles, say, to 'tapping' wires of foreign embassies").

141. *See, e.g.*, Seery v. United States, 130 Ct. Cl. 481, 483, 489 (1955) (allowing a naturalized U.S. citizen to succeed in a taking claim for seizure of her land in Austria by the U.S. Army); *see also* United States v. Belmont, 301 U.S. 324, 332 (1937) ("[O]ur Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens.").

142. Alina Veneziano, *Applying the U.S. Constitution Abroad, From the Era of the U.S. Founding to the Modern Age*, 46 FORDHAM URB. L.J. 602, 606 n.17 (2019) (listing various constitutional protections afforded to resident aliens); *see also* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2086–87 (2020) (reaffirming constitutional rights of resident aliens in certain circumstances).

143. Reid v. Covert, 354 U.S. 1, 8–9 (1957) (stating that, when applying the Constitution to U.S. citizens overseas, "we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.").

144. *See, e.g.*, Kwong Hai Chew v. Colding, 344 U.S. 590, 601–02 (1953).

145. *See* Wong Wing v. United States, 163 U.S. 228, 237 (1896) ("[W]hen congress sees fit to further promote [alien exclusion] policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.").

146. Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886); *see also* Sardino v. Fed. Rsrv. Bank of N.Y., 361 F.2d 106, 111 (2d Cir. 1966) ("[T]he Court has declared unequivocally, with respect to non-resident aliens owning property within the

It is not a stretch to say that lack of citizenship does not itself bar Fifth Amendment takings protections for resident aliens designated as SDNs, assuming the proper contacts are established.[147] This becomes apparent by imagining—instead of a foreign national challenging his SDN designation approved through Washington, D.C.—that he were bringing a takings claim against a local government regarding a zoning dispute. Indeed, it would be hard to imagine why the local authorities would be subject to equal protection and due process constraints but would not be obligated to make the same eminent domain payment to a non-citizen that a citizen would surely get.

Alternatively, as discussed *supra* in Part III, *Russian Volunteer Fleet* recognized a limited space for "alien friends" to engage the protection of the Just Compensation Clause. However, the applicability of the "alien friend" status to an SDN-designated person is not likely to succeed: though they are not necessarily from countries with which the United States is at war, their home countries are certainly not U.S. allies (e.g., Iran). In any event, the point for now remains that lack of U.S. citizenship alone does not necessarily bar recovery.

2. Extraterritoriality

The next issue in the context of the Constitution abroad is extraterritoriality. Without question, an SDN plaintiff would need a territorial hook to the United States to trigger Just Compensation Clause protections. The most obvious way to find such a hook is to

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United States, that they 'as well as citizens are entitled to the protection of the Fifth Amendment.'" (quoting United States v. Pink, 315 U.S. 203, 228 (1942))).

147. *See* Fulmen Co. v. Off. of Foreign Assets Control, No. CV 18-2949 (RJL), 2020 WL 1536341, at *21 (D.D.C. Mar. 31, 2020) (discussing how a takings claim might have been demonstrable for the plaintiff had he established "substantial connections" with the United States: "[a]lthough the Supreme Court has recognized that 'aliens [that] have come within the territory of the United States and established 'substantial connections' with this country' may be entitled to some constitutional protections, [plaintiff] has not established any connection to the United States, let alone a substantial one." (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990))).

establish U.S. citizenship.[148] Of course, this route is by definition unavailable to SDNs.[149]

A non-U.S. citizen could establish a territorial hook by showing "substantial connections" to the United States.[150] Relatively recent precedent indicates that this hook requires more than just showing that the United States has asserted authority over him by freezing his assets. A prior contract with the U.S. Army, for instance, is sufficient to establish substantial connections where the U.S. government excluded the plaintiff company from property in which it had an interest.[151] On the other hand, in *Atamirzayeva v. United States*, the court held that an Uzbek cafeteria owner whose cafeteria was destroyed by the Uzbek government following U.S. orders could not show a substantial connection to the United States merely because the U.S. embassy was next door and the United States had authorized the destruction.[152] Tellingly, the *Atamirzayeva* Court distinguished *United States v. Turney*, in which a Philippine corporation could recover the value of radar equipment taken by the United States government after the Second World War.[153] There, the plaintiff established substantial connections to the United States because the corporation in question had been formed by U.S. citizens, these U.S. citizens had assigned relevant interests to the corporation, and a U.S. citizen had been appointed as liquidating trustee of the corporation.[154]

Putting this together, one way of framing the underlying principle could be that the connection to the United States must occur prior to and/or outside of the alleged taking by the U.S. government. An SDN could satisfy such a territorial hook if he has money or assets stored with a U.S. bank and if the account is located in United States. This fact pattern would be at least somewhat analo-

148. *See, e.g.*, Hughes, *supra* note 27, at 558 ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." (quoting *Reid*, 354 U.S. at 5–6)).

149. For a high-level discussion of basic questions relating to SDN designation, see *Frequently Asked Questions*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1631 [https://perma.cc/65D7-UTDN] (last visited Aug. 6, 2022).

150. *See* Atamirzayeva v. United States, 524 F.3d 1320, 1325 (Fed. Cir. 2008) (quoting *Verdugo-Urquidez*, 494 U.S. at 271); Kuwait Pearls Catering Co., WLL v. United States, 145 Fed. Cl. 357, 365–66 (2019).

151. *See Kuwait Pearls Catering Co., WLL*, 145 Fed. Cl. at 366–67.

152. *Atamirzayeva*, 524 F.3d at 1327–28.

153. *Id.* at 1326–28 (discussing *Turney v. United States*, 126 Ct. Cl. 202 (1953)).

154. *Atamirzayeva*, 524 F.3d at 1327–28.

gous to *Turney*, in that a foreign person would be directly involved with a U.S. business (certainly as long as the bank is run by U.S. persons). Further, the Court of Claims has recognized (albeit in dicta) that the location of frozen assets in the United States might create a substantial connection for territoriality purposes.[155] In any event, it would be a counterintuitive result if an SDN's ownership of U.S. dollars in a U.S. banking institution in New York run largely by U.S. citizens (e.g., J.P. Morgan) would be considered extraterritorial for constitutional purposes.

3. War / Peace

The next issue is what to make of the fact that asset freezes of SDN property often occur against nationals of countries with whom the United States is not at war, but with which the diplomatic relationship is not exactly one of peace either. Does the deference that courts typically grant the political branches in times of war or emergency extend to SDN designation more generally? Or should courts consider an uneasy diplomatic relationship a state of peace for purposes of the Just Compensation Clause? At stake is whether an SDN sufficiently resembles a military enemy undeserving of just compensation.[156]

Although Cold War-era precedent takes the first approach by pointing to national security deference norms, this approach is vulnerable to two conceptual critiques: (1) that it stretches the traditional war-time emergency beyond its appropriate limit; and (2) that in an effort to recognize real-world, pragmatic diplomatic concerns, the doctrinal justification for national security deference ends up being logically specious.

a. The Weight of Precedent

The strongest argument that SDN designation "parallels" war is the weight of existing precedent from the Cold War era on the subject. For instance, in *Aris Gloves, Inc. v. United States*, a California corporation sued the U.S. government for just compensation regarding a glove manufacturing plant in East Germany.[157] In 1941,

155. Fulmen Co. v. Off. of Foreign Assets Control, No. CV 18-2949 (RJL), 2020 WL 1536341, at *22 (D.D.C. Mar. 31, 2020) (finding no substantial connection to the United States where plaintiff "does not allege that it has assets in the United States that were frozen by OFAC, or that it sought and was unable to acquire property in the United States"). The implication is that, had the plaintiff made these allegations, he might have pled the requisite connection.

156. *See* discussion *supra* Part III(A).

157. 190 Ct. Cl. 367, 367 (1970).

the German government had seized it as U.S.-enemy property.[158] After the war ended, the U.S. military took authority over the German property during its post-war occupation of Germany. Thereafter, it ceded control over East Germany to the Soviet Union, which immediately dismantled the plant.[159] The court said that the wartime condition precluded recovery, as the property had been located on enemy territory during a period of war.[160] The implication is that, even though WWII had concluded by the time a takings-like action had arguably occurred, uncertainty as the Allies reconstructed the country warranted judicial deference on the takings issue.[161]

Other courts have mirrored *Aris Glove*'s pragmatic approach to diplomatic hostility in the context of sanctions.[162] For instance, in *Tole S.A. v. Miller*, shareholders of Compania Petrolera Trans-Cuba (Trans Cuba), a Cuban corporation, brought a takings claim against the United States after the United States froze the company's $1.8 million in assets held in a New York bank.[163] The United States had done so in response to the Castro regime's nationalization of the company, which had given the Cuban government ownership of the assets.[164] The Southern District of New York denied the plaintiffs' claim that this freezing—which prevented them from withdrawing their interests as shareholders in the company—constituted a taking.[165] The court supported its decision by invoking national security deference norms, pointing in particular to diplomatic tension between the two countries: "[a]lthough this court is not qualified to judge the quality of the relationship between the United States and Cuba, it can say without doubt that it has not returned to normal."[166] The position seems to be that al-

158. *Id.* The company also sued for loss of a property in Czechoslovakia. *Id.* However, that is not immediately relevant to the just compensation issue at play.

159. *Id.* at 367–68.

160. *Id.* at 375–82.

161. *See id.* at 377 (noting that the existence of hostilities in post-war settings triggers a wartime exception to the Just Compensation Clause).

162. *See, e.g.*, IPT Co. v. Dep't of Treasury, No. 92 CIV. 5542 (JFK), 1994 WL 613371, at *5 (S.D.N.Y. Nov. 4, 1994) ("Through the Trading with the Enemy Act . . . the nation sought to deprive enemies, actual or potential of the opportunity to secure advantages to themselves or to perpetrate wrongs against the United States or its citizens through the use of assets that happened to be in this country." (quoting Propper v. Clark, 337 U.S. 472, 481–82 (1949))).

163. 530 F. Supp. 999, 1000–02 (S.D.N.Y. 1981), *aff'd*, 697 F.2d 298 (2d Cir. 1982).

164. *Id.* at 1000–01.

165. *Id.* at 1004–05.

166. *Id.* at 1005.

though the United States and Cuba are not directly at war, a takings analysis should account for non-war diplomatic hostilities and defer on that basis.

The Second Circuit more directly addressed how the issue of U.S.-Cuba relations affected its analysis of takings issues in *Sardino v. Federal Reserve Bank of New York*.[167] Noting that "[t]he world today is not the classical international law world of black squares and white squares, where everyone is either an enemy or a friend," the Second Circuit observed that the United States is only "in a technical sense" at peace with Cuba.[168] The court opined that the framers of the Constitution "could not have meant to tie one of the nation's hands behind its back by requiring it to treat as a friend a country which has launched a campaign of subversion throughout the Western Hemisphere."[169] Although this language is the Second Circuit's and not that of the Supreme Court, it may still be telling of the Cold War-era judiciary's overall attitude that modern diplomacy requires a gray area between war and peace in which just compensation is not always applicable.

b. Issues of Sanctions Cases with Earlier Precedent

Although these Cold War-era cases manage the pragmatic consequences of complex diplomatic relationships,[170] they are not necessarily the best or most logical interpretation of the Just Compensation Clause. There are two normative issues with the view that SDN designation creates a space between war and peace for the president to act without being constrained by the Just Compensation Clause.

First, the lower courts' denial of just compensation in cases of diplomatic hostility may overextend the underlying principle of pertinent wartime takings precedent. *Aris Gloves*, for instance, had specifically arisen in the context of a post-war occupation of a recently defeated enemy;[171] nothing about it, as such, means its prin-

167. 361 F.2d 106, 111–12 (2d Cir. 1966).

168. *Id.* at 111.

169. *Id.* at 112.

170. *Cf.* Sitaraman & Wuerth, *supra* note 57, at 1917 (noting that beginning in the 1940s, "the [Supreme Court's] divergent treatment of foreign affairs [compared to domestic cases] was increasingly based on functional arguments about the exceptional nature of foreign relations, sometimes mixed with cursory analysis of constitutional text or history").

171. *See Aris Gloves, Inc.*, 190 Ct. Cl. at 375 ("The prime situation which did exist at the time of the alleged taking was that the United States was engaged in a war. Therefore, this case must be governed by those taking cases which deal with *wartime* appropriations of individually owned property." (emphasis added)).

ciples should extend to all hostile diplomatic relationships. Perhaps it is wrong, therefore, to reduce *all* hostile diplomatic relations to a state of war, as far as Bill of Rights protections are concerned. The United States is not an occupant of or belligerent against many countries with individuals designated as SDNs, yet one following the *Sardino* court's logic would consider these SDNs belligerent enough to support such designation.[172] Whatever the merits of that approach pragmatically, the lack of an imminent, present, or recent war with many of these countries attenuates the connection between SDN designation and the urgent needs of the executive branch confronting an emergency.

Indeed, such a deferential stance might not only stretch *Aris Gloves* too far, but also seems to counter the longer-established precedent of *Mitchell*.[173] There, the Court at least nominally provided circumscriptions to the government's power of taking during times of war:

> Private property may be taken by a military commander to prevent it from falling into the hands of the enemy, or for the purpose of converting it to the use of the public; but the danger must be *immediate and impending, or the necessity urgent for the public service*, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for.[174]

The *Mitchell* Court's tolerance of the takings power during wartime applies only to emergency situations and is not faithfully read as a broad grant of power to the president whenever so doing would be diplomatically advantageous. It would seem, then, that the emergency and/or wartime exception should be read to be fairly narrow. As far as the right to just compensation is concerned, then, it is perhaps conceptually hard to square approaches like the *Sardino* court's—which seemingly elevates diplomatic tensions to the same level as full-on wartime emergencies—with *Mitchell*'s more narrow circumscription.

Second, the argument the *Sardino* court raised—that modern diplomacy departs from "classical" international law understandings[175]—is constitutionally unfounded. Framing the argument step-by-step reveals this. Ultimately, the court was attempting to deter-

172. *See Sardino*, 361 F.2d at 112 (stating that the United States is not required "to treat as a friend a country which has launched a campaign of subversion throughout the Western Hemisphere").

173. Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851).

174. *Id.* at 128 (emphasis added).

175. *Sardino*, 361 F.2d at 111.

mine whether sanctioning a foreign national constitutionally required compensation. To answer this, it looked at the use of asset freezes on Cuban nationals in the context of a state of "quasi-war" with Cuba, highlighting Cuba's engagement in subversive activities in Latin America against the United States.[176] It then used that state of quasi-war as a justification for the sanction against a particular individual. This approach is undoubtedly pragmatic, but it brought a new category of foreign relations to bear on constitutional rights that is not actually in the Constitution: that there are some countries with whom the United States is hostile enough to warrant asset freezes and other economic actions, but is not hostile enough to use force per se. It is one thing to say property seized or frozen as incidental to waging war is acceptable because the Constitution explicitly provides for circumstances under which war may be waged (which necessarily leads to a truncation of at least *some* rights);[177] but where the freezing of property *itself* is understood as an act of hostility (or something close to it), it is hard to say that that act must be constitutional because it is functionally an act of "quasi-war." By this logic, the government could circumvent the constitutional rights of resident aliens by declaring the United States to be in a state of quasi-war with the country of which these aliens are nationals. This outcome would clearly run afoul of Supreme Court precedent,[178] but seems to flow from the judiciary's logic in the foreign affairs takings context.

In light of the above, perhaps the best understanding of deferential cases like *Sardino* is that they are an attempt to *manage* our constitutional system in a world that does not fit neatly into the war-peace boxes of international law.[179] This Note does not argue whether such a pragmatic approach on the part of the judiciary is the best approach from a policy perspective. Rather, the point is that in the realm of constitutional formalism, the positions of courts like the *Sardino* court are not as strong as they appear at first glance. Theoretically, there should be no waiver of takings protections where an individual has a valid claim to them simply because diplomatic tensions arise between nations.

176. *Id.* at 112 n.5.

177. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 11 (conferring on Congress the power to declare war).

178. *See* sources cited *supra* note 147.

179. *Sardino*, 361 F.2d at 111.

B. Takings Principles

The next set of issues arises out of domestic takings jurisprudence, meaning an SDN litigant would encounter them were he to clear the above hurdles. The key issues are: (1) whether the fact that an IEEPA asset freeze is temporary should matter; (2) how the precise theory of taking impacts the likelihood of success; and (3) whether underlying constitutional principles of just compensation, in their broadest form possible, are probative of how a court should rule.

1. Temporality of the Freezing

One common justification among lower courts in refusing to find a taking upon an asset freeze under sanctions law is its nominally temporary duration.[180] It is hard to say, the argument goes, that the frozen property in question has ceased to vest in the SDN—and instead vests in the United States—if the frozen assets involved will eventually be released back to the private individual after a certain timeframe.[181] This justification is common regardless of the specific sanctions regime at issue in the litigation (e.g., Cuban Assets Control Regulations[182] or others[183]).

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180. Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 78 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003) ("[B]lockings under Executive Orders are temporary deprivations that do not vest the assets in the Government. Therefore, blockings do not, as a matter of law, constitute takings within the meaning of the Fifth Amendment. Accordingly, courts have consistently rejected these claims in the IEEPA and TWEA context." (first citing Propper v. Clark, 337 U.S. 472 (1949); then citing Tran Qui Than v. Regan, 658 F.2d 1296, 1301 (9th Cir. 1981); then citing Global Relief Found., Inc. v. O'Neill, 207 F. Supp. 2d 779, 801–02 (N.D. Ill. 2002); and then citing IPT Co. v. Dep't of Treasury, No. 92 CIV. 5542 (JFK), 1994 WL 613371, at *5 (S.D.N.Y. Nov. 4, 1994))); *see also* Islamic Am. Relief Agency v. Unidentified FBI Agents, 394 F. Supp. 2d 34, 51 (D.D.C. 2005), *aff'd in part and remanded sub nom.* Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728 (D.C. Cir. 2007) (citing *Holy Land Found.*, 219 F. Supp. 2d at 78); Kadi v. Geithner, 42 F. Supp. 3d 1, 30 (D.D.C. 2012) (rejecting takings claim on temporality grounds in dicta). *But see* Nielsen v. Sec'y of Treasury, 424 F.2d 833, 843–44 (D.C. Cir. 1970) (saying that a temporary blocking can amount to a taking under statute if it proceeds indefinitely over a long enough time horizon).

181. *See, e.g.*, *Tran Qui Than*, 658 F.2d at 1304 (stating that the blocking of assets under TWEA "involves a deprivation of the enjoyment of a property interest[, but] [t]hat deprivation is temporary . . . and is not equivalent to vesting").

182. Tole S.A. v. Miller, 530 F. Supp. 999, 1005 (S.D.N.Y. 1981), *aff'd*, 697 F.2d 298 (2d Cir. 1982) (rejecting plaintiffs' argument that, during the litigation, Cuban Assets Control Regulations had proceeded indefinitely and thus amounted to a taking).

183. *See* sources cited *supra* note 180.

Yet this approach to temporality is not necessarily dispositive under current Supreme Court precedent. Following the above decisions, the Court handed down *Arkansas Game & Fish Commission v. United States*, which directly addressed the temporality issue in the takings context.[184] There, the U.S. Army Corps of Engineers had authorized flooding onto land owned by the Arkansas Game and Fish Commission. The repeated flooding destroyed significant amounts of the Commission's timber.[185] In evaluating the Commission's taking claim against the United States, the Supreme Court reviewed whether the fact that the flooding authorized was temporary warranted dismissal of the claim. The Court held that a temporary period of harming property could still count as a taking under certain circumstances.[186] Writing for a unanimous court (excluding Justice Kagan, who had recused herself), Justice Ginsburg pointed to WWII-era cases in which temporality was not found to bar takings liability: "[a] temporary takings claim could be maintained . . . when government action occurring outside the property gave rise to 'a direct and immediate interference with the enjoyment and use of the land.'"[187] Justice Ginsburg also compared the case to *Pewee Coal Co.*, where the Court made the United States bear the operating costs associated with running the coal company after the United States had temporarily seized control, in connection with labor unrest.[188] The resulting outcome was thus that a temporary deprivation of property was not exempted from just compensation under the Fifth Amendment simply because it was temporary.[189]

Arkansas Game & Fish Commission thus amounts to an about-face on the lower courts' stances on temporality. If an SDN can show that he incurred harms related to an asset freeze, the new rule seems to be that courts cannot dismiss his claim on the basis that the sanctions are temporary. The fact that the *Arkansas Game & Fish Commission* Court cites precedent from WWII-related cases, moreover, weakens the counterargument that the national security dimension of sanctions cases alters the analysis.

Of course, the SDN plaintiff may still struggle to show that he has borne a substantial harm to his property for the duration of the

184. 568 U.S. 23, 26–27 (2012).

185. *Id.* at 26.

186. *Id.* at 32–34.

187. *Id.* at 33 (quoting United States v. Causby, 328 U.S. 256, 266 (1946)).

188. *Id.* (citing United States v. Pewee Coal Co., 341 U.S. 114 (1951)); *see also Pewee Coal Co.*, 341 U.S. at 115, 117 ("[T]he Fifth Amendment requires the United States to bear operating losses incurred during the period the Government operates private property in the name of the public without the owner's consent.").

189. *Ark. Game & Fish Comm'n*, 568 U.S. at 34, 38–39.

freeze order. After all, although the plaintiff in *Arkansas Game & Fish Commission* was able to show that the temporary flooding may have effected a taking, the case was remanded on the issue of damages (among other things).[190] In that respect, the U.S. Army Corps of Engineers' action is significantly different from a Treasury department order to freeze a bank account for several years. However, to the extent that the SDN incurs sanctions-related costs—e.g., loss of reasonable interest on any investments made with the funds in question, banking fees, etc.—*Arkansas Game & Fish Commission* removes the government's defense of temporality.

2. Regulatory Takings Theories

The next set of issues deals with the precise taking theory an SDN plaintiff might make out. There are generally four ways of proving that a taking has occurred: (1) the government has expressly seized title to a piece of property through its exercise of eminent domain powers;[191] (2) the government has physically intruded upon private property and must pay damages for the trespass;[192] (3) a regulation strips the plaintiff of 100% of the economic value of their property;[193] and/or (4) a regulation "goes too far," and, on the balancing of pertinent interests, becomes a de facto taking.[194]

Since SDN designation does not explicitly vest title to frozen assets in the government, Theory 1 fails. Theory 2 is also unavailable at the outset since it applies specifically to the physical intrusion of tangible, real property; it is impossible to imagine the government "touching" a piece of property like a bank account.[195] Under

190. *Id.* at 40. Although the Supreme Court discussed the periodic flooding of plaintiff's property over a seven-year period, *see id.* at 26, it remanded on the issue of damages.

191. Jeffrey L. Braun & James G. Greilsheimer, *The Supreme Court Further Expands the Definition of a Physical "Taking" of Property That Violates Fifth Amendment Protections*, KRAMER LEVIN: PERSPECTIVES (July 30, 2021), https://www.kramerlevin.com/en/perspectives-search/the-supreme-court-further-expands-the-definition-of-a-physical-taking-of-property-that-violates-fifth-amendment-protections.html [https://perma.cc/G4DT-M5DU] ("The most obvious example of a taking is when the government—or a private party authorized by law to do so (such as a utility)—exercises the power of eminent domain to acquire actual ownership of private property, or at least a permanent interest in property.").

192. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982). Note that the holding in *Loretto* is limited to *permanent* physical occupation of property by the government.

193. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

194. *See* sources cited *supra* notes 40–41 (establishing foundation of regulatory takings jurisprudence generally).

195. *See Loretto*, 458 U.S. at 441.

Theories 3 and/or 4, however, there is a fair argument that a taking may have occurred, though a court is likely to avoid the issue out of pragmatic concerns with judicial meddling in foreign affairs.

a. *Lucas*, Temporality, and SDN Designation

The critical issue for Theory 3 (aka, a *Lucas* theory) is whether there are circumstances under which a temporary freeze order can be understood to deprive an SDN of 100% of the economic value of his property.[196] A freeze order on a bank account prevents a person from spending, giving, or investing his money, possibly indefinitely. At first glance, this might reasonably be understood to encompass all "economically beneficial uses" of the property that were part and parcel of the SDN's original use interests in the assets.[197]

The problem with this argument, however, is the temporality of the taking. It is hard to allege that one has lost 100% of the economic benefits of a piece of property where there is a chance the assets will be unfrozen in the future. Temporality may not bar recovery generally for SDNs per the above Part, but it might preclude recovery under *Lucas* specifically. In the domestic context, for instance, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* held that a temporary moratorium on real property did not count as a taking under a *Lucas* theory.[198] The *Tahoe-Sierra* Court said that *Lucas* had been decided on a "permanent taking theory" rather than on a temporary one.[199] Moreover, it added that "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[200] Fee simple ownership over a bank account should, in theory, be treated no differently.[201]

196. *See Lucas*, 505 U.S. at 1019.

197. *Id.* at 1027 ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."). Though *Lucas* was decided specifically in the context of real estate, not personal property, the Supreme Court later confirmed that the same protections extend to both personal and real property. *See* Horne v. Dep't of Agric., 576 U.S. 351, 358, 361 (2015) ("The different treatment of real and personal property in a regulatory case suggested by *Lucas* did not alter the established rule of treating direct appropriations of real and personal property alike." (citation omitted)).

198. 535 U.S. 302, 330–32, 342–43 (2002).

199. *Id.* at 330 (discussing *Lucas*, 505 U.S. 1003).

200. *Id.* at 332.

201. *See Horne*, 576 U.S. at 358, 360–61 (iterating that personal and real property receive similar protections under the Just Compensation Clause).

While the logic of *Tahoe-Sierra* is reasonable on its face, applying it to the SDN context leaves open how to understand *indefinite* asset freezes under *Lucas*.[202] The moratorium analyzed in *Tahoe-Sierra* had closed by the time the Supreme Court had reviewed the case;[203] this is a different set of circumstances from an indefinite, years-long asset freeze with no sign of release as of when the case is decided. It is not hard to imagine an SDN designation being so indefinite and perennial—in the right diplomatic context—as to become a permanent freeze, practically speaking.[204] Further, while such an indefinite designation may be couched in the language of temporariness, the prospect of *not* subjecting the government to takings liability might create a rule ripe for abuse in indefinite freeze contexts. Where aggressive regulations can be re-branded as "temporary" at the outset, government authorities could theoretically sidestep *Lucas* entirely by saying that frozen assets will someday be released, but never actually do so. Perhaps, then, indefinite asset freezes—under IEEPA or otherwise—are not covered by *Tahoe-Sierra* and are more properly conceptualized as permanent takings for *Lucas* purposes.

On the other hand, even if recovery is unavailable under *Lucas*, government incentives might align properly where plaintiffs can receive compensation for temporary deprivations amounting to de facto takings under a *Penn Central* theory.[205] The next Part takes up this general regulatory taking theory.

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202. *See, e.g.*, Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 77–78 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003) (denying takings claim alleged under TWEA/IEEPA but noting that the plaintiff might eventually "have a credible argument that the long-term blocking order has ripened into a vesting of property in the United States. At this stage, [however, plaintiff's] assets have only been blocked for eight months, and it is premature to determine that the temporary deprivation is equivalent to a vesting."). This discussion is unclear as to whether it includes only a standard regulatory takings analysis, discussed *infra* Part IV(B)(2–3), or whether it also includes the more particularized *Lucas* inquiry about loss of total economic value of the property at issue.

203. 535 U.S. at 306.

204. *See* Nielsen v. Sec'y of Treasury, 424 F.2d 833, 843–44 (D.C. Cir. 1970) (suggesting that a temporary asset block under TWEA can amount to a taking under the applicable statutory scheme if it proceeds indefinitely over a sufficiently long time horizon).

205. *See* First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 318–19, 322 (1987) (ruling that a denial of all use of land even on a temporary basis can count as a taking). Such a temporary inhibition would preclude recovery under *Lucas*, but that is just one route to show a regulatory taking, not the only one.

b. Regulatory Taking

To succeed on a more general regulatory taking theory,[206] the plaintiff must show the balance of three factors weighs in his favor: the "economic impact of the regulation," the extent of interference with "investment-backed expectations," and the "character of the governmental action."[207] In the SDN asset freeze context, this is a place for the court to overtly weigh the SDN's property interest against the national security objectives served by the sanctions. Factors in favor of the plaintiff include, but are not limited to, whether the owner can show that the government has appropriated a common-law property interest (e.g., forcibly creating an easement or appropriating the right to exclude),[208] as well as the investor's "investment-backed expectations" with respect to that piece of property.[209]

SDNs have a fair argument that the scope of the intrusion on private property is large. Not being able to access or direct frozen assets as one sees fit completely undermines the purposes associated with possessing money or securities. The ability to spend, invest, or distribute one's own money is undoubtedly part of the basic rights that one would associate with the possession of money at common law.[210] A frozen bank account or other financial asset, therefore, would render the defendant's property interest useless for the duration of the SDN designation. Even if not considered a deprivation of 100% of all economic benefit of the assets, a freezing order is certainly still a substantial intrusion.

The obvious obstacle to any taking claim is the background norm of national security and foreign affairs deference, which is highly appealing to courts for reasons discussed previously. For one, this deference informs the analysis of individuals' investment-backed expectations: courts have held that private persons assume the risk of property loss resulting from what happens in the realm

206. The *Lucas* theory discussed above is doctrinally considered a subset of broader regulatory taking claims. *See generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014–32 (1992).

207. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

208. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074–76 (2021).

209. *Penn Cent.*, 438 U.S. at 124; Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

210. *See, e.g.*, Restatement (Third) of Torts: Liab. for Econ. Harm § 18 (Am. L. Inst. 2020) (outlining grounds for liability for tortious interference with economic expectations, which illustrates a manner in which economic expectations are protected by common law).

of international politics.[211] Sanctions are perceived as highly visible to private individuals; therefore, property rights in international commerce are seen as inherently variable depending on what happens in the diplomatic arena.[212]

What is more, the government interest in SDN asset freezes is substantial and repeatedly found by lower courts to dominate over the property interests of individual SDNs. For instance, in *IPT Co. v. Department of Treasury*, the Southern District of New York held that President George H. W. Bush's invocation of IEEPA in 1992 against assets held by a state-owned company of the Federal Republic of Yugoslavia did not amount to a taking under the Fifth Amendment.[213] The court reasoned that the president has the "long settled" broad power to make and implement foreign policy:

> The temporary freezing of foreign-owned assets in this country falls within the constitutional limits of the Fifth Amendment and has been used repeatedly as a means of implementing policy. . . . The President has wide latitude to chart and determine foreign policy and the tools at his disposal, including blocking of assets, should be as unencumbered as possible within the limits of the Constitution.[214]

This position summarizes how courts below the Supreme Court often see the takings matter in SDN cases.[215] Though not always couched specifically in terms of balancing the three central *Penn Central* factors,[216] it is clear that national security interests out-

211. Chang v. United States, 859 F.2d 893, 897 (Fed. Cir. 1988) ("When dealing in foreign commerce, the possibility of changing world circumstances and a corresponding response by the United States government can never be completely discounted."); Abrahim-Youri v. United States, 139 F.3d 1462, 1468 (Fed. Cir. 1997) ("[T]hose who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity.").

212. *See* Paradissiotis v. United States, 304 F.3d 1272, 1276 (Fed. Cir. 2002); *see also* Am. Int'l Grp., Inc. v. Islamic Republic of Iran, 657 F.2d 430, 448 (D.C. Cir. 1981) (holding that vacation of revocable license to attach claims against the government of Iran did not constitute a taking because a revocable license is inherently subject to revocation).

213. No. 92 CIV. 5542 (JFK), 1994 WL 613371, at *1, *5 (S.D.N.Y. Nov. 4, 1994).

214. *Id.* at *5 (first citing Baker v. Carr, 369 U.S. 186, 217 (1962); and then citing Propper v. Clark, 337 U.S. 472, 481–82 (1949)).

215. *See* Chichakli v. United States, 141 Fed. Cl. 633, 640–41 (2019); *Paradissiotis*, 304 F.3d at 1274–76.

216. *See Paradissiotis*, 304 F.3d at 1275 ("[V]alid regulatory measures taken to serve substantial national security interests may adversely affect individual contract-based interests and expectations, but those effects have not been recognized as compensable takings for Fifth Amendment purposes."). Although the *Paradissiotis*

weigh private property concerns. This position is arguably supported by the institutional superiority of the political branches to make "factual determinations involving foreign situations" relative to the courts, who might fail to "predict or deal with the reactions of the foreign governments affected by their decisions."[217]

The above approach makes sense if the court must assume that it may not stymie foreign affairs policy, but the underlying logic is conclusory.[218]

Consider the judiciary's analysis of investment-backed expectations, i.e., the expectation of financial returns that a property purchaser has when investing in a particular asset.[219] The government's prospective argument that the private parties lack protection-worthy investment-backed expectations would presumably fail if applied in the domestic context. Pointing to uncertainty in U.S. foreign policy as a justification that property owners internationally "assume the risk" of foreign policy changes is like pointing out that common law property interests are always vulnerable to the uncertainties of local legislation and zoning policy.[220] While there certainly is uncertainty as to U.S. foreign policy, local legislation, zoning, and all other regulation, contending on that basis that common-law property rights categorically do not *deserve* protection might read the Just Compensation Clause out of existence. The logic is also circular: private parties engaging in international commerce form investment-backed expectations in the shadow of court determinations of whether SDNs are entitled to just compensation when their assets are frozen.[221] Therefore, trying to use their expectations to define the scope of takings protections effectively uses a

court's analysis did not specifically address each *Penn Central* factor, its holding arrived at the conclusion that national security interests weigh heavily in a regulatory takings analysis.

217. Trimble, *supra* note 28, at 365.

218. *See supra* Part IV(A)(3).

219. For a discussion of what investment-backed expectations entail as a general matter, see Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3, 4 (1987) ("Investment-backed expectations arise in property markets, where market participants invest with the expectation that they will obtain capital gains from the development of their property.").

220. *Cf.* Adler, *supra* note 70, at 1561 ("Domestic as well as foreign investors may occasionally expect the government to use property, as when one buys a house on a tract of land being considered for a highway. *Yet the expectation that the government may bulldoze one's house . . . does not make compensation less appropriate.*" (emphasis added)).

221. *Cf.* David Kolansky, *Unintended Consequences for Reversing Rapprochement: Is the US Government Liable for a Loss of US Property in Cuba?*, 53 VAND. J. TRANSNAT'L L.

theory of reasonable investment-backed expectations to determine what investment-backed expectations are reasonable.[222]

Courts' analysis of the government's national security interest suffers similar defects. For one, courts tend to argue that cognizing a taking in this context would frustrate the entire purpose of sanctions: "[e]conomic sanctions would hardly be sanctions if the foreign targets of the sanctions could simply stand in line to be compensated for the losses those sanctions caused them."[223] This might be true, but the argument puts the cart before the horse. If the court's role is to analyze whether the sanctions program, as written by Congress, squares with constitutional rights, it does not matter whether the sanctions' congressional purpose would be frustrated.[224] Indeed, where the political branches attempt to use a foreign relations and/or national security rationale to avoid just compensation for U.S. citizens, courts have generally prescribed limits.[225] Because this Note has assumed the existence of a hypothetical SDN that can feasibly claim a similar entitlement to constitutional protection, the fact that he is a non-citizen should not be relevant.[226] One could still respond that the functional impossibility of giving every SDN compensation may just not be worth creating such an obligation; however, if the judiciary's role is to determine constitutional limits on government power, it cannot use unfortunate headaches resulting from those limits to read them out of existence.[227]

329, 358–59 (2020) (discussing the "regulatory expectations" of U.S. companies on whom Cuban embargoes were reinstated under the Trump Administration).

222. For a discussion of this circularity issue for the investment-backed expectations analysis in just compensation claims generally, see Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 227–31 (1995) (reviewing various commentators' diagnoses of, and solutions to, the circularity issue for the investment-backed expectation analysis in taking law). Mandelker also notes that Supreme Court decisions "hardly have been coherent" in their analysis of investment-backed expectations. *Id.* at 225.

223. *Paradissiotis*, 304 F.3d at 1275; *see also* Chichakli v. United States, 141 Fed. Cl. 633, 641 (2019) (quoting *Paradissiotis*, 304 F.3d at 1275).

224. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803) (describing the act of striking down unconstitutional laws as the "very essence of judicial duty").

225. E-Sys., Inc. v. United States, 2 Cl. Ct. 271, 275 (1983) ("There is no more persuasive reason why [the Fifth Amendment's policy rationales] should not apply in achieving a national purpose or benefit in the field of foreign policy than in the accomplishment of any other lawful national purpose or benefit.").

226. *See* discussion *supra* Part IV(A)(1).

227. *See* sources cited *supra* note 14.

Of course, one could counter that the court's regulatory takings jurisprudence simply calls upon it to make a value judgment between national security priorities and the property owners' interests. But this amounts to an ipse dixit claim about the state of constitutional affairs: namely, that national security interests must stand in higher priority to private property in foreign affairs because they must.[228] While there is nothing per se wrong with this approach—one could simply believe courts occasionally have to make tough value judgments—there is nothing demonstrably superior about it either. The end result is a pragmatic declaration (again) about the rights of SDNs, derived not from a set hierarchy of competing constitutional values[229] but from a desire to avoid an alternative that would undermine U.S. diplomatic interests.

3. Underlying Constitutional Principles

Regardless of a court's precise analysis of the just compensation claim, it would inevitably confront the question of what broader constitutional interest the Just Compensation Clause is designed to protect. Case law and commentators alike have argued that the clause is designed to prevent political majorities from forcing minorities to bear a disproportionate cost of public policy.[230] More specifically, the clause addresses the prospect of wealth transfers from group A to group B for no greater reason than the raw political power of B over A.[231]

On the one hand, SDNs appear to be far from innocent bystanders forced to bear the incidental costs of diplomacy. They are highly unsympathetic from the perspective of U.S. courts, both through affiliation with a foreign adversary and (possibly) a position of privilege, influence, or prominence within a regime the United States opposes. Further, it is hard to argue that the SDN designation process is the result of the kind of interest-group conflict that gives rise to naked wealth transfers from one social faction

228. *See* sources cited *supra* note 162.

229. *See* Colucci, *supra* note 21, at 568 ("The current scope of presidential authority in foreign affairs [is] amorphous. . . . [The Constitution] does not enumerate any comprehensive foreign affairs power scheme. In many ways, current concerns over the separation of powers in foreign affairs embody the same struggles experienced in the earliest years of this country.").

230. *See, e.g.*, Nat'l Bd. of Young Men's Christian Ass'ns v. United States, 395 U.S. 85, 89 (1969); Sunstein, *supra* note 44, at 1689, 1692.

231. Sunstein, *supra* note 44, at 1689, 1692; *see also* Kelo v. City of New London, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring) ("[T]ransfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.").

to another, suggesting that the Just Compensation Clause's historically recognized, overarching purpose is not triggered by SDN designation.[232] Counterfactually, were SDNs considered a cohort whose property interests are particularly vulnerable to jealousy by other groups with power over the legislative process, perhaps there would be a stronger case for invoking takings protection in their favor.

The counter to this position, however, is that concerns about wealth transfers are merely an underlying *purpose* of the Just Compensation Clause, but do not determine how the clause ought to be applied in every circumstance. Namely, the Bill of Rights is understood to create individual—not collective—rights. The stronger read of the Just Compensation Clause, then, is that it applies to all individuals with a plausible entitlement to constitutional rights generally. This Note has so far argued that SDNs' entitlement can be plausible under the right circumstances; as such, we would expect property protection under the Just Compensation Clause to be as warranted as to them as to other resident aliens or U.S. citizens. On this account, it would make no more sense for the Executive to be able to designate their property as frozen (without any judicial findings that they have violated law) than for the president to unilaterally declare anyone else's property a lower-order interest.

The above argument does not purport to say that SDNs are a misunderstood class of discrete minorities, nor is it meant to serve as a normative endorsement of an expansive takings jurisprudence generally. Rather, the argument is that *as long as* the Supreme Court has signaled a libertarian position on property (i.e., to afford it broad protection),[233] there should be no denial to SDNs on opaque national security grounds of the very protections that others enjoy.

V.
CONCLUSION

This Note has argued that certain SDNs' just compensation claims make theoretical sense given current regulatory takings jurisprudence. The fact that the judiciary consistently denies these claims on conclusory national security grounds suggests that judges

232. *See* Sunstein, *supra* note 44, at 1689, 1692. For an example of historical judicial attitudes toward the validity of wealth transfers, see Taylor v. Porter, 4 Hill 140, 147 (N.Y. Sup. Ct. 1843) ("If the legislature can take the property of A. and transfer it to B., they can take A. himself, and either shut him up in prison, or put him to death.").

233. *Cf.* Meezan, *supra* note 15, at 592, 630–631.

are motivated by a pragmatic, realist attitude that restricting sanctions programs is overall undesirable.

There are several implications of this analysis. The first is a response to commentary on *Dames & Moore*, which has urged a stronger recognition of the just compensation requirement in the context of international claims settlement.[234] The SDN hypothetical highlights that courts look to national security interests to avoid confronting the constitutional status of sanctions law. Perhaps, therefore, analysts should expect similarly deferential outcomes in claims settlement contexts where national security interests are implicated. The next time claims are settled against a foreign adversary, courts will likely find that the private individuals in question have no reasonable investment-backed expectations in recovering their claims against unpredictable and hostile foreign governments; that national security interests weigh too heavily; or that in the absence of whatever political concession the United States wins by settlement of claims, those claims never would have been recovered anyway. In other words, understanding the policy-based motivation behind courts' approach to SDN designation helps us understand the importance of such policy considerations even in other IEEPA/TWEA contexts, such as that of claim settlement.

The second implication of this Note is a modest critique to Sitaraman and Wuerth's discussion of the normalization of foreign relations law.[235] While the Roberts Court may generally be interested in normalizing its approach to foreign relations,[236] we should not expect the same to occur in the takings context. Perhaps the pattern of normalization recognized by Sitarman and Wuerth is less applicable where normalizing foreign affairs law would produce serious consequences for the U.S. government's basic diplomatic capacity.

Finally, although the mostly conservative Supreme Court has signaled an interest in a robust takings jurisprudence, the SDN hypothetical shows that this approach is irreconcilable with affirming the political branches' supremacy on national security issues. It is inconsistent to fully adopt current takings jurisprudence without believing that the SDN context constitutes an aberration.[237]

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234. *See* discussion *supra* Part II(B).

235. *See* discussion *supra* Part II(B) (addressing Sitaraman & Wuerth's analysis of foreign affairs exceptionalism); *see also* Sitaraman & Wuerth, *supra* note 57.

236. Sitaraman & Wuerth, *supra* note 57, at 1924 ("In the last decade, the Roberts Court has ushered in a third wave of normalization.").

237. At least, not if it is desirable that the judiciary "speak law as it is" and not simply make value judgments. *See* sources cited *supra* note 14.

A solution would be for courts to limit their regulatory takings jurisprudence generally. Though unlikely, such a change would probably be the most effective way to make constitutional doctrine more consistent while also recognizing the hard realities of foreign policy needs. Perhaps courts could invoke deference norms in the national security context similar to the deference they give to federal, state, and local governments in the context of environmental regulation and social policy more broadly. This alternative would help normalize the Supreme Court's approach to national security interests by putting them on equal footing with other government objectives.[238] Though perhaps problematic for unrelated reasons, this approach might be the most effective way to harmonize seemingly irreconcilable constitutional values.

238. *Cf.* Sitaraman & Wuerth, *supra* note 57, at 1901 (arguing in favor of courts' normalizing their approach to foreign relations law).