

The United States-Iran Hostage Agreement: A Study in Presidential Powers

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**THE UNITED STATES-IRAN HOSTAGE AGREEMENT:
A STUDY IN PRESIDENTIAL POWERS†**

OUTLINE

| | |
|--|-----|
| INTRODUCTION | 150 |
| I. THE HOSTAGE AGREEMENT | 153 |
| A. THE UNITED STATES' RESPONSE TO THE HOSTAGE TAKING | 153 |
| B. THE ORIGINAL VERSION OF THE AGREEMENT | 155 |
| C. REAGAN'S IMPRIMATUR | 161 |
| II. DAMES & MOORE V. REGAN | 162 |
| III. RELEVANT STATUTES | 164 |
| A. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 | 165 |
| B. THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT | 168 |
| 1. <i>History and Policy</i> | 168 |
| 2. <i>IEEPA and the Dissolution of Attachments</i> | 171 |
| 3. <i>IEEPA and the Termination of Litigation</i> | 172 |
| C. THE HOSTAGE ACT | 174 |
| D. SUMMARY | 177 |
| IV. CONSTITUTIONALITY OF SUSPENSION OF LITIGATION | 177 |
| A. SEPARATION OF POWERS | 179 |
| 1. <i>Framework for Analysis</i> | 179 |
| 2. <i>President Acting with Congressional Authorization</i> | 180 |
| a. Claims Settlement Practice | 181 |
| b. Congressional Authorization | 187 |
| 3. <i>President's Actions are Incompatible with the Will of Congress</i> | 188 |
| 4. <i>Conclusion</i> | 190 |
| B. THE TAKING OF PROPERTY UNDER THE FIFTH AMENDMENT | 190 |
| 1. <i>The Procedural Setting</i> | 190 |
| 2. <i>The Substantive Law</i> | 191 |
| a. Have the Claimants Acquired "Property Interests"? | 192 |

† The author thanks Victoria L. Potelicki for her work in editing this Note.

b. Has the Property Been "Taken"? 197
 c. Have the Claimants Received "Just Compensation"? 198
 CONCLUSION 200

INTRODUCTION

Among the more controversial provisions of the Hostage Agreement,¹ through which the United States and Iran² agreed to the terms for the release of the 52 Americans held captive in Iran for 444 days, were President Carter's commitment to nullify all attachments

1. The Hostage Agreement as completed in Algiers on January 19, 1981, is recorded in five documents: A Declaration of the Government of Algeria describing the Agreement [hereinafter cited as Declaration]; a procedural document, entitled "Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria," that describes the disposition of various Iranian assets through an escrow fund [hereinafter cited as Undertakings]; a second declaration of the Algerian Government, entitled "Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran," describing the claims settlement procedure [hereinafter cited as Claims Settlement Declaration]; the Escrow Agreement, which provides for the management of the escrow fund; and, the Technical Agreement, which describes the duties of the depository bank. (The Bank of England later agreed to serve as escrow depository.)

The Department of State publicly released copies of the first and second documents, (1) the general declaration of the Algerian Government and, (2) the declaration concerning the claims settlement process. The New York Times reprinted these two documents. N.Y. Times, Jan. 20, 1981, at A4, col. 1. These two documents, together with the Undertakings, *supra*, of the government of the United States and the government of Iran are reprinted in the transcript of the hearing held on February 19, 1981, before the Senate Committee on Banking, Housing, and Urban Affairs. *Iranian Asset Settlement: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. 30-41 (1981) [hereinafter cited as *Senate Banking Hearing*]. All five documents are included in the record of the Senate Foreign Relations Committee. *The Iran Agreements: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 230-42 (1981). [hereinafter cited as *Senate Foreign Relations Hearings*].

President Carter issued a series of Executive orders shortly before he left office implementing the provisions of the Hostage Agreement. Exec. Order Nos. 12,276-84, 46 Fed. Reg. 7913-30 (1981). In issuing these Executive orders, President Carter relied in part on authority vested in him by the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (Supp. II 1978) (IEEPA). Section 204(b) of the IEEPA, 50 U.S.C. § 1703(b), requires the President to report to the Congress immediately upon the exercise of his authority under the Act. See ACTION WITH RESPECT TO IRAN: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 15, 97th Cong., 1st Sess. (1981). On the Hostage Agreement and the litigation it has spawned, see generally *Symposium on the Settlement with Iran*, 13 LAW. AM. 1 (1981); Note, *The Iranian Hostage Agreement Under International and United States Law*, 81 COLUM. L. REV. 822 (1981).

2. In November 1980, the Iranian officials primarily responsible for dealing with all aspects of the hostage affair designated the Algerian government as the sole contact for communications between Iran and the United States on the hostage issue. *Iran's Seizure of the United States Embassy: Hearings Before the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 73 (1981) (prepared statement of Harold H. Saunders, Former Assistant Secretary of State for Near Eastern and South Asian Affairs) [hereinafter cited as *House Foreign Affairs Hearings*].

of Iranian assets in the United States, to terminate all litigation pending against Iran in United States courts, and to refer those claims to a specially created international arbitral tribunal.³ Commercial claimants, both individual and corporate, immediately challenged the provisions of the Hostage Agreement that jeopardized their claims against Iran.⁴ The claimants asserted that the Hostage Agreement raised "serious constitutional and other legal questions."⁵

3. See *infra* notes 25-48 and accompanying text.

4. See e.g., N.Y. Times, Jan. 22, 1981, at A11, col. 1; *id.*, Jan. 23, 1981, at A8, col. 3; *id.*, at A17, col. 1. One company, the Electronic Data Systems Corporation Iran (EDS), asserts that it is the only claimant that had both validly attached Iranian assets in this country and had actually secured a \$19 million judgment against Iran before President Carter froze the Iranian assets on November 14, 1979. See *infra* notes 16-17 and accompanying text. Soon after the Hostage Agreement took effect, EDS sought an injunction in a federal district court in Texas to ensure that the government would not interfere with its judgment or attachment. See also *infra* note 5. Pursuing all options, EDS also sued the United States government to ensure that it would receive money from the escrow account called for in the Agreement. Wall St. J., Jan. 26, 1981, at 2, col. 3.

Not all claimants rushed immediately into court to challenge the Agreement. Thirty-seven law firms representing clients with claims of nearly \$1.3 billion formed a steering committee to coordinate their clients' efforts to protect their claims against Iran. Lawrence W. Newman, of Baker & McKenzie, chaired the committee. N.Y. Times, Feb. 19, 1981, at D2, col. 3.

5. N.Y. Times, Jan. 24, 1981, at 5, col. 1. The claimants argued that the President's actions unconstitutionally invaded the provinces of the judiciary and the Congress; that the statutes upon which President Carter relied did not authorize the actions he took to free the hostages; and, that even if the cited statutes properly authorized the President's actions, the Hostage Agreement resulted in a public "taking" under the fifth amendment, for which the claimants deserved to receive just compensation. These arguments are analyzed *infra* at notes 230-74 and accompanying text.

In addition to these constitutional and statutory challenges, the circumstances surrounding the resolution of the crisis suggest two other challenges to the validity of the Hostage Agreement. A claimant advanced one of the arguments in support of its application for a preliminary injunction to bar the United States government from taking any action that would interfere with its ability to execute on a \$19 million judgment against the Social Security Organization of Iran. EDS argued that President Carter did not legally promulgate the Executive orders that implemented the Hostage Agreement. EDS noted that President Carter signed the Orders on January 19, 1981, while he was still in office, but that the Orders were not filed for publication with the Federal Register until January 23, 1981, three days after he left office. A document required to be published in the Federal Register is not valid until it has been filed with the Office of the Federal Register and copies are made publicly available. 44 U.S.C. § 1507 (1976). Brief of Plaintiff Electronic Data Systems Corporation Iran in Support of Application for Preliminary Injunction In Aid of Judgment at 20-22, *Elec. Data Sys. Corp. Iran v. Social Sec. Org. of the Gov't of Iran*, 508 F. Supp. 1350 (N.D. Tex. 1981).

The district court granted plaintiff's motion for preliminary injunction. In response to this particular argument the court noted that the plaintiff raised "a unique and novel question of law" and concluded that there was "a substantial likelihood that the Executive Order[s] [were] not validly promulgated during President Carter's term of office." *Elec. Data Sys. Corp. Iran v. Social Sec. Org. of the Gov't of Iran*, 508 F. Supp. 1350, 1359 (N.D. Tex. 1981) (order granting preliminary injunction).

On February 24, 1981 President Reagan ratified the Executive orders that President Carter had signed on January 19, 1981. Exec. Order No. 13,294, 46 Fed. Reg. 14,111 (1981). He took this action "to remove any doubt as to their effect, an issue that has been raised in recent litigation challenging them." SUSPENSION OF CERTAIN LITIGATION

In the storm of litigation that occurred soon after the release of the hostages, the federal district and circuit courts were reaching conflicting decisions regarding the validity and enforceability of the Hostage Agreement.⁶ A definitive ruling on the validity of the Agreement was necessary, because Iran could have considered the United States to be in breach of the Agreement if all of the attached Iranian assets were not transferred out of the United States by July 19, 1981.⁷ Responding to the exigencies of the situation, the

AGAINST IRAN: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. No. 25, 97th Cong., 1st Sess. 1 (1981).

The circumstances surrounding the resolution of the crisis also suggest a second challenge to the Hostage Agreement. Arguably, the Agreement is void because it was obtained through the illegal use of force and duress, in violation of Article 52 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, *opened for signature* May 22, 1969, 1980 Gr. Brit. T.S. No. 58 (Cmd. 7964) (entered into force Jan. 27, 1980), *reprinted in* 8 I.L.M. 679 (1969). This issue was the subject of debate in a series of articles that appeared in the National Law Journal. See Malawar, *A Gross Violation of Treaty Law*, Nat'l L.J., Mar. 2, 1981, at 13, col. 1; Gordon, *Ratification with Reservations*, Nat'l L.J., Apr. 20, 1981, at 13, col. 1; Malawar, *Renunciation, With Rigor*, *id.*, at 13, col. 2. See also Correspondence, *Void Ab Initio: The U.S.-Iran Hostage Accords*, 21 VA. J. INT'L L. 347 (1981). But see N.Y. Times, Jan. 23, 1981, at A8, col. 3, wherein it is reported that Andreas F. Lowenfeld, professor of international law at New York University, and other legal experts do not agree with the suggestion that the Hostage Agreement might be invalid due to duress and extortion. Warren M. Christopher, Former Deputy Secretary of State and head of the United States negotiating team in Iran, believes that because the Agreement as a whole is in the best interests of the United States, this country should not raise the issue of the validity and enforceability of the Agreement under the provisions of the Vienna Convention. See *Senate Foreign Relations Hearings*, *supra* note 1, at 39 (statement of Warren M. Christopher, Former Deputy Secretary of State).

6. Courts upholding the Agreement included: *Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430 (D.C. Cir. 1981); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800 (1st Cir. 1981); *Sec. Pac. Nat'l Bank v. Gov't of Iran*, 513 F. Supp. 864 (C.D. Cal. 1981) (President had the authority to declare all attachments of Iranian property null and void); *Unidyne Corp. v. Gov't of Iran*, 512 F. Supp. 705 (E.D. Va. 1981); *Dames & Moore v. Atomic Energy Org. of Iran*, No. 79-04918 LEW (Px) (C.D. Cal. 1981) (denied the claimant's motion for a preliminary injunction to prevent enforcement of the Executive orders implementing the Hostage Agreement).

Courts taking the view that at least some aspect of the Hostage Agreement was objectionable included: *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 518 F. Supp. 69 (S.D.N.Y. 1981) (the court denied the government's motion to vacate the attachments on the Iranian assets); *Elec. Data Sys. Corp. Iran v. Social Sec. Org. of the Gov't of Iran*, 508 F. Supp. 1350 (N.D. Tex. 1981) (enjoined the government from removing the assets being secured with an attachment).

7. The Declaration of the Government of the Democratic and Popular Republic of Algeria required the United States to transfer to a designated central bank all Iranian deposits and securities in U.S. branches of U.S. Banks within six months of the date of the Hostage Agreement. Declaration, *supra* note 1, Points II and III, para. 6.

In testimony before the Senate Foreign Relations Committee and the House Foreign Affairs Committee former Deputy Secretary of State Warren M. Christopher contended that a total or partial repudiation of the Hostage Agreement would constitute a breach of faith with Algeria, Great Britain, West Germany, and Switzerland—countries that helped the United States and Iran conclude the accords. N.Y. Times, Feb. 18, 1981, at A4, col. 3. *Senate Foreign Relations Hearings*, *supra* note 1, at 33 (statement of Warren M. Christopher, Former Deputy Secretary of State). *House Foreign Affairs Hearings*,

Supreme Court granted certiorari before judgment in *Dames & Moore v. Regan*⁸ and set an expedited briefing and argument schedule. Eight days after oral argument the Court rejected several statutory and constitutional challenges and held that the President had the authority to enter into the Hostage Agreement.⁹ This decision cleared the way for the timely release of the attached assets.¹⁰

This Note examines the Hostage Agreement¹¹ and the Court's opinion in *Dames & Moore v. Regan*.¹² In particular, this Note analyzes the President's statutory¹³ and constitutional¹⁴ authority to terminate the domestic litigation involving Iran. This analysis suggests that although the Court's conclusion in *Dames & Moore v. Regan* is correct, the Court's opinion should have rested on other grounds. This Note also discusses the possible outcome of future litigation that may be brought by claimants who are dissatisfied with the outcome of their proceeding before the Arbitral Tribunal.¹⁵

I. THE HOSTAGE AGREEMENT

A. THE UNITED STATES' RESPONSE TO THE HOSTAGE TAKING

In response to the captivity of American diplomatic personnel in Iran, President Carter declared a national emergency¹⁶ and blocked the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become

supra note 2, at 144 (statement of Warren M. Christopher, Former Deputy Secretary of State).

8. *Dames & Moore v. Regan, cert. granted*, 101 S. Ct. 3071 (1981). See *infra* notes 57-77 and accompanying text. See generally Tell, *Iran Assets Case Finally Makes It to High Court*, Nat'l L.J., June 22, 1981, at 3, col. 1; N.Y. Times, June 12, 1981, at D1 col. 6.

9. *Dames & Moore v. Regan*, 101 S. Ct. 2972 (1981).

10. See *infra* notes 25-35 and accompanying text.

11. See *infra* notes 16-56 and accompanying text.

12. See *infra* notes 57-77 and accompanying text.

13. See *infra* notes 78-151 and accompanying text.

14. See *infra* notes 152-273 and accompanying text.

15. See *infra* notes 230-74 and accompanying text.

16. As authority for his actions, the President cited the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701-1706 (Supp. II 1978), which provides, in part, that the President may exercise his authority under the Act "to deal with any unusual or extraordinary threat, which has its source in whole or in substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1701(a) (Supp. II 1978).

This was the first time that a President invoked the IEEPA. *Senate Banking Hearing, supra* note 1, at 2 (statement of Sen. John Heinz). For further discussion of the IEEPA and the President's reliance upon it for authority in concluding the Hostage Agreement, see *infra* notes 103-34 and accompanying text.

subject to the jurisdiction of the United States."¹⁷ The Treasury Department, acting pursuant to presidential authorization, issued detailed regulations implementing the provisions of the Executive order.¹⁸

The regulations authorized judicial proceedings, including pre-judgment attachments, with respect to blocked property in which Iran or an Iranian entity had an interest.¹⁹ But the regulations explicitly did not authorize or license the entry of any judgment, the payment out of a blocked account based upon a judicial proceeding, or the enforcement of any judgment or decree with regard to any blocked property.²⁰ The regulations did not invalidate pre-judgment attachments legally obtained before November 14, 1979, but the regulation did establish procedures for the licensing of pre-judgment attachments obtained after that date.²¹ In addition, the regulations clearly provided that the post-freeze licenses could be amended, modified, or revoked at any time.²²

Before the release of the American hostages, United States nationals, both individuals and corporations, took advantage of all available procedures to protect their rights against the Government of Iran. More than three hundred nonbank companies with claims totaling more than \$3 billion filed lawsuits against Iran, and claimants registered over two thousand other claims with the Treasury Department.²³ The claimants in these lawsuits included oil compa-

17. Exec. Order No. 12,170, 3 C.F.R. 457 (1980). See also 15 WEEKLY COMP. PRES. Doc. 2117-18 (Nov. 15, 1979).

18. The regulations provided, in part, that:

No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after the effective date [November 14, 1979] Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized.

31 C.F.R. § 535.201 (1980). In the days and weeks immediately following the President's declaration of the Iranian asset freeze, the Treasury Department frequently amended, revised, and sometimes revoked the pertinent regulations as the Executive Branch struggled to understand and implement this previously untested foreign policy weapon. The regulations appearing at 31 C.F.R. §§ 535.101-.904 (1980) reflect all changes as of June 30, 1980. The volume of the *Code of Federal Regulations* revised as of July 1, 1981 includes the Treasury Department Regulations that implement the Hostage Agreement. 31 C.F.R. §§ 535.101-.904 (1981). This Note will frequently cite to the 1980 version of the regulations. Though already superseded at the time of this writing, the 1980 regulations were controlling during most of the crisis period.

19. *Id.* §§ 535.418, .504.

20. *Id.* §§ 535.504(b)(1)-(2), .418.

21. *Id.* § 535.801. A general license authorized the pre-judgment attachments and other judicial proceedings.

22. *Id.* § 535.805.

23. N.Y. Times, Jan. 22, 1981, at A11, col. 1. Supplementing his testimony before the Senate Banking, Housing, and Urban Affairs Committee, a former Deputy Secretary of the Treasury submitted a report that divided all claims into eight general categories and briefly analyzed each group. *Senate Banking Hearing, supra* note 1, at 28-29.

nies, contractors, and other corporations that did business with Iran before the fall of the Shah.

B. THE ORIGINAL VERSION OF THE AGREEMENT

The United States' effort to secure the safe release of the hostages and protect the legitimate interests of U.S. banks and other claimants in Iranian assets culminated in the Hostage Agreement. The Agreement rests on two general principles. First, that the United States would restore "the financial position of Iran, insofar as possible, to that which existed prior to Nov. 14, 1979." Second, that the governments of the United States and Iran would terminate all litigation between each government and the nationals of the other party and would "bring about the settlement and termination of all such claims through binding arbitration."²⁴

To restore Iran to its financial position of November 14, 1979, while mollifying the antipathy between Iran and the United States, the Hostage Agreement precisely detailed the procedure by which the United States would unblock and transfer to Iran over \$11 billion. In understanding the financial settlement, it is helpful to think of the frozen Iranian assets in four categories:²⁵ \$2.5 billion in the form of gold bullion and securities held in the Federal Reserve Bank of New York; \$5.5 billion in interest bearing deposit accounts in overseas branches of U.S. banks; \$2.2 billion in deposits and securities held in various U.S. branches of U.S. banks; and \$1 to 1.5 billion of other Iranian assets in the United States.²⁶

The Hostage Agreement required the United States to establish an escrow account in the name of the Algerian Central Bank in a mutually agreeable central bank.²⁷ Immediately after signing the Agreement the United States transferred into this escrow account the Iranian assets that had been held in the Federal Reserve Bank of

24. Declaration, *supra* note 1, General Principles.

25. For lucid descriptions of the complicated financial transactions the Hostage Agreement called for, see *Senate Banking Hearing, supra* note 1, at 11-14 (prepared statement of Harold H. Saunders, Former Assistant Secretary of State for Near Eastern and South Asian Affairs); *id.* at 20-27 (prepared statement of Robert Carswell, Former Deputy Secretary of the Treasury); *House Foreign Affairs Hearings, supra* note 2, at 21-24 (prepared statement of Harold H. Saunders, Former Assistant Secretary of State for Near Eastern and South Asian Affairs).

26. This fourth category of Iranian assets consisted of properties other than funds, securities, and deposits, including personal property, real property, and accounts payable. *House Foreign Affairs Hearings, supra* note 2, at 195 (statement of Walter J. Stoessel, Deputy Secretary of State for Political Affairs); *Senate Banking Hearing, supra* note 1, at 25 (prepared statement of Robert Carswell, Former Deputy Secretary of the Treasury).

27. Declaration, *supra* note 1, Points II and III, para. 2. The Bank of England agreed to serve as escrow depositary. See also 31 C.F.R. § 535.210 (1981).

New York and in the overseas branches of U.S. banks.²⁸ This amounted to \$7.955 billion.²⁹ The successful transfer of these funds into escrow triggered the release of the fifty-two Americans from Iran.³⁰ When the plane carrying the former hostages safely moved out of Iranian airspace, the Bank of England, depository of the escrow account, transferred a portion of the assets in the account to Iran.³¹

The terms of the Agreement further provided that the United States would transfer the remaining Iranian assets, those assets on deposit in U.S. branches of U.S. banks and other assets in the United States, to Iran within six months of the signing of the documents.³² As the \$2.2 billion in deposits in the U.S. branches of U.S. banks were transferred to Iran, the Agreement called for one-half to be deposited in an interest bearing security account in another central bank.³³ When the assets in the special security account reached \$1 billion, the balance of the bank deposits were to be transferred directly to Iran.³⁴ This \$1 billion security account would provide the funds for the payment of awards of the Iran-United States Claims Tribunal against Iran. The Government of Iran agreed to maintain a minimum balance of \$500 million in the account at all times to satisfy the judgments.³⁵

28. Declaration, *supra* note 1, Points II and III, paras. 4-5; 31 C.F.R. §§ 535.211-212 (1981).

29. Undertakings, *supra* note 1, para. 1.

30. *Id.*; *House Foreign Affairs Hearings, supra* note 2, at 140 (statement of Warren M. Christopher, Former Deputy Secretary of State).

31. Declaration, *supra* note 1, Points II and III, para. 3. The Bank of England only transferred 36% of the escrow funds on the day Iran released the hostages: of the \$7.55 billion in the account, the Bank of England transferred \$3.667 billion back to the United States to pay off Iranian debts to U.S. banks, the Bank retained \$1.418 billion in the escrow account to pay disputed amounts between the U.S. banks and Iran, and thus only paid over to Iran \$2.88 billion when Iran released the Americans. Undertakings, *supra* note 1, para. 2; *House Foreign Affairs Hearings, supra* note 2, at 140 (statement of Warren M. Christopher, Former Deputy Secretary of State); *Senate Foreign Relations Hearings, supra* note 1, at 29 (statement of Warren M. Christopher, Former Deputy Secretary of State).

32. Declaration, *supra* note 1, Points II and III, para. 6. 31 C.F.R. § 535.213 (1981).

33. Declaration, *supra* note 1, Points II and III, para. 7. Iran and the United States later concluded arrangements to establish a security account at N.V. Settlement Bank of the Netherlands. Department of State, Public Notice 772, 46 Fed. Reg. 45,057 (1981).

34. Declaration, *supra* note 1, Points II and III, para. 7.

35. *Id.* This provision greatly concerns American claimants. They are not convinced that Iran will faithfully replenish the security account. N.Y. Times, Feb. 19, 1981, at D2, col. 3; Nat'l L.J., Mar. 2, 1981, at 3. See also N.Y. Times, Mar. 8, 1982, at A11, col. 1. American officials have acknowledged the claimants' concerns, but are confident that Iran will abide by the terms of the Agreement. They optimistically refer to the fund as a "bottomless pitcher." These officials point out that the hostage crisis tarnished Iran's reputation in the international community, and argue that Iran will not risk further damaging its national honor by failing to implement the Agreement. Furthermore, the Agreement provides that a judgment of the Iran-United States Claims Tribunal is enforceable against either government in the courts of any nation in accordance with

To fully resolve the hostage crisis, the United States and Iran agreed on a method "for U.S. nationals to pursue their commercial claims against Iran, while at the same time responding to Iran's demand for the return of its frozen assets."³⁶ President Carter agreed to immediately terminate all litigation against Iran in American courts,³⁷ and "to promote the settlement" of those claims.³⁸ The parties agreed that claims not settled within six to nine months³⁹ of the entry into force of the Agreement would be submitted to binding third-party arbitration.⁴⁰ The Tribunal, officially known as the Iran-

forum laws. Claims Settlement Declaration, *supra* note 1, Art. IV. Thus, a dissatisfied claimant could pursue Iran across the globe, attaching its oil revenues in order to enforce the Tribunal's award. See *House Foreign Affairs Hearings*, *supra* note 2, at 216 (statement of Mark Feldman, Acting Legal Adviser, Department of State); *Senate Foreign Relations Hearings*, *supra* note 1, at 61, 67 (statement of Warren M. Christopher, Former Deputy Secretary of State).

36. *House Foreign Affairs Hearings*, *supra* note 2, at 142 (statement of Warren M. Christopher, Former Deputy Secretary of State).

37. Declaration, *supra* note 1, General Principles (B).

38. Claims Settlement Declaration, *supra* note 1, Art. I. As set forth in the general Declaration of the Government of the Democratic and Popular Republic of Algeria, the United States agreed to terminate the prosecution of pending and future claims of the United States or its nationals relating to:

(A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran.

Declaration, *supra* note 1, Points II and III, para. 11.

The Agreement's definition of United States "national" requires the United States to also terminate claims arising from a U.S. ownership interest in an Iranian corporation if that ownership does not entail control of the corporation. Claims Settlement Declaration, *supra* note 1, Art. VII(2).

Furthermore, the government of the United States agreed to withdraw its claims pending before the International Court of Justice. Declaration, *supra* note 1, Points II and III, para. 11. In early 1980, the United States took its case against Iran before the International Court of Justice. Iran ignored the entire proceeding. On May 24, 1980, the International Court of Justice ordered Iran to release the hostages, return the American Embassy building to the United States, and pay damages. The International Court of Justice kept the case open pending release of the hostages. Pursuant to the terms of the Hostage Agreement, the United States moved to dismiss the case on April 6, 1981. In its petition to the Court, however, the United States reserved the right to re-open the proceedings if Iran should breach the Agreement. N.Y. Times, Apr. 7, 1981, at A4, col. 3.

39. The Agreement calls for a six-month settlement period that could be extended once by three months at the request of either party. At the request of the Government of Iran the parties extended the settlement period to October 19, 1981. Department of State, Public Notice 763, 46 Fed. Reg. 36,278 (1981).

40. Claims Settlement Declaration, *supra* note 1, Art. I.

For purposes of settlement and, if necessary, presentation of claims to the Tribunal, the Agreement divided all claims into two categories: claims for less than \$250,000 and claims for \$250,000 or more. *Id.* Art. III. United States claimants with large claims (\$250,000 or more) would negotiate a settlement with Iran on an individual basis. On April 27, 1981, the Government of Iran officially notified the Department of State that it was ready to negotiate with the claimants. Department of State, Public Notice 753, 46 Fed. Reg. 25,026 (1981). Iran requested that the settlement negotiations take place in

United States Claims Tribunal, is composed of nine members:⁴¹ three from the United States, three from Iran, and three selected by the first six.⁴² The Agreement specified that the seat of the Tribunal would be The Hague, the Netherlands,⁴³ and that except to the extent modified by the parties, the members would conduct business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).⁴⁴

Vienna, Austria. Department of State, Public Notice 763, 46 Fed. Reg. 36,277 (1981). The B.F. Goodrich Company announced that it expected to be the first claimant to be paid out of the \$1 billion account. It reached a privately negotiated settlement with Iran for \$182 thousand on a claim of \$351 thousand. N.Y. Times, May 12, 1982, at D1, col. 1.

The United States government assumed responsibility for negotiating a lump-sum settlement of the smaller claims (under \$250,000). Department of State, Public Notice 749, 46 Fed. Reg. 19,893 (1981). For a description of typical claims falling into this small-claims category, see Wall St. J., Feb. 10, 1982, at 18, col. 3. If successful, the group settlement would eliminate 2,795 of the estimated 5,000 claims against Iran. *Id.* If the United States government fails to negotiate a settlement, the Agreement requires the United States government to submit these claims to the Tribunal. Claims Settlement Declaration, *supra* note 1, Art. III (3). At the close of the settlement period, October 19, 1981, the United States had not negotiated a lump-sum settlement of the smaller claims. Department of State, Public Notice 775, 46 Fed. Reg. 49,695 (1981).

The Agreement provides for a three-month period (October 20, 1981—January 19, 1982) during which the United States, acting on behalf of the smaller claimants, and other claimants may file their claims with the Tribunal. Claims Settlement Declaration, *supra* note 1, Art. III (4). On November 18, 1981, the United States filed a claim on behalf of the smaller claimants, seeking an award of at least \$180 million in compensation for their losses. Department of State, Public Notice 781, 46 Fed. Reg. 57,812 (1981).

41. The Agreement provided that the Tribunal could consist of nine members or such larger multiple of three as the parties agreed were necessary. Claims Settlement Declaration, *supra* note 1, Art. III (1). The parties agreed on placing only nine people on the Tribunal, although the United States would have liked thirty arbitrators to speed the processing of the claims. Nat'l L.J., Apr. 20, 1981, at 5.

42. The American members of the Tribunal are Howard M. Holtzmann, a New York lawyer and expert in international arbitration, George H. Aldrich, a Virginia lawyer and member of the United Nations International Law Commission, and Richard M. Mosk, a Los Angeles lawyer. Iran's members include Tehran law professors Mahmoud M. Kashani, and Shafey Shafeiei, a former judge. A third appointee, Seyyed H. Enayat, a former Foreign Ministry legal aide, unexpectedly resigned and returned to Iran in early 1982. N.Y. Times, Mar. 8, 1982, at A11, col. 1. The jointly selected members are Gunnar Lagergren, a former Swedish court of appeals judge and now a member of the permanent Court of Arbitration in The Hague; Pierre Bellet, a former chief justice of France's Supreme Court; and Niels Mangaard, a justice on Sweden's Court of Appeals. N.Y. Times, Oct. 19, 1981, at D1, col. 3.

43. Claims Settlement Declaration, *supra* note 1, Art. VI (1).

44. *Id.* Art. III (2). The United Nations recently promulgated the UNCITRAL rules as an alternative to older arbitral regimes, such as that of the International Chamber of Commerce, that some lesser developed nations viewed as being too closely attuned to the commercial interests of industrialized nations. *Senate Banking Hearing*, *supra* note 1, at 137-38 (prepared statement of John F. Olson, an attorney representing several claimants). For a detailed description of the modifications the parties made to the Uncitral arbitration rules, see e.g., Department of State, Public Notice 764, 46 Fed. Reg. 37,418 (1981); Department of State, Public Notice 775, 46 Fed. Reg. 49,695 (1981).

At the opening of the claims filing period, the parties had not yet agreed on several important procedural matters that the Hostage Agreement did not address. These unresolved issues included: fixing the length of time the Government of Iran could have to respond to the claimants' charges; deciding upon the degree of secrecy that should

The Hostage Agreement specifies the types of claims over which the Tribunal will have jurisdiction, and the types of claims that lie outside the Tribunal's jurisdiction. The Tribunal will have jurisdiction to decide (1) claims and related counterclaims outstanding on the date of the Agreement by the nationals of either party against the government of the other, (2) official claims of the Governments of the United States and Iran against each other arising out of contracts for the purchase and sale of goods and services, and (3) any dispute regarding the interpretation or performance of any provision of the Agreement.⁴⁵

Specifically excluded from the Tribunal's jurisdiction, however, are claims (1) relating to the seizure or detention of the hostages,⁴⁶ injury to United States property or property within the compound of the United States Embassy, and injury to persons or property as a

surround the arbitration process and the manner by which the hearings would be recorded; disposing of the interest accumulated on the \$1 billion security account at the N.V. Settlement Bank (the United States would like the interest to revert to the account and be available to pay claims); and assigning responsibility between the parties to pay the N.V. Settlement Bank's administrative costs and to guarantee the bank against future claims on attachments. *See* N.Y. Times, Oct. 19, 1981, at D1, col. 3; *id.*, Mar. 8, 1982, at A11, col. 1; Wall St. J., Feb. 10, 1982, at 18, col. 3.

45. Claims Settlement Declaration, *supra* note 1, Art. II.

46. The provisions of the Agreement that prevent the hostages and their families from pursuing their legal remedies against Iran in American courts and in the Iran-United States Claims Tribunal have been termed one of the "most nettlesome aspects of the accords." N.Y. Times, Feb. 19, 1981, at A1, col. 2. The United States government defends the exclusion of these claims by contending that the hostages' claims were of little value since Iran would answer a tort claim brought in a United States court with a very strong sovereign immunity defense. *House Foreign Affairs Hearings, supra* note 2, at 95 (statement of Harold H. Saunders, Former Assistant Secretary of State for Near Eastern and South Asian Affairs). Warren M. Christopher, former Deputy Secretary of State and head of the U.S. negotiating team, believed he was not giving a lot away when the United States government waived these claims. Mr. Christopher also defends the move by explaining that as early as August 1980, the Department of State secured the approval of most of the hostages' families to waive the claims. The families did not want negotiation over these claims to delay the release of the hostages. *Id.* at 143 (statement of Warren M. Christopher, Former Deputy Secretary of State).

The American hostages are not without some relief. They and their families will benefit from the provisions of the Hostage Relief Act of 1980, 5 U.S.C. § 5561 (Supp. IV 1980). In addition, President Carter ordered the formation of the President's Commission on Hostage Compensation to make recommendations regarding special financial compensation the hostages should receive to supplement their award under the Hostage Relief Act of 1980. Exec. Order No. 12,285, 46 Fed. Reg. 7931 (1981). That Commission completed its work and recommended to the President that the hostages (with the exception of the one nongovernment employee among the hostages) receive \$12.50 a day for their 444 days in captivity and unlimited medical and health benefits for those hostages suffering disabilities stemming from their detention. N.Y. Times, Sept. 22, 1981, at A1, col. 6.

Despite the prohibition in the Agreement, several hostages and their families brought actions against the Government of Iran alleging that the detention violated their diplomatic privileges, immunities, and civil rights. The United States government quickly moved to dismiss the suits. N.Y. Times, Feb. 5, 1981, at A10, col. 6; *id.*, Feb. 14, 1981, at 16, col. 2; *id.*, Mar. 8, 1981, at A32, col. 1.

result of popular movements in the course of the Islamic Revolution in Iran that were not actions of the Government of Iran,⁴⁷ and (2) claims arising under the terms of a binding contract specifically providing that any disputes thereunder shall be within the sole jurisdiction of the Iranian courts.⁴⁸

47. 31 C.F.R. § 535.216 (1981). The meaning of the phrase "popular movements in the course of the Islamic Revolution in Iran," and thus the scope of this exclusion, is not at all clear. For an informed discussion of this matter, see *Senate Foreign Relations Hearings, supra* note 1, at 186-87 (statement of Mark Feldman, Acting Legal Adviser, Department of State).

48. The Iranian "choice of forum" clause, inserted in the Agreement at the insistence of Iran's Parliament, is one of the most controversial and significant provisions in the Hostage Agreement, and has given commercial claimants much cause for concern. Many claimants—perhaps as many as one-third, representing hundreds of millions of dollars of claims—may be excluded from access to the Tribunal because of this provision. *Senate Banking Hearing, supra* note 1, at 145 (prepared statement of John F. Olson, an attorney representing several claimants).

Whether the Tribunal will reject jurisdiction over these claims depends on how broadly the Tribunal members construe the exclusion. Few of the contracts that will be the subject of the arbitration contain a "choice of forum" clause drafted in the exact language of the exclusion clause. But many of the contracts do contain language tying resolution of disputes in some manner to Iranian courts, Iranian law, or arbitration in Iran. See, e.g., *id.* at 87 (statement of Arthur Albertson, Vice President of CBI Industries, a claimant). If the exclusion clause is broadly construed by members of the Tribunal—only one third of whom are Americans—many claims will be excluded from the arbitration.

The United States government is aware of the claimants' concerns and has urged the claimants to argue to the Tribunal that jurisdiction properly lies with the Tribunal. The claimants should seek to convince the arbitrators that the exclusion clause is too narrow to cover their claims or, by invoking the doctrine of "changed circumstances" that is preserved in the Agreement, Claims Settlement Declaration, *supra* note 1, Art. V, the claimants should argue that they did not bargain for courts of the Islamic government of the Ayatollah Khomeini to adjudicate their contract disputes. One Reagan Administration official is of the opinion that the lawyers for Iran may also desire the Tribunal to read this exclusion provision narrowly. The official suggests that Iran will prefer to have the Tribunal resolve as many of these claims as possible because they are afraid of how the U.S. courts will deal with the issues if the claimants resume their domestic litigation. *Senate Foreign Relations Hearings, supra* note 1, at 187 (statement of Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice). N.Y. Times, Jan. 24, 1981, at 5, col. 1.

The government's views are contained in the Statement of Interest the Department of Justice filed with the federal courts that were hearing or had pending claims against Iran. The Statement of Interest was made a part of one claimant's brief in a case pending in the Federal Court for the Northern District of Texas. Brief of Plaintiff Electronic Data Systems Corporation Iran in Support of Application for Preliminary Injunction in Aid of Judgment, Exhibit A at 24-25, Elec. Data Sys. Corp. Iran v. Social Sec. Org. of the Gov't of Iran, 508 F. Supp. 1350 (N.D. Tex. 1981). [hereinafter cited as Statement of Interest].

The interpretative problem that this exclusion clause poses highlights the difficulties claimants and their attorneys face as they struggle to understand the Hostage Agreement. The lawyers are handicapped by the secrecy that surrounds the negotiations; there are no public documents that explain how the parties drafted the Agreement and what they contemplated when they chose certain terms and phrases. One newspaper account reveals that the United States negotiators purposefully inserted three separate phrases into the Agreement to add ambiguity to the non-negotiable Iranian "choice of forum clause." Nat'l L.J., Apr. 20, 1981, at 5. One law firm tried to overcome the handicap that this lack of negotiating information posed by filing a Freedom of Information Act

C. REAGAN'S IMPRIMATUR

President Reagan declined to publicly endorse the Hostage Agreement during his first thirty days in office. After an interagency committee carefully reviewed the documents and reached conclusions as to the Agreement's legality, Reagan agreed to implement the accords.⁴⁹ He gave to them, however, an interpretation that substantially narrowed the reach of the Hostage Agreement. He then authorized the Treasury Department to immediately issue regulations that would implement his Administration's understanding of the terms of the Agreement.⁵⁰

The Hostage Agreement purports to cancel all claims, attachments, and proceedings against Iran in American courts.⁵¹ Reagan, however, did not call for an immediate termination of all litigation. Rather, he ordered the federal courts only to suspend the prosecution⁵² of all claims over which the Iran-United States Claims Tribunal arguably had jurisdiction.⁵³ Reagan's interpretation conflicts sharply with Article VII of the Claims Settlement Declaration, which provides that "[c]laims referred to the Arbitral Tribunal shall, as of the date of filing such claims with the Tribunal, be considered *excluded from the jurisdiction of the courts* of Iran, or of the United States, or of any other court."⁵⁴

request with the Department of State to obtain drafts of all documents relating to the Agreement. Nat'l L.J., Mar. 2, 1981, at 3.

49. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981), SUSPENSIONS OF CERTAIN LITIGATION AGAINST IRAN: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 25, 97th Cong., 1st Sess. (1981). See also *Senate Foreign Relations Hearings*, *supra* note 1, at 174-75 (statement of Walter Stoessel, Under Secretary of State for Political Affairs); N.Y. Times, Feb. 19, 1981, at A1, col. 2; *id.*, Feb. 17, 1981, at A1, col. 1.

50. The new regulations are scattered throughout 31 C.F.R. pt. 535 (1981). These Treasury Regulations amended as necessary the Iranian Asset Control Regulations that the Treasury Department issued when President Carter first imposed the freeze on November 14, 1979.

51. Declaration, *supra* note 1, General Principles (B). See *supra* notes 36-38 and accompanying text.

52. In effect, the President ordered the courts to transfer the claims to a special "suspense calendar." Nat'l L.J., Mar. 2, 1981, at 3.

53. Exec. Order No. 12,294, § 1, 46 Fed. Reg. 14,111 (1981); 31 C.F.R. § 535.222(a) (1981).

The Executive order also provides that the suspension applies to all claims either presently pending or filed after the date of the Executive Order (§ 1); that claimants are not prohibited from commencing an action for purposes of tolling a period of limitations (*id.*); that nothing in the Order shall require dismissal of any action for want of prosecution (§ 2); that nothing in the Order shall apply to any claim concerning the validity or payment of a standby letter of credit, performance or payment bond, or other similar instrument (§ 5); and, that nothing in the Order shall prohibit the assertion of a counterclaim or set-off by a United States national in any judicial proceeding pending or commenced by Iran or its entities (§ 6).

54. Claims Settlement Declaration, *supra* note 1, Art. VII(2) (emphasis added).

The implementing regulations provide that if the Tribunal determines that it does not have jurisdiction over a claim the suspension of that claim shall terminate, and the claimant may pursue his remedies in U.S. courts.⁵⁵ Suspended claims shall be fully discharged and removed from the docket of the U.S. courts only after the Tribunal determines on the merits that the claimant is entitled to no recovery, or determines on the merits that the claimant is entitled to a recovery and Iran satisfies the judgment.⁵⁶

Although an American forum is guaranteed for those claims that the Tribunal excludes, in most cases the Agreement will operate to remove jurisdiction from the U.S. court to the international Arbitral Tribunal.

II. *DAMES & MOORE v. REGAN*

Litigants immediately challenged the constitutionality of the Hostage Agreement in federal courts across the country.⁵⁷ The Agreement was questioned in nearly four hundred lawsuits against Iran or Iranian government entities⁵⁸ involving claims of over twenty billion dollars.⁵⁹ The district courts divided over the validity of the Hostage Agreement⁶⁰ but both circuit courts that addressed the issue found that the Agreement was a valid exercise of Presidential authority.⁶¹ A final ruling on the issue was necessary before July 19, 1981 because Iran could have considered the United States to be in breach of the Agreement unless it released attached Iranian assets by that date.⁶² Therefore, on June 11, 1981 the Supreme Court granted

55. Exec. Order No. 12,294, § 3, 46 Fed. Reg. 14,111 (1981); 31 C.F.R. § 535.222(e) (1981). The class of claimants that stands to benefit the most from Reagan's interpretation of the Agreement are those commercial claimants whose claim is based upon a contract that contained an Iran "choice of forum" clause. *See supra* note 48 and accompanying text. If the Tribunal broadly construes the exclusion clause of the Agreement and thereby excludes these claimants from the arbitration proceeding, they may pursue a remedy against Iran in the United States courts.

This interpretation will benefit other claimants whose claims the Tribunal may exclude pursuant to other ambiguously-worded clauses in the Agreement. The only claimants definitely foreclosed from a remedy in both the U.S. courts and in the Tribunal are the hostages and their families. *N.Y. Times*, Jan. 24, 1981, at 5, col. 1.

56. Exec. Order No. 12,294, § 4, 46 Fed. Reg. 14,111 (1981); 31 C.F.R. § 534.222(f) (1981).

57. *See N.Y. Times*, Feb. 27, 1981, at D15, col. 1, indicating that litigation involving Iranian assets was pending in at least 40 federal district and circuit courts.

58. *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 518 F. Supp. 69 (S.D.N.Y. 1981); *Winer, New Chinks in the Iran Deal*, *Nat'l L.J.*, Mar. 2, 1981, col. 1.

59. *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 518 F. Supp. 69 (S.D.N.Y. 1981).

60. *See supra* note 6.

61. *Id.*

62. The Agreement called for the United States to transfer attached Iranian assets within six months of the initialing of the Agreement. Declaration, *supra* note 1, Points II and III, para. 6.

certiorari in *Dames & Moore v. Regan*,⁶³ on July 2, 1981 the Court announced its decision upholding the Hostage Agreement.⁶⁴

The Court separately analyzed the President's authority to dissolve the pre-judgment attachments and to suspend claims pending in United States courts. The Court concluded that the President enjoyed statutory and constitutional authority to perform both acts. The Court first held that the International Emergency Economic Powers Act (IEEPA)⁶⁵ endowed the President with the requisite power to dissolve the pre-judgment attachments and to transfer the Iranian assets out of this country.⁶⁶ The Court stated that because the President nullified the attachments and transferred the Iranian assets pursuant to specific congressional authorization, his actions deserved "the widest latitude of judicial interpretation."⁶⁷ In reaching its conclusion the Court noted that *Dames & Moore* obtained its pre-judgment attachment of the defendant's property after President Carter had frozen the Iranian assets in this country. Thus, the Court reasoned that having acted pursuant to Treasury Department regulations permitting pre-judgment attachments, *Dames & Moore* was on notice of the contingent nature of its interest in the frozen assets.⁶⁸

The Court more elaborately analyzed the President's authority to suspend the claims against Iran pending in American courts. The

63. *Dames & Moore v. Regan*, *cert. granted*, 101 S. Ct. 3071 (1981).

64. *Dames & Moore v. Regan*, 101 S. Ct. 2972 (1981). *Dames & Moore* had filed suit in the District Court for the Central District of California on December 19, 1979, alleging that it was owed over \$3 million plus interest for services performed under a contract with the Atomic Energy Organization of Iran. Pursuant to Treasury Department Regulations, *Dames & Moore* obtained pre-judgment attachments against property of the defendant. On January 27, 1981 the District Court awarded *Dames & Moore* summary judgment against the Government of Iran and the Atomic Energy Organization for the amount claimed under the contract plus interest. Subsequent district court orders prevented *Dames & Moore* from executing its judgment pending appeal by the Government of Iran and the Atomic Energy Organization and vacated all pre-judgment attachments *Dames & Moore* had obtained against the Iranian defendants.

On April 28, *Dames & Moore* filed a separate action in the District Court for declaratory and injunctive relief to prevent the enforcement of the Hostage Agreement and the Treasury Department Regulations implementing the Agreement. On May 28, 1981 the District Court dismissed the second action for failure to state a claim upon which relief could be granted. *Dames & Moore* filed a notice of appeal with the Ninth Circuit on June 3, 1981. On June 4, the Treasury Department issued regulations requiring the transfer out of the United States of all Iranian assets by June 19, 1981. *Dames & Moore* then petitioned the Supreme Court for a writ of certiorari before judgment. The Court granted the petition for the writ and adopted an expedited briefing schedule. The Court heard oral argument on June 24, 1981. 101 S. Ct. 2972, 2977-81.

65. 50 U.S.C. § 1702 (Supp. II 1978). See *infra* notes 104-34 and accompanying text.

66. 101 S. Ct. 2972, 2984.

67. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

68. *Id.* at 2983. See also 31 C.F.R. § 535.805 (1980), which provided that "the provisions of this part and any rulings, licenses, authorizations, instructions, orders, or forms issued thereunder may be amended, modified, or revoked at any time."

Court concluded that neither the IEEPA nor the Hostage Act,⁶⁹ which President Carter had relied on, provided specific statutory authority for the termination of litigation.⁷⁰ The statutes were highly relevant, however, as indicating congressional acceptance of the broad scope of Presidential authority in emergencies such as the Iranian hostage crisis.⁷¹ The Court buttressed this conclusion with evidence of a long history of congressional acquiescence in Presidential power to settle claims of American nationals against foreign governments.⁷² The Court forcefully rejected Dames & Moore's argument that the Executive Order suspending the litigation in American courts circumscribed the jurisdiction of the federal courts in violation of article III of the Constitution.⁷³ Furthermore, the Court refused to read the Foreign Sovereign Immunities Act of 1976 (FSIA) as prohibiting the President from settling the claims of U.S. nationals against foreign governments.⁷⁴ Rather, the Court held that Congress intended the FSIA to simply remove the issue of sovereign immunity as a barrier to suit for U.S. litigants pursuing foreign governments in American courts. The Court therefore held that, in light of the inferences it drew from congressional legislation and from the history of congressional acquiescence in executive claims settlements, the President possessed the authority to suspend the claims pending against Iran in American courts.⁷⁵

The Court refused to consider whether the suspension of litigation constituted a taking within the scope of the fifth amendment.⁷⁶ Though all parties agreed that that issue was not ripe for review, the Court did hold that the Court of Claims would have jurisdiction to hear claims that the Hostage Agreement effected an unconstitutional taking.⁷⁷

III. RELEVANT STATUTES

Complete consideration of the issues presented in the Hostage Agreement requires analysis of three statutory regimes: the Foreign Sovereign Immunities Act of 1976 (FSIA),⁷⁸ the International Emergency Economic Powers Act (IEEPA),⁷⁹ and the century old Hostage

69. 22 U.S.C. § 1732 (1976). *See infra* notes 135-51 and accompanying text.

70. 101 S. Ct. 2972, 2984-85.

71. *Id.* at 2985.

72. *Id.* at 2986-88.

73. *Id.* at 2989.

74. *Id.* at 2989-90.

75. *Id.* at 2990.

76. *Id.* at 2991.

77. *Id.* at 2992.

78. 28 U.S.C. §§ 1602-1611 (1976).

79. 50 U.S.C. §§ 1701-1706 (Supp. II 1978).

Act.⁸⁰ The latter two statutes provide support for the President's authority to agree to the terms of the accord with Iran; the former does not. The FSIA precisely details the circumstances under which a litigant may sue foreign governments and their state agencies in federal courts, and prescribes the procedure for the pre-judgment attachment of the assets of a foreign government. At first blush it seems that if claimants sued Iran pursuant to the terms of the FSIA, the President could not interfere with the litigation.⁸¹ The IEEPA and the Hostage Act, however, give the President great latitude in dealing with international crises, which may include the power to interfere with domestic litigation.⁸² The question thus becomes which of these statutory schemes should govern the litigation against Iran.

A. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

The FSIA codifies four types of immunity that a foreign state, its agencies, and instrumentalities enjoy under American law: jurisdictional immunity,⁸³ immunity from pre-judgment attachment,⁸⁴ immunity from post-judgment attachment,⁸⁵ and immunity from execution upon a judgment.⁸⁶ The FSIA provides for the immunity of a foreign sovereign from jurisdiction in American courts except in specified circumstances.⁸⁷ The exceptions include situations in which the sovereign is deemed to have waived its jurisdictional immunity,⁸⁸ and in which the sovereign is engaged in commercial activity that has an effect in the United States.⁸⁹ In the Iranian asset litigation, the claimants sought federal court jurisdiction under one or both of these exceptions to jurisdictional immunity.⁹⁰

80. 22 U.S.C. § 1732 (1976). The 40th Congress passed this Act in 1868.

81. The plaintiff in *Dames & Moore* made and lost this argument in the Supreme Court. 101 S. Ct. 2972, 2989-91 (1981). See *supra* note 73-75 and accompanying text.

82. Presidents Carter and Reagan relied on these two statutes as authority for interrupting Iranian assets litigation. Exec. Order Nos. 12,276-85, 46 Fed. Reg. 7913-32 (1981); Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

83. 28 U.S.C. § 1604 (1976).

84. *Id.* § 1609.

85. *Id.*

86. *Id.*

87. *Id.* §§ 1604, 1605-1607.

88. *Id.* § 1605(a)(1).

89. *Id.* § 1605(a)(2). Other exceptions include suits that the foreign government itself has instituted (§ 1607), suits involving violations of international law (§ 1605(a)(3)), and suits involving certain torts committed in the United States (§ 1605(a)(5)).

90. See *e.g.*, *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383, 390 (D.N.J. 1979) (commercial exception and waiver exception); *New England Merchant's Nat'l Bank v. Iran Power Generation & Transmission Co.*, 502 F. Supp. 120 (S.D.N.Y. 1980) (waiver exception). Iran's waiver of its jurisdictional immunity is expressed in the Treaty of Amity, Aug. 15, 1955, Iran-United States, art. XI, 8 U.S.T. 901, 908, T.I.A.S. No. 3853:

The FSIA did not substantially alter the criteria to be considered before subjecting a foreign sovereign to suit in the United States. It did, however, significantly alter the procedure by which the determination of immunity was to be made.⁹¹ Before Congress passed the FSIA, the Department of State determined a foreign government's immunity from suit on a case-by-case basis.⁹² The Department of State would accept legal briefs and sometimes hear oral arguments before making its recommendation for or against immunity to the appropriate court.⁹³ The Department of State's recommendation was binding on the court, even if it appeared that the Department had considered political factors in making its decision.⁹⁴ To achieve one of its major purposes—depoliticizing the immunization process⁹⁵—the FSIA provides for the judicial determination of sovereign immunity questions.⁹⁶ Accordingly, in the Iranian asset

No enterprise of either [the United States or Iran], including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

Id. ¶ 4.

91. HOUSE COMM. ON THE JUDICIARY, JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES, H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7, 19, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6606, 6616; SENATE COMM. ON THE JUDICIARY, DEFINE JURISDICTION OF U.S. COURTS IN SUITS AGAINST FOREIGN STATES, S. REP. NO. 1310, 94th Cong., 2d Sess. 17 (1976).

The United States had already announced its formal abandonment of the "absolute theory" of foreign sovereign immunity that Justice Marshall expressed in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). The abandonment came in the form of the "Tate Letter" that declared that the Department of State would no longer grant immunity to friendly sovereigns in suits arising from private or commercial activity. 26 DEP'T ST. BULL. 984-85 (1952). The Tate Letter did not, however, offer specific guidelines for determining when a state's acts were private or commercial. See Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 SW. L.J. 1009, 1011-12 (1979); Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 211-18 (1979); von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 41 (1978).

92. H.R. REP. NO. 1487, *supra* note 91, at 7; S. REP. NO. 1310, *supra* note 91, at 10.

93. Kahale & Vega, *supra* note 91, at 215.

94. H.R. REP. NO. 1487, *supra* note 91, at 7; S. REP. NO. 1310, *supra* note 91, at 10; Kahale & Vega, *supra* note 91, at 215-16; see also Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543, 547-49 (1977).

95. H.R. REP. NO. 1487, *supra* note 91, at 7; S. REP. NO. 1310, *supra* note 91, at 8-9. See also Kahale & Vega, *supra* note 91, at 219-20; von Mehren, *supra* note 91, at 45.

96. "The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602 (1976).

litigation the lower federal courts decided that Iran was not immune from the American suits.

Under the FSIA a foreign state is immune from pre-judgment attachment of its assets unless two conditions are met: first, the foreign state has explicitly waived its immunity from pre-judgment attachment; and second, the purpose of the attachment is to secure a judgment that may be entered rather than to obtain jurisdiction.⁹⁷ The district courts have disagreed on the validity, under the FSIA, of the pre-judgment attachments of Iranian assets. The courts split on whether the Iran-United States Treaty of Amity constitutes a waiver of immunity from pre-judgment attachment.⁹⁸ The Hostage Agreement purports to remove federal court jurisdiction to hear suits against Iran and to nullify the attachments obtained pursuant to the freeze.

In *Dames & Moore v. Regan*, the American company argued that passage of the FSIA in 1976 deprived the President of any power he may have possessed to suspend domestic litigation as part of a claims settlement with a foreign country.⁹⁹ Since the FSIA gave the judiciary the exclusive voice in determining the sovereign immunity of foreign governments, Dames & Moore maintained that President Carter's interference with the litigation, after the courts had decided Iran was not immune from suit, was an unconstitutional circumscription of the courts' jurisdiction under article III. The Supreme Court rejected this argument.¹⁰⁰ First, the Court characterized the President's action as a change in the substantive rule of law governing the suits, rather than as a modification of federal court jurisdiction.¹⁰¹ Second, the Court read the FSIA narrowly. According to the Court, when Congress passed the statute, it did not intend

97. *Id.* § 1610(d).

98. See *supra* note 90 for the pertinent portion of the Treaty. Chief Judge Fisher of the New Jersey District Court has held that although the Treaty of Amity is not an explicit waiver of immunity for the purposes of § 1610(d), a reasonable reading of that Treaty indicates that it was intended to allow pre-judgment attachment and that § 1609 preserves that intention. *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383, 394-95 (D.N.J. 1979).

Judge Duffy of the Southern District of New York maintains that the pre-judgment attachments of Iranian assets are invalid under the FSIA because of the conspicuous absence of an express waiver of immunity in the Treaty. *New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*, 502 F. Supp. 120, 126 (S.D.N.Y. 1980). Judge Duffy went on to hold, however, that the Carter-imposed freeze of Iranian assets overcomes the immunity from pre-judgment attachment that FSIA would otherwise protect. *Id.* at 130. Judge Kellcher also held that in the Iran-United States Treaty of Amity, Iran did not explicitly waive its immunity from pre-judgment attachments. *Sec. Pac. Nat'l Bank v. Gov't of Iran*, 513 F. Supp. 864, 880 (C.D. Cal. 1981).

99. 101 S. Ct. 2972, 2989 (1981).

100. *Id.* But see *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 518 F. Supp. 69, 81-83 (S.D.N.Y. 1981).

101. 101 S. Ct. 2972, 2989.

to impair the President's ability to conduct foreign policy. The Court stated that presidential discretion in this area includes a power to settle American claims against foreign countries.¹⁰²

B. THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT

1. History and Policy

The relevant grant of authority under the IEEPA, drawn directly from the Trading With the Enemy Act of 1917 (TWEA),¹⁰³ provides

[T]he President may . . .

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, 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.¹⁰⁴

The primary purpose of the IEEPA, which became law in 1977, was to redefine and delimit the President's power to regulate international economic transactions during wars or national emergencies.¹⁰⁵ Two developments accounted for passage of the IEEPA. First, section 5(b) of the TWEA had become an "essentially unlimited grant of authority" to the President.¹⁰⁶ To illustrate, the fact that President

102. *Id.* at 2989-90.

103. 50 U.S.C. app. §§ 1-44 (1976).

104. 50 U.S.C. § 1702(a)(1) (Supp. II 1978).

105. HOUSE COMM. ON INTERNATIONAL RELATIONS, TRADING WITH THE ENEMY ACT REFORM LEGISLATION, H.R. REP. NO. 459, 95th Cong., 1st Sess. 1-2 (1977); SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, INTERNATIONAL EMERGENCY ECONOMIC POWERS LEGISLATION, S. REP. NO. 466, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 4540, 4541. See also Note, *Presidential Emergency Powers Related to International Economic Transactions: Congressional Recognition of Customary Authority*, 11 VAND. J. TRANSNAT'L L. 515 (1978).

106. H.R. REP. NO. 459, *supra* note 105, at 7. Section 5(b), as amended by the Banking Act of 1933, conferred upon the Executive four major groups of powers for use in time of congressionally declared war or other Presidentially declared national emergency:

(a) Regulatory powers with respect to foreign exchange, banking transfers, coin, bullion, currency, and securities;

(b) Regulatory powers with respect to "any property in which any foreign country or a national thereof has any interest";

(c) The power to vest "any property or interest of any foreign country or national thereof"; and

Truman's declaration of emergency in 1950 at the time of the Korean Conflict was never terminated, made it possible for the TWEA to be the cited authority for four different presidential activities occurring as late as 1976.¹⁰⁷ More specifically, there were four major objections to continuing presidential reliance on the TWEA. First, the TWEA was no longer a grant of authority reserved for wartime use.¹⁰⁸ Second, Presidents had invoked the TWEA to support actions of an entirely domestic nature.¹⁰⁹ Third, Congress had no means of reviewing presidential exercise of the TWEA authority.¹¹⁰ Fourth, the duration of the emergencies was limitless.¹¹¹

(d) The powers to hold, use, administer, liquidate, sell, or otherwise deal with "such interest or property" in the interest of and for the benefit of the United States.

Id. at 2.

A survey of the history of its use reveals that Presidents were using their broad powers under the TWEA in both the domestic and international economic arenas. The President triggered his TWEA authority by declaring a national emergency. 50 U.S.C. app. § 5(b)(1) (1976).

107. The four mentioned activities were

(a) Promulgation of the Foreign Assets Control Regulations, which provided that all transactions between the U.S. and China, North Korea, Vietnam, and Cambodia were prohibited except by license of the Department of the Treasury. 31 C.F.R. §§ 500.101-.809 (1976).

(b) Promulgation of the Cuban Assets Control Regulations, which provided that all transactions between the U.S. and Cuba were similarly prohibited, with certain exceptions. 31 C.F.R. §§ 515.101-.809 (1976).

(c) Promulgation of the Transaction Control Regulations, which prohibited U.S. persons from participating in shipping strategic goods to any of fourteen Communist countries. 31 C.F.R. §§ 505.01-.60 (1976).

(d) Promulgation of the Foreign Funds Control Regulations, which continued the World War II blockage of the assets of Czechoslovakia, Estonia, East Germany, Latvia and Lithuania. 31 C.F.R. §§ 520.01-.809 (1976).

108. The original language of the TWEA of 1917 limited the President's use of his powers under the Act to wartime use only. In 1933, President Roosevelt declared a national emergency, and under that emergency, a bank holiday to prevent gold hoarding. The President took this domestic action citing § 5(b) of the TWEA for authority. When Congress passed the Emergency Banking Act of 1933 it amended § 5(b) to provide that the President could exercise his authority under that section in time of national emergency. H.R. REP. NO. 459, *supra* note 105, at 4; S. REP. NO. 466, *supra* note 105, at 2.

109. H.R. REP. NO. 459, *supra* note 105, at 7; S. REP. NO. 466, *supra* note 105, at 2.

110. H.R. REP. NO. 459, *supra* note 105, at 7. In hearings before the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations, several respected scholars commented on the absence of any congressional supervision or other objective criteria delimiting the proper scope of the President's authority under the TWEA.

Professor Stanley D. Metzger, of the Georgetown University Law Center, commented that

No statement of findings and policy, and no standards to guide its administration are set forth in section 5(b). There is no provision for congressional participation There is no provision for congressional consideration of whether a particular action remains provident after it is taken, and to terminate it if not. There is no provision for Presidential reporting at intervals concerning actions he has taken under section 5(b), with reasons for his actions.

Professor Andreas F. Lowenfeld, of New York University Law School, remarked similarly:

The second development giving rise to the IEEPA was Congress's passage, in 1976, of the National Emergencies Act.¹¹² That Act provided that all powers and authorities the President possessed as a result of any declaration of emergency still in effect on the date of its passage would terminate two years from the date of enactment. The National Emergencies Act then provided new procedures for the declaration, conduct, and termination of future emergencies, including provision for congressional termination, by concurrent resolution, of a national emergency. The Act exempted from its coverage, however, certain emergency power statutes then in use because of their deemed importance for the continued functioning of the government. One of these exempted statutes was section 5(b) of the TWEA. Congress provided this exemption so that it could more carefully study how to revise these important statutes.

The bill incorporating the IEEPA is the result of Congress's careful review of section 5(b).¹¹³ Congress passed the IEEPA in 1977, to deal with unusual or threatening situations involving the national security, foreign policy, or economy of the United States. The IEEPA grants Presidential power where one of these situations, having its source wholly or partially abroad, causes the President to declare a national emergency.¹¹⁴ The TWEA is once again restricted to wartime use.¹¹⁵ In passing the IEEPA, Congress intended to provide the President with power to regulate only international eco-

First, there seems to be no way under existing law to terminate a state of emergency proclaimed by the President except by another Presidential proclamation; and no practical constraint limiting actions taken under emergency authority to measures related to the emergency. The Trading With the Enemy Act itself, and particularly section 5(b), is legislation without limit of time. It has been in effect in its present [sic] form since 1941 and has had no expiration date or requirement of congressional scrutiny or review. Second, the delegated authority is not only broad: there are no criteria at all. Subject only to the existence of a national emergency, the power of the President, acting "through any agency he may designate" to affect property or transactions is virtually unlimited, provided there is at least some foreign connection in the property or transaction affected.

Id. at 8.

111. In its report, the House Committee on International Relations observed that:

[t]hese powers may be exercised so long as there is an unexpired declaration of national emergency on the books, whether or not the situation with respect to which the emergency was declared bears any relationship to the situation with respect to which the President is using the authorities.

Id. at 7.

112. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified in scattered titles of U.S.C.).

113. Act of Dec. 28, 1977, Pub. L. No. 95-223, 91 Stat. 1626 (1977).

114. 50 U.S.C. § 1701 (Supp. II 1978).

115. Act of Dec. 28, 1977, Pub. L. No. 95-223, § 101(a), 91 Stat. 1626 (1977); H.R. REP. NO. 459, *supra* note 105, at 10, 15; S. REP. NO. 466, *supra* note 105, at 4.

conomic transactions, not purely domestic matters.¹¹⁶ Additionally, Congress required the President, when possible, to consult with Congress before exercising any of his power under the IEEPA, and mandated regular consultation so long as the President exercised such powers.¹¹⁷ Congress further required the President to transmit to it a detailed report immediately after each exercise of IEEPA authority.¹¹⁸ Congress reserved to itself authority to terminate any national emergency and to prohibit further presidential exercise of IEEPA power.¹¹⁹

2. *IEEPA and the Dissolution of Attachments*

In *Dames & Moore v. Regan*, the Supreme Court held that the IEEPA provided specific congressional authorization for the President's nullification of pre-judgment attachments of Iranian assets.¹²⁰ *Dames & Moore* presented a relatively easy case because the American company obtained the attachment pursuant to Treasury Department licensing procedures after the November 1979 asset freeze.¹²¹ Treasury Department regulations clearly stated that all licenses authorizing attachments were revocable at any time.¹²² Therefore, persons obtaining attachments pursuant to the regulations were on notice that the President might alter their interest in the assets at any time.

116. H.R. REP. NO. 459, *supra* note 105, at 10-11.

117. 50 U.S.C. § 1703(a) (Supp. II 1978).

118. *Id.* § 1703(b). The President must specify:

- (a) the circumstances which necessitate such exercise of authority;
- (b) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;
- (c) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;
- (d) why the President believes such actions are necessary to deal with those circumstances; and
- (e) any foreign countries with respect to which such actions are to be taken with respect to those countries.

119. *Id.* § 1706(b).

120. 101 S. Ct. 2972, 2984.

121. The Court, in a footnote, dismissed *Dames & Moore's* argument that only the Treasury Department licenses to obtain attachments, not the attachments themselves, were revocable. 101 S. Ct. 2972, 2984 n.6.

Dames & Moore also failed to persuade the Court that it acquired a property interest in the attachment that remained vested even after the revocation of the licenses. The Court, therefore, answered in the negative the claim that *Dames & Moore* deserved just compensation under the fifth amendment for the nullification of its interest in the once-attached assets. *Id.* Judge Duffy accepted *Dames & Moore's* line of argument in *Marchalk Co. v. Iran Nat'l Airlines Corp.*, 518 F. Supp. 69, 98-100 (S.D.N.Y. 1981).

122. 31 C.F.R. § 535.805 (1980).

On this issue, *Dames & Moore* provides a sound conclusion. Reading the FSIA and the IEEPA together, it is clear that Congress intended the IEEPA, not the FSIA, to govern the control of foreign assets in times of crisis. Congress passed the IEEPA to deal with crises; it intended the FSIA to cover routine litigation. Indeed, even *Dames & Moore* agreed that the President could have entirely forbidden the attachment of Iranian assets.¹²³ If this is so, there is no valid justification for thwarting the President's efforts to do something less than fully barring attachments.

Two circuit courts agreed that the IEEPA authorized the President to nullify the attachment of Iranian assets.¹²⁴ In addition, a 1953 Supreme Court opinion interpreting presidential authority under the TWEA also supports this result.¹²⁵ In *Orvis v. Brownell*,¹²⁶ the Court empowered the Alien Property Custodian (acting under presidential direction) to freely dispose of frozen assets in which U.S. litigants had obtained post-freeze attachments. The attachments in *Orvis* were ineffective against the President's authority to transfer, vest, and dispose of the blocked assets as he saw fit.

3. IEEPA and the Termination of Litigation

Although the IEEPA endows the President with a variety of powers, it does not specifically authorize the nullification of claims.¹²⁷ The IEEPA only gives the President the authority to regulate international economic transactions.¹²⁸

123. 101 S. Ct. 2972, 2984 n.6.

124. 50 U.S.C. § 1702(a)(1)(A), (B) (Supp. II 1978). See *Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430 (D.C. Cir. 1981); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800 (1st Cir. 1981).

125. The *Marschalk* court disagreed with the treatment of this early case and distinguished it. *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 518 F. Supp. 69, 96-97 (S.D.N.Y. 1981).

126. 345 U.S. 183 (1953). In *Orvis*, U.S. litigants had obtained attachments against the property of Japanese nationals that was subject to a Presidential blocking order entered pursuant to § 5(b) of the TWEA. The Alien Property Custodian subsequently "vested" the property against which the attachment was entered, and refused the litigants a license to use vested funds in satisfaction of their judgment against the Japanese nationals.

127. The dissolution of attachments is an action distinct from the termination of litigation. The claims themselves have "an existence apart from the attachments which accompanied them." *Dames & Moore v. Regan*, 101 S. Ct. 2972, 2984 (1981). As a practical matter, a claimant whose attachment on the property of a foreign state is dissolved, but whose claim is not, may continue to litigate in a federal court. If the claimant obtains a judgment, it may pursue the appropriate execution remedies under the FSIA. 28 U.S.C. §§ 1609-1611 (1976). Thus, it may execute on any property that Iran later brings into the United States and which is not then frozen. The claimant may also attempt to execute its judgment abroad. Therefore, one must consider separately the cancellation of the claims and the nullification of the attachments.

128. 50 U.S.C. § 1702 (Supp. II 1978). See *supra* notes 103-19 and accompanying text.

Accordingly, the question presented in the Hostage Agreement litigation is whether suits that involve the property of a foreign government are "international economic transactions" under the IEEPA. The IEEPA allows the President to "regulate" the "transfer" of property,¹²⁹ but that may not entail the power to remove the suits from federal court. A literal reading of the statute does not support an interpretation that such suits are international economic transactions. A suit in a domestic court will at most determine the rights to the disputed property. It will not necessarily dictate a "transaction" involving the property.

Significantly, the statute's legislative history indicates a congressional concern for the ability of American citizens to recover claims against foreign governments.¹³⁰ This history supports the President's claim that the IEEPA authorizes actions that are related to a later claims settlement.¹³¹ But this legislative history will also support an argument against the President's power to suspend claims. Domestic plaintiffs, by focusing on the inconveniences and uncertainties of arbitration at The Hague, can argue that the removal of the cases frustrates, rather than enhances, their ability to recover from Iran.¹³² On balance, it seems that because the legislative history merely indicates a concern for recovery against foreign governments, but does not indicate how that recovery is to be obtained, it does not persuasively argue in favor of broad presidential authority. This is especially true in light of the fact that when Congress passed the IEEPA

129. 50 U.S.C. § 1702(b) (Supp. II 1978).

130. H.R. REP. NO. 459, *supra* note 105, at 17.

131. Letter from Attorney General Benjamin R. Civiletti, *reprinted in Senate Banking Hearing, supra* note 1, at 117. This argument is stronger if made in conjunction with an argument that the President has inherent powers to settle claims against foreign governments. *See infra* notes 134-42 and accompanying text. The government has defended the provision in the Hostage Agreement that requires claimants to seek recovery against Iran in the Iran-United States Claims Tribunal by maintaining that the claimants are better off in The Hague than they would have been in domestic courts. Many suits are based on breaches of contracts that provided for arbitration instead of litigation, or that provided that any litigation must occur in Iran. Also, claimants would have had to overcome the strong defense of sovereign immunity before many of the suits could have proceeded. The Government saw the elimination of these barriers to suit as significant benefits flowing to claimants from the Hostage Agreement. *See e.g., Senate Foreign Relations Hearings, supra* note 1, at 58 (statement of Warren M. Christopher, Former Deputy Secretary of State).

132. Some claimants consider themselves worse off if they must resort to The Hague to obtain recoveries against Iran. Going to Europe entails higher travel expenses. The administrative costs of arbitrating may be greater. The claimants feel they have no real assurance that Iran will cooperate in upholding its end of the Agreement. The claimants have no way of predicting the length of time required to arbitrate their claim and receive a decision. The claimants are unsure of the three foreign arbitrators' dispositions and attitudes about the merits of the claimants' positions. *See Senate Banking Hearing, supra* note 1, at 92 (panel discussion).

it intended to curtail the broad authority the President had been exercising under the TWEA.

Moreover, neither the IEEPA nor its predecessor, the TWEA, was ever viewed as empowering the President to remove pending cases from the jurisdiction of federal courts. In fact, in other cases involving frozen assets, courts have held that the freeze itself does not prevent the courts from litigating the rights to the frozen assets.¹³³ Thus, it seems that Congress did not, under the IEEPA, intend to delegate to the President the power to remove cases from the jurisdiction of federal courts. But it should be noted that even if the IEEPA does not represent an express grant of authority to terminate litigation, it is nonetheless highly relevant as an indicator of congressional support for presidential action in times of emergency.¹³⁴

C. THE HOSTAGE ACT

President Carter also relied on the so-called Hostage Act¹³⁵ for authority to settle the Iranian hostage crisis. This obscure Act, enacted in 1868, provides

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to the Congress.¹³⁶

The Hostage Act does not explicitly grant the President the power to nullify domestic suits or attachments against foreign governments. Nowhere are these powers discussed in the congressional

133. *Zittman v. McGrath*, 341 U.S. 446, 451 (1951) (by Executive Orders in 1941 the President froze the assets of German nationals); *Nat'l Airmotive Corp. v. Iran*, 499 F. Supp. 401, 404-05 (D.D.C. 1980); *Vishipco Line v. Chase Manhattan Bank*, No. 77 Civ. 1251, slip op. at 5 (S.D.N.Y. Nov. 3, 1978).

134. *See* 101 S. Ct. 2972, 2985 (1981).

135. 22 U.S.C. § 1732 (1976). Congress passed the Act because "naturalized citizens of the United States being present in Great Britain, without the commission of any offense, had been arrested, tried, convicted, sentenced, and punished as criminals, upon the ground that they were natural born citizens of the Crown. . . ." HOUSE COMM. ON FOREIGN AFFAIRS, REPORT ON THE RIGHTS OF AMERICAN CITIZENS IN FOREIGN STATES, 40th Cong., 2d Sess. (1868), *reprinted in* CONG. GLOBE, 40th Cong., 2d Sess. pt. 5, app. 94, 94 (1868).

136. 22 U.S.C. § 1732 (1976).

debates on the Act.¹³⁷ But these omissions are not significant. Congress was considering the Hostage Act at a time when the President, in effect, already exercised power to forbid domestic suits against foreign sovereigns: the executive branch, until the mid-twentieth century, made all decisions regarding a foreign sovereign's immunity from suit.¹³⁸ Therefore, the congressional debates focused on other powers the President could exercise to seek the release of Americans held captive abroad.¹³⁹ Clearly, the drafting Congress intended the President to enjoy a variety of powers under the Act.¹⁴⁰ The debates show that Congress intended the President to have authority to commit acts having effects both at home and abroad.¹⁴¹ Indeed, one congressman stated that the President "is to do all he can under the Constitution and laws in every way to secure the release of a citizen" who is improperly detained.¹⁴²

Judicial interpretations of the Hostage Act support the conclusion that the President possesses broad authority under that Act. Before the *Dames & Moore* decision, the only important interpreta-

137. CONG. GLOBE, 40th Cong., 2d Sess. pt. 3, 2311-18; pt. 5, 4204-09, 4231-35, 4352-60 (1868).

138. See *supra* notes 91-96 and accompanying text.

139. Congress considered the power to employ diplomatic means, the power to imprison summarily the citizens of nations that unjustly imprisoned Americans, and the power to terminate all commercial intercourse with a foreign nation unjustly holding American prisoners. CONG. GLOBE, 40th Cong., 2d Sess. pt. 5, 4233, 4355; pt. 3, 2317, 4205 (1868). The final version of the Hostage Act contains the first of these mentioned powers: the President is to inquire into the reasons for the imprisonment, and to demand the release of the captive Americans. The latter two powers are not mentioned in the Act partly because Congress did not want to appear to be limiting the President's authority to only enumerated powers. Admittedly, there was vigorous opposition to providing the President with the power to summarily imprison foreigners. See *e.g.*, CONG. GLOBE, *supra* note 137, pt. 5, at 4205-06. "[T]o seize an innocent citizen or subject of another country and hold him in prison on account of the improper arrest of an American citizen would be an act of personal injustice and outrage." *Id.* at 4234 (statement of Sen. Morton).

140. [T]hose portions of the bill which confer the specific powers there named upon the President should be stricken out, for the reason that they only provide two specific ways by which the rights of American citizens abroad shall be vindicated; one is by suspending commercial intercourse with the foreign country, and the other is by arresting a citizen of that country in the United States, when there may be a great variety of cases arising where other and different means would be equally effective, and where the end desired could be accomplished without resorting to such dangerous and violent measures.

Id. at 4233 (statement of Sen. Williams).

141. See Note, *The Hostage Act: New Life for an Old Law*, 14 CORNELL INT'L L.J. 369 (1981).

142. CONG. GLOBE, *supra* note 137, at 4333 (statement of Sen. Williams). This statement referred to the form of the bill that Congress eventually approved. At several points in the debates congressmen discussed amendments that would have specifically required the President to exercise all his powers under the Constitution. These did not pass because they were thought to lack precision. *Id.* at 4333, 4354. Nonetheless, the Congress seemed to be in agreement that the President should be able to exert his full constitutional powers.

tions of the Hostage Act involved its use to authorize travel restrictions. The President successfully relied on the Hostage Act to refuse to allow American citizens to travel to communist nations,¹⁴³ and to refuse to issue passports to Communist Party members.¹⁴⁴ These cases confirm the President's ability to take actions under the Hostage Act that have effects both at home and abroad. Indeed, there is nothing to suggest that the President may not exercise his fullest constitutional powers under the Hostage Act.¹⁴⁵

In *Dames & Moore v. Regan*, the Supreme Court did not consider the Hostage Act as authority for the President's action nullifying attachments of Iranian assets in this country. The Court was satisfied that the IEEPA authorized that action.¹⁴⁶ The Court did, however, examine the language and history of the Hostage Act with reference to the President's suspension of domestic litigation against Iran. The Court noted that the broad language of the Act suggested it would cover this presidential action,¹⁴⁷ but refused to rely on the Hostage Act as specific authorization for the interference with domestic litigation.¹⁴⁸ After studying the legislative history, the Court concluded that Congress passed the Hostage Act to deal with a

143. *Zemel v. Rusk*, 381 U.S. 1 (1965) (Department of State refusal to issue passport to Cuba upheld); *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959) (Department of State refusal to issue passports to China, Korea, and Viet Nam upheld). Even though the President did not deny these travel permits in response to the taking of American prisoners, the President was justified in part because his actions prevented a situation from arising that would require him to invoke his Hostage Act powers. That is, these passport refusals seem to have anticipated the taking of hostages by the communist nations. *Zemel v. Rusk*, 381 U.S. 1, 15 (1965); *Worthy v. Herter*, 270 F.2d 905, 910 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959).

144. *Briehl v. Dulles*, 248 F.2d 561 (D.C. Cir. 1957), *rev'd sub nom. Kent v. Dulles*, 357 U.S. 116 (1958) (regulations prohibiting the issuance of passports to Communist Party members upheld).

145. There is dicta in *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959), that may indicate that the President possesses only diplomatic powers under the Hostage Act. "The instrumentalities he must use to fulfill the congressional mandate are diplomatic, or foreign-service consular." *Id.* at 910. A more complete reading of the opinion, however, reveals that the President's powers may not be so limited.

A decision on the part of the President to prevent, if possible, the necessity for calling into play his diplomatic instrumentalities *and the use of his powers—persuasive or compulsory*—upon a foreign nation is a phase of "foreign affairs."

The selection by him of the means to be used in a given such case rests in large part upon policy, obviously foreign policy.

Id. (emphasis added). It has been stated elsewhere that the Hostage Act requires the President "to exert the full diplomatic *and political power* of the United States on behalf of any citizen . . . in jeopardy abroad." *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (emphasis added). Certainly, then, the Hostage Act authorizes the use of more than merely diplomatic instrumentalities. See generally Note, *The Hostage Act: New Life for an Old Law*, 14 CORNELL INT'L L.J. 369 (1981).

146. 101 S. Ct. 2972, 2984.

147. *Id.* at 2985.

148. *Id.*

situation quite unlike that presented in the Iranian crisis.¹⁴⁹ Furthermore, the Court was not convinced that Congress contemplated the type of actions taken in the Iranian crisis. Congress simply may have contemplated reprisals directed against the offending nation and its citizens.¹⁵⁰ Although it would not read the Hostage Act as specific authorization for the suspension of litigation, the Court noted that it was relevant as an indication of "congressional acceptance of a broad scope for executive action in circumstances such as those presented" by the hostage crisis.¹⁵¹

D. SUMMARY

The analysis of the relevant statutes indicates that the FSIA, passed in 1976, codified the current doctrines of sovereign immunity and gave the judiciary the exclusive voice in determining the extent of immunity a foreign state would enjoy in United States courts. This Act, however, was directed primarily at routine commercial litigation and may not have diminished the President's power to conduct foreign policy and settle suits against foreign states in times of crisis. The IEEPA, passed one year later, specifically authorized the nullification of attachments. Although neither the IEEPA nor the Hostage Act specifically authorized the cancellation of the claims, each of these statutes indicates that Congress intended to endow the President with a broad array of powers in dealing with international crises. This congressional support is crucial to an evaluation of the constitutionality of these actions.

IV. CONSTITUTIONALITY OF SUSPENSION OF LITIGATION

The President's nullification of the attachments on Iranian assets was constitutional. The President acted with the express authority of the Congress; the language of the IEEPA authorized the action. The case for the constitutionality of the Executive Order suspending the Iranian litigation pending in American courts is not so clear. In the field of foreign affairs, the President's powers extend beyond those that the drafters provided in the Constitution, and those that the Congress has expressly delegated to him.¹⁵² Accord-

149. *Id.*

150. *Id.*

151. *Id.*

152. "Students of American government, and citizens generally, know that American foreign relations are in the charge of the President." L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 37 (1972). "The President as Chief Executive, Commander-in-Chief and the representative organ, seems to have sufficient power to make all political decisions in foreign affairs not exclusively vested in Congress or the treaty-making power and

ingly, the citations of authority in the Executive Orders implementing the Hostage Agreement included not only the IEEPA and the Hostage Act, but also "the authority vested in [the] President by the Constitution and statutes."¹⁵³ These powers are the President's inherent powers over the conduct of foreign affairs.¹⁵⁴

The President's inherent powers are great,¹⁵⁵ but they are not unlimited. At the least, they are subject to the limits of the Constitution.¹⁵⁶ Thus, although the President may assume powers that are

not conflicting with international law, treaty or existing act of Congress." Q. WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 267 (1922). See also E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1948*, at 216-24 (1948). The landmark case espousing the broad foreign relations power of the President is *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), wherein Justice Sutherland, *inter alia*, reiterated that, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *Id.* at 319 (quoting *ANNALS OF CONG.* 6th Cong., col. 613 (1800) (statement of John Marshall)).

153. Exec. Order Nos. 12,276-85, 46 Fed. Reg. 7913-32 (1981); Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

154. The Constitution expressly provides that the President shall be Commander in Chief (U.S. CONST. art. II, § 2, cl. 1), make treaties (*id.* cl. 2), appoint ambassadors (*id.*), and faithfully execute the laws, (*id.* § 3). Those powers not specifically enumerated are inherent powers. E. CORWIN, *supra* note 126; see also L. HENKIN, *supra* note 152, at 16-28.

155. A stranger reading the Constitution would get little inkling of such large Presidential authority, for the powers explicitly vested in him are few and seem modest. . . . What the Constitution says and does not say, then, can not have determined what the President can and can not do. The structure of the federal government, the facts of national life, the realities and exigencies of international relations, the practices of diplomacy, have afforded Presidents unique temptations and unique opportunities to acquire unique powers.

. . . .

As a result, in addition to powers which were indisputably the President's by explicit enumeration, many more came to him by accretion. . . .

L. HENKIN, *supra* note 152, at 37-38. See also E. CORWIN, *supra* note 152, at 209-10.

The source of the foreign relations powers of the federal government in general is disputed. Justice Sutherland seemed to suggest that the foreign affairs powers of the federal government are extra-constitutional. He stated that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). Instead, he contended that when the American colonies separated from Great Britain, the powers of external sovereignty passed directly from the Crown to the federal government. *Id.* at 316. Commentators have criticized this theory. Specifically, some have suggested that Justice Sutherland's history is inaccurate because at the birth of the Union, the federal government did not in fact exercise external sovereignty. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *YALE L.J.* 467 (1946). But whether his reasons are right or wrong, the vitality of Justice Sutherland's doctrine of broad federal powers over foreign affairs remains unquestioned. L. HENKIN, *supra* note 152, at 23-28.

156. See generally L. HENKIN, *supra* note 152, at 94-99. Moreover, it is clear that even Executive settlement agreements may not violate the Constitution. "[A]n executive agreement, not being a transaction which is even mentioned in the Constitution, cannot impair Constitutional rights." *Seery v. United States*, 127 F. Supp. 601, 606 (Ct. Cl. 1955); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 171 (1978). See also L. HENKIN, *supra* note 152, at 251-81.

not specifically granted to him by the Constitution,¹⁵⁷ he may not usurp powers that the Constitution clearly grants to Congress.¹⁵⁸ In addition, the President's foreign affairs powers are not exempt from those constitutional limitations that favor individual rights.¹⁵⁹ Therefore, the inquiry into the constitutionality of the President's order suspending the Iranian litigation must focus on two questions. First, whether the President's actions violated the doctrine of separation of powers because of his interference either with Congress's establishment of federal court jurisdiction or with the judiciary's exercise of that jurisdiction.¹⁶⁰ Second, even if the President's actions did not violate principles of separation of powers, whether the interference with the litigation constituted a taking under the fifth amendment, thus entitling the claimants to just compensation.

A. SEPARATION OF POWERS

1. Framework for Analysis

Over the years the courts have employed several conceptual approaches to analyze separation of powers problems.¹⁶¹ Of these,

Even a properly ratified treaty may not conflict with the Constitution. *Reid v. Covert*, 354 U.S. 1, 16-17 (1957); *L. TRIBE, supra*, at 169-70. Therefore, *a fortiori*, an executive agreement may not transgress constitutional boundaries.

157. In the field of foreign affairs, the lines distinguishing the powers of the President from the powers of the Congress are blurred. The President and the Congress share the power to conduct foreign affairs and courts do not require rigid delegations of power.

[T]he foreign relations powers appear not so much "separated" as fissured, along jagged lines indifferent to classical categories of power: some powers and functions belong to the President, some to Congress, some to the President-and-Senate; some can be exercised by either the President or the Congress, some require the joint authority of both. . . . Delegations by Congress to the President have been extensive and constant and *Curtiss-Wright* [299 U.S. 304 (1936)] tells us that in foreign affairs the principle of Separation does not bar them.

L. HENKIN, supra note 152, at 32. Therefore, it would be unusual and unnecessary to require that the IEEPA or the Hostage Act contain an explicit delegation of power to assure constitutionality. These statutes are valuable as indicators of congressional approval of the President's power to cancel suits against Iran.

158. [The President] cannot exercise, even for foreign affairs purposes, the general powers allocated to Congress: he cannot regulate patents or copyrights or the value of money, or establish post offices, or dispose of American territory or property; he cannot enact necessary and proper laws to carry into execution the powers of Congress or even his own powers, for example, criminal laws to enforce an arms embargo. He cannot spend money on his own authority for foreign aid, or draw funds from the Treasury, without Congressional appropriation, to build an embassy.

L. HENKIN, supra note 152, at 95-96.

159. *L. HENKIN, supra* note 152, at 251-81.

160. U.S. CONST. art III.

161. There is no single, generally accepted procedure for analyzing separation of powers problems. Indeed, one commentator has made a strong argument that legalisms are of little use in this field and that, instead, a strong appreciation of current political realities is essential to a sensible resolution of these issues. Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 OR. L. REV. 211, 213 (1973).

the approach Justice Jackson took in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*¹⁶² is most readily applicable to foreign affairs issues.¹⁶³ In *Dames & Moore v. Regan*, the Court followed the general framework set out in *Youngstown*.¹⁶⁴ Justice Jackson outlined three categories of Presidential action:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.¹⁶⁵

2. *President Acting With Congressional Authorization*

In upholding the Hostage Agreement, the Supreme Court in *Dames & Moore* held that the President's actions suspending the litigation fit into the first category under Justice Jackson's analysis.¹⁶⁶ As support for the President's actions, the Court relied not only on Congress's implied grants of broad powers to deal with international emergencies discovered in the IEEPA and the Hostage Act,¹⁶⁷ but also on Congress's history of acquiescence in executive settlements.¹⁶⁸ Crucial to the Court's reasoning was the fact that as a matter of international practice, the executive branch has historically enjoyed the power to enter into international claims settlement agreements.¹⁶⁹ The Court did not adequately point out, however, that the Hostage Agreement settling the Iranian crisis differs from previous claims settlement agreements, and that Congress's position on claims settlements generally is far from clear.

Nevertheless, a convenient summary of four conceptual approaches to separation of powers issues appears in Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 686-97 (1978).

162. 343 U.S. 579, 634 (1952) (Jackson, J., concurring). This well-known case involved the validity of President Truman's effort to seize and operate the nation's steel mills in order to avert a nationwide strike by the steelworkers. The Court held the Presidential action unconstitutional.

163. L. HENKIN, *supra* note 152, at 104-08.

164. 101 S. Ct. 2972, 2977 (1981).

165. 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

166. 101 S. Ct. 2972, 2990 (1981).

167. *Id.*

168. *Id.* at 2987-88.

169. *Id.*

a. Claims Settlement Practice

Today, there are three methods by which a United States national may assert a claim against a foreign government.¹⁷⁰ First, the national may institute suit in an American court.¹⁷¹ The FSIA currently provides the only means of access to a federal court for a suit against a foreign sovereign.¹⁷² Second, the national may institute proceedings in the courts of the foreign sovereign.¹⁷³ The American national, however, is then subject to the laws of the foreign sovereign. Third, if these procedures fail, the national may ask the United States government to espouse his claim.¹⁷⁴ In this last situation, where the national has no other recourse for his claim, the President exercises his broadest powers to dispose of the private claim.¹⁷⁵ In practice, the American government has employed three methods of settling claims of its nationals:

- (1) by submitting individual claims through the diplomatic channel to the foreign government concerned and obtaining restitution or compensation; (2) by obtaining a lump sum in settlement of all claims, with the amount paid distributed by an agency of the United States government; or (3) by an agreement submitting all claims to an international arbitral tribunal for adjudication.¹⁷⁶

Although the first method is the traditional method of espousal,¹⁷⁷ it was not employed in reaching the Hostage Agreement. Rather, the Hostage Agreement contains elements of each of the latter two methods of espousal. For claims of \$250,000 or less, the United States government hopes to reach a lump-sum settlement;¹⁷⁸

170. Note, *The Nature and Extent of Executive Power to Espouse the International Claims of United States Nationals*, 7 VAND. J. TRANSNAT'L L. 95, 96 (1973). See generally R. LILLICH & G. CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION (1962).

171. See 7 VAND. J. TRANSNAT'L L., *supra* note 170, at 96 n.5.

172. See *supra* notes 85-102 and accompanying text.

173. See 7 VAND. J. TRANSNAT'L L., *supra* note 170, at 96 n.5.

174. R. LILLICH & G. CHRISTENSON, *supra* note 170, at 3-4, 88-103.

175. In this situation, the claim belongs not to the private claimant, but to the American government. Accordingly, the government exercises full control over the claim. It alone decides whether to pursue the claim in international courts, to reach a compromise settlement, or to drop the claim altogether. In addition, if the government collects an award or settlement, it is under no obligation to pass the money on to the national. Nonetheless, the American government normally passes awards on to the interested individuals, but these payments are considered gratuities. *Blagge v. Balch*, 162 U.S. 439, 457 (1896); L. HENKIN, *supra* note 152, at 262; R. LILLICH & B. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, PART I: THE COMMENTARY 1 (1975); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 211-214 (1965); 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1216-33 (1967).

176. Department of State Memorandum, "Nationalization, Intervention or Other Taking of Property of American Nationals," March 1, 1961 *reprinted in* 56 AM. J. INT'L L. 166 (1962).

177. R. LILLICH & G. CHRISTENSON, *supra* note 170, at 89. For more discussion of this method of espousal, see *id.* at 88-103.

178. See *supra* note 40.

all claims over \$250,000 must be presented to an international tribunal.¹⁷⁹

The government has frequently used the second method—the lump-sum settlement national claims commission technique—especially as a means of compensating individuals for losses sustained in Eastern Europe during and after World War II.¹⁸⁰ The general procedure for compensating individual claimants under this technique begins with the President. The President reaches an Executive agreement with a foreign nation. The President agrees to extinguish all claims of a certain category that U.S. nationals brought against the foreign sovereign in exchange for the foreign government's lump-sum payment to the United States. Private claimants then present their claims to a congressionally established national claims commission that has the exclusive authority to disburse the fund.¹⁸¹ Determinations of the commission are binding and nonreviewable.¹⁸² These agreements, therefore, are the product of presidential and congressional cooperation.

Since World War II, the United States has only infrequently resorted to the third method of claims settlement—the submission of the claims to an international arbitral tribunal.¹⁸³ Like many arbitration arrangements, the Hostage Agreement provides for a tripartite international arbitral tribunal composed of representatives from the United States, Iran, and a neutral state.¹⁸⁴ The affected claims are barred from domestic courts, and the international commission's decisions are binding and nonreviewable.¹⁸⁵

Because the President participates in the claims settlement process, commentators generally accept the assertion that he enjoys

179. See *supra* notes 37-48.

180. R. LILLICH, *INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS* 8 (1962). See generally R. LILLICH & B. WESTON, *supra* note 175; Coerper, *The Foreign Claims Settlement Commission and Judicial Review*, 50 AM. J. INT'L L. 868 (1956).

181. R. LILLICH, *supra* note 180, at 8-23; Re, *International Law and the Foreign Claims Settlement Commission*, 23 FED. BAR. J. 79 (1963).

182. *Z. & F. Assets Realization Corp. v. Hull*, 311 U.S. 470 (1941); *Nebenzal v. Re*, 407 F.2d 717 (D.C. Cir. 1968), *cert. denied*, 395 U.S. 920 (1969); *First Nat'l City Bank of New York v. Gilliland*, 257 F.2d 223 (D.C. Cir.), *cert. denied*, 358 U.S. 837 (1958); *Zutich v. Gilliland*, 254 F.2d 464 (6th Cir. 1958); *Am. & European Agencies, Inc. v. Gilliland*, 247 F.2d 95 (D.C. Cir.), *cert. denied*, 355 U.S. 884 (1957); *Haas v. Humphrey*, 246 F.2d 682 (D.C. Cir.), *cert. denied*, 355 U.S. 854 (1957); *Dayton v. Gilliland*, 242 F.2d 227 (D.C. Cir.), *cert. denied*, 355 U.S. 813 (1957); *De Vegvar v. Gilliland*, 228 F.2d 640 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 994 (1956). See also R. LILLICH, *supra* note 180, at 13.

183. See e.g., R. LILLICH & G. CHRISTENSON, *supra* note 170, at 115; Note, *The Gut Dam Claims Agreement with Canada*, 59 AM. J. INT'L L. 892 (1965).

184. See *supra* notes 41-42 and accompanying text.

185. See *Doerchuck v. Mellon*, 55 F.2d 741 (D.C. Cir. 1931); *American-Mexican Claims Bureau, Inc. v. Morgenthau*, 26 F. Supp. 904 (D.D.C. 1939).

blanket authority to settle claims of American nationals.¹⁸⁶ For instance, the Restatement (Second) of Foreign Relations Law states:

The President may waive or settle a claim against a foreign state based on the responsibility of the foreign state for an injury to a United States national, without the consent of such national.¹⁸⁷

The two most important claims settlement cases are *United States v. Belmont*¹⁸⁸ and *United States v. Pink*.¹⁸⁹ These cases arose out of the Litvinov Assignment, by which the Soviet Government assigned its claims against American nationals to the United States in exchange for diplomatic recognition.¹⁹⁰ The cases involved the rights of foreigners to funds in deposit accounts in New York banks. The Soviet Government claimed ownership of the accounts and assigned the claim to the United States.¹⁹¹ Against defenses that the Soviet nationalizations did not affect the New York assets because the act of nationalization violated New York public policy,¹⁹² *Belmont* and *Pink* held that in light of the foreign effects of the cases, federal law, as expressed in the executive agreement implementing the assignment, must override state public policy.¹⁹³ The Court also held that the nationalization and confiscation of the deposit account did not effect a taking of property in violation of the fifth amendment because the Constitution could not operate extraterritorially to regulate a foreign government's handling of the property of its own

186. "International agreements settling claims by nationals of one state against the government or nationals of another are established international practice reflecting traditional international theory." L. HENKIN, *supra* note 152, at 262. See also 2 C. HYDE, INTERNATIONAL LAW 890-91 (2d rev. ed. 1945); 8 M. WHITEMAN, *supra* note 175, at 1217; Q. WRIGHT, *supra* note 152, at 244. The cases that are most widely cited for this proposition are *United States v. Belmont*, 301 U.S. 324 (1937) and *United States v. Pink*, 315 U.S. 203 (1942). But see the discussion of *Belmont* and *Pink*, *infra* notes 188-200 and accompanying text.

187. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1965).

188. 301 U.S. 324 (1937).

189. 315 U.S. 203 (1942).

190. The purpose [of the Litvinov Assignment] was to bring about a final settlement of the claims and counterclaims between the Soviet Government and the United States; and it was agreed that the Soviet Government would take no steps to enforce claims against American nationals; but all such claims were released and assigned to the United States, with the understanding that the Soviet Government was to be duly notified of all amounts realized by the United States from such release and assignment.

United States v. Belmont 301 U.S. 324, 326 (1937); DEP'T OF STATE, ESTABLISHMENT OF DIPLOMATIC RELATIONS WITH THE UNION OF SOVIET SOCIALIST REPUBLICS (1948). (Department of State Publication 528). See generally D. BISHOP, THE ROOSEVELT-LITVINOV AGREEMENTS (1965).

191. 315 U.S. at 210-11; 301 U.S. at 326.

192. 315 U.S. at 214; 301 U.S. at 327.

193. 315 U.S. at 217-26; 301 U.S. at 327-32.

nationals.¹⁹⁴ Those aggrieved nationals could only look to their own government for redress.

One can find in *Pink* broad language on the extent of presidential power to conduct foreign affairs.¹⁹⁵ In particular, there is language indicating that the President may do whatever is necessary in recognizing a foreign government, and that he may settle claims of United States nationals.¹⁹⁶ Although commentators have criticized *Belmont* and *Pink*,¹⁹⁷ later courts have cited the decisions on several occasions in support of the proposition that the President may settle the claims of American citizens against foreign governments.¹⁹⁸ Most recently, in *Dames & Moore*, the Supreme Court relied, in part, on *Pink* in upholding the validity of the Hostage Agreement.¹⁹⁹

Cautioning against strong reliance on *Belmont* and *Pink*, it must be noted that the claims settlements involved in these early cases are distinguishable from the claims settlement mechanism provided for in the Hostage Agreement. *Belmont* and *Pink* involved litigation of interests in nationalized property. The major issue there was whether state public policy could override the foreign affairs powers of the federal government.²⁰⁰ *Belmont* and *Pink* did not involve suits against a foreign sovereign, and the Court's holdings in those cases did not impair the ability of federal courts to hear cases.

It is clear that the Court in *Belmont* and *Pink* did not have occasion to address the central issue in the Hostage Agreement litigation:

194. 315 U.S. at 226-34; 301 U.S. at 332. *Pink* also indicates that the agreement's purpose of providing American citizens with a claim superior to that of foreigners was a factor in its holding that there was no fifth amendment violation. 315 U.S. at 228.

195. "The purpose of the discussions leading to the policy of recognition was to resolve 'all questions outstanding' between the two nations. . . . Settlement of all American claims against Russia was one method of removing some of the prior objections to recognition based on the Soviet policy of nationalization." *United States v. Pink*, 315 U.S. 203, 227 (1942).

[The authority to recognize foreign governments] is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts.

Id. at 229.

196. "Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.'" *Id.* at 229 (quoting *United States v. Curtiss-Wright Export Corp.*, 229 U.S. 304, 320 (1936)).

197. Note, *United States v. Pink—A Reappraisal*, 48 COLUM. L. REV. 890 (1948); Note, *Effect of Soviet Recognition Upon Russian Confiscatory Decrees*, 51 YALE L.J. 848 (1942); 55 HARV. L. REV. 864 (1942).

198. *Ozanic v. United States*, 188 F.2d 228, 231 n.10 (2d Cir. 1951); *Avaramova v. United States*, 354 F. Supp. 420, 422-23 (S.D.N.Y. 1973). See also Statement of Interest, *supra* note 48, at 7, 10, 16.

199. 101 S. Ct. at 2988.

200. 315 U.S. at 217-26; 301 U.S. at 327-32.

whether the President's power to settle claims entails the power to restrict federal court jurisdiction. For this reason, *Belmont* and *Pink* are not strong authorities to support the President's ability to enter into the Hostage Agreement.

The Hostage Agreement differs significantly from earlier claims settlement agreements. One may distinguish the Hostage Agreement from all pre-1952 settlement claims and corresponding court cases and argue that the outcomes of those claims and cases, including *Pink*, should have no bearing on the questions of executive authority presented in the Hostage Agreement litigation. The distinction rests on the fact that before 1952 the absolute theory of sovereign immunity prevailed, placing in the Executive sole responsibility for determining when and under what conditions a foreign government could be sued.²⁰¹ Since 1952, however, the restrictive theory of sovereign immunity has governed; the executive authority in this area is therefore dramatically reduced.²⁰² Cases from the pre-1952 period, suggesting broad executive authority, should not govern the outcome of the difficult issues presented in the Hostage Agreement litigation.

In *Dames & Moore*, the petitioning claimant made this argument to the Court. The Court acknowledged that there was some merit to the argument, but was quick to point out that even after setting aside all pre-1952 claims settlements, there still remained ten post-1952 claims settlements by executive agreement.²⁰³ The congressional acquiescence in these ten settlements was strong evidence of the Executive's authority to act as he did in concluding the Iranian hostage crisis.

One might continue to argue that the Hostage Agreement is even distinguishable from these post-1952 claims settlements. The results of pre-1976 claims settlements should not determine the outcome in the present case, for in 1976 the Congress passed the FSIA, finally ousting the executive branch from any role in deciding when foreign sovereigns may be subject to suit in U.S. courts.²⁰⁴ The fact that the Executive had a visible and legitimate role to play in pre-1976 claims settlements does not mean he may act similarly today.

Yet there are flaws in this argument as well. Even conceding that pre-1976 claims settlements are distinguishable, there have been three claims settlements by executive agreement since 1976.²⁰⁵ Fur-

201. *See supra* note 91.

202. *Id.*

203. 101 S. Ct. at 2989.

204. *See supra* notes 92-96 and accompanying text.

205. Agreement Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Settlement of Claims, May 11, 1979, United States-People's Republic of China, 30 U.S.T. 1957, T.I.A.S. No.

thermore, one year after passing the FSIA in 1976, Congress passed the IEEPA.²⁰⁶ In the legislative history of that Act, the drafters indicated that nothing in the Act was to impair the President's ability to settle claims.²⁰⁷ Finally, the Congress that passed the FSIA considered but soon discarded other proposals that, if passed, would have restricted the President's ability to settle claims.²⁰⁸

Nevertheless, one can still try to distinguish the Hostage Agreement. It clearly differs from even the post-1976 claims settlements in that none of those settlements included a provision allowing the President to terminate domestic litigation.²⁰⁹ The Hostage Agreement is the only claims settlement agreement that has removed cases from federal courts. Although, in the past, the President has enjoyed much discretion in settling international claims, in the Hostage Agreement, the President has done something that no American President has done in the history of international claims settlement.

9306; Agreement Between the Government of the United States of America and the Government of Peru, September 22, 1976, United States-Peru, 27 U.S.T. 3993, T.I.A.S. No. 8417; Agreement Between the Government of the United States of America and the Government of the Arab Republic of Egypt Concerning Claims of Nationals of the United States, May 1, 1976, 27 U.S.T. 4214, T.I.A.S. No. 8446.

206. 50 U.S.C. §§ 1701-1706 (Supp. II 1978).

207. S. REP. NO. 466, *supra* note 105, at 6.

208. *See* 101 S. Ct. at 2990 n.11.

209. The United States-China settlement called for China to make a lump-sum payment of \$80.5 million in settlement of any claims of U.S. or Chinese nationals "arising from any nationalization, expropriation, intervention, and other taking of, or special measures directed against, property of nationals of the USA on or after October 1, 1949 and prior to the date of this Agreement. . . ." 30 U.S.T. 1957, 1958. There was no mention of a cancellation of suits against China. Indeed, there probably were no suits pending in American courts because Chinese assets were blocked, U.S.T. 1957, 1958-59, and most or all claims arose before Congress passed the FSIA in 1976.

The United States-Peru settlement called for Peru to pay over \$61 million to an American firm, the Marcona Mining Company, because the Government of Peru had expropriated the assets of that company. 27 U.S.T. 3993, Art. I. The Peruvian government further agreed not to impose or enforce against the company any liability, claim, or civil action, that arose out of the company's activities in Peru prior to the expropriation. 27 U.S.T. 3993, Art. III. Both countries agreed not to allow any of its nationals to submit claims to the government of the other party that relate to the nationalization or the operation of the Marcona Mining Company. 27 U.S.T. 3993, Art. IV. But the agreement did not remove any suits from United States courts.

According to the United States-Egypt agreement, Egypt was to make a lump-sum payment of \$10 million "in full settlement and discharge of all the claims of nationals of the United States against the Egyptian Government which are described in this Agreement." 27 U.S.T. 4214, Art. I. The Agreement states that the U.S. nationals' claims affected included, but were not limited to, claims regarding land reform, sequestration, nationalization, expropriation for public utilities, financial and fiscal matters. 27 U.S.T. 4214, Art. II. But the Agreement does not purport to entirely extinguish all claims of U.S. nationals. Although the U.S. agreed not to espouse any claims affected by the Agreement, the Agreement recognizes that U.S. nationals may assert their claims in the courts of third countries. 27 U.S.T. 4214, Art. VI. In addition the agreement explicitly excludes certain claims from the Agreement. 27 U.S.T. 4214, Agreed Minute. These exclusions included official claims of the Government of the United States, and certain private claims of U.S. nationals. *Id.*

b. Congressional Authorization

The *Dames & Moore* Court identified three indicators of Congress's implicit authorization for executive claims settlement. By far the most important indicator is Congress's establishment of commissions to disburse lump-sum settlements.²¹⁰ Congress created the Foreign Claims Settlement Commission²¹¹ as a general decision-making body with respect to the claims of U.S. nationals for settlement funds, and has also acted to facilitate the President's settlement of claims against particular nations.²¹² Moreover, Congress has never objected to this historical practice of Presidential claims settlement.²¹³ But because the Hostage Agreement is far different from any of the previous claims settlement agreements, these congressional acts do not constitute express authorization for the President's implementation of the Agreement. These congressional acts are, however, indicators of general congressional acquiescence in executive claims settlements.

The *Dames & Moore* Court also relied on the IEEPA and the Hostage Act as indicators of congressional authorization.²¹⁴ These acts further evidence Congress's approval of broad executive powers to deal with international crises.²¹⁵ Finally, Congress's recent actions indicate its support for the Hostage Agreement. After the Agreement went into effect, committees of the House and Senate held hearings to review the terms and implications of the Hostage Agreement.²¹⁶ The tone of the hearings was favorable and supportive of the position the government had taken. Though it had the opportunity, neither house of Congress passed any sort of resolution or legislation expressing displeasure with the terms of the Agreement.²¹⁷ The transcripts of the hearings provide further evidence

210. International Claims Settlement Act, 22 U.S.C. §§ 1621-1644m (1976 & Supp. IV 1980). The commission is now known as the Foreign Claims Settlement Commission. *Id.* See also *Dames & Moore v. Regan*, 101 S. Ct. 2972, 2987 (1981).

211. 22 U.S.C. §§ 1621-1644m (1976 & Supp. IV 1980).

212. The Supreme Court pointed out that Congress authorized the Foreign Claims Settlement Commission to adjudicate the merits of claims of U.S. nationals against East Germany and has made an effort to establish an official inventory of losses of private U.S. property in Vietnam. 101 S. Ct. at 2987-88. Each of these measures is designed to assist the Executive branch in its conduct of government-to-government negotiations of these claims. *Id.*

213. See e.g., *id.* at 2987.

214. *Id.* at 2985.

215. *Id.* at 2985-86. See also *supra* notes 103-51 and accompanying text.

216. See *Senate Banking Hearing*, *supra* note 1; *Senate Foreign Relations Hearings*, *supra* note 1; *House Foreign Affairs Hearings*, *supra* note 2.

217. The *Dames & Moore* Court contrasted the position the Congress took while reviewing the Hostage Agreement with positions other Congresses have taken in response to the President's claims settlement activity. In the past, the Congress has shown itself capable of soundly disapproving of Executive action: in 1973 Congress

that Congress has generally acquiesced to the President's role in claims settlement matters.

In summary, the Congress has expressly approved of similar, but not identical, settlements. Congress has granted the President broad powers through the IEEPA and the Hostage Act, and congressional committees have subsequently approved of the Hostage Agreement. This is strong, but not conclusive, evidence that the President was acting in harmony with the will of Congress when he implemented the Hostage Agreement.

3. *President's Actions are Incompatible with the Will of Congress*

In *Dames & Moore*, the petitioner's argument that the President's actions were inconsistent with the will of Congress centered on the FSIA. Exercising its constitutionally granted authority to establish federal court jurisdiction,²¹⁸ the Congress passed the FSIA in order to ensure judicial, nonpolitical determinations of the circumstances under which a foreign sovereign should be immune from suit in U.S. courts.²¹⁹ The FSIA recognizes exceptions to foreign sovereign immunity and requires the federal courts to apply these standards.²²⁰ Notably absent from the FSIA is a provision allowing the President to ignore or overturn a judicial decision denying immunity. In fact, the legislative history of the FSIA reveals that Congress intended that subsequent executive agreements would not discard its provisions lightly.²²¹ Moreover, neither the IEEPA nor the Hostage

quickly passed legislation requiring that the 1973 Executive Agreement with Czechoslovakia be renegotiated. 101 S. Ct. at 2991 n.13.

218. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. See also *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

219. See *supra* notes 91-96 and accompanying text.

220. 28 U.S.C. §§ 1604-1607 (1976).

221. The immunity provisions of the FSIA

are made subject to "existing" treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control. Thus, the bill would not alter the rights or duties of the United States under the NATO Status of Forces Agreement or similar agreements with other countries; nor would it alter the provisions of commercial contracts or agreements to which the United States is a party, calling for exclusive nonjudicial remedies through arbitration or other procedures for the settlement of disputes.

H.R. REP. NO. 1487, *supra* note 91, at 17; S. REP. NO. 1310, *supra* note 91, at 17. But the preeminence of international agreements clearly applies only to agreements existing at the time of passage of the FSIA.

[T]he committee has preserved the reference to "existing international agreements" but has deleted the language that would make this bill subject to "future" agreements. Mention of future agreements was found to be unnecessary and

Act explicitly grants the President the kind of authority that would allow him to override judicial determinations under the FSIA. Therefore, the Hostage Agreement represents presidential action that (1) is inconsistent with at least one expression of the will of Congress—the FSIA, and (2) attempts to usurp a function that the Constitution grants to Congress.

In *Dames & Moore* the Supreme Court had two responses to this argument. First, it held that the Hostage Agreement was not unconstitutional because the Agreement did not, as the petitioner argued, divest the federal courts of “jurisdiction.” The Court decided that the Agreement merely changed the substantive law governing the lawsuit.²²² It is difficult to accept this conclusion. The only substantive rule that would have the same effect as the Hostage Agreement is the one that provides that federal courts cannot decide claims against Iran unless the Arbitral Tribunal refuses to entertain the suit. The effect of such a rule is indisputable. The federal court is no longer able to decide cases that, but for the Hostage Agreement, were comfortably within its jurisdiction. Therefore, regardless of its characterization, the President has impaired the power of the judiciary to entertain a certain class of suits.²²³

The Court also responded to *Dames & Moore*’s argument by refusing to read the FSIA as broadly as *Dames & Moore* suggested.²²⁴ The Court explained that Congress intended the FSIA only to remove the sovereign immunity barrier to suit. According to the Court, Congress could not have meant to interfere with the President’s power to settle claims.²²⁵

misleading. The purpose for including the reference was to take into account the possibility that sovereign immunity might become the subject of an international convention. Such a convention would, under article VI of the Constitution, take precedence, whether or not the bill was made expressly subject to a future international agreement. Moreover, it was thought best to eliminate any possible question that this language might be construed to authorize a future international agreement.

S. REP. NO. 1310, *supra* note 91, at 6.

222. 101 S. Ct. at 2989. The Court emphasized the fact that President Reagan merely “suspended” the claims against Iran. They will “revive” if the Arbitral Tribunal refuses to hear the claim. The Court accurately interprets the Agreement, however, the fact remains that the Agreement effected a change of forum for those claims over which the Arbitral Tribunal exercises jurisdiction. A change of forum is different from a change of substantive law.

223. There are good grounds for arguing that the Hostage Agreement does, in fact, restrict federal court jurisdiction. The FSIA provides *in personam* jurisdiction over foreign sovereigns. See von Mehren, *supra* note 91, at 46-48. In effect, the FSIA is a federal long-arm statute. H.R. REP. NO. 1487, *supra* note 91, 13-14. One may argue that since the FSIA would have allowed federal courts to hear the Iranian litigation, the President’s frustration of FSIA policy effected a restriction of federal court jurisdiction.

224. 101 S. Ct. at 2989-90.

225. *Id.*

4. Conclusion

The separation of powers analysis shows that strong arguments exist to support both the proposition that the Hostage Agreement is consistent with the will of Congress, and the proposition that the Agreement conflicts with the will of Congress. Therefore, it is easy to conclude that congressional pronouncements on this issue are ambiguous. Because of the "absence of either a Congressional grant or denial of authority,"²²⁶ the Supreme Court erred in *Dames & Moore* by fitting the President's actions into Justice Jackson's first category of presidential actions, rather than placing them into the more appropriate second category.²²⁷ Within the second category, according to Justice Jackson, the President can continue to act in reliance only on his own authority, but the distribution of power between the President and the Congress in this area is less certain.²²⁸

Even if the *Dames & Moore* Court correctly characterized the President's actions as being within the "zone of twilight,"²²⁹ of the second category, the Court would have been reluctant to invalidate the President's actions. Although the Congress did not clearly authorize the President's actions, neither did it clearly disapprove of them. Recategorizing the President's actions would not have permitted the Court to be less sensitive to the delicate foreign affairs ramifications that invalidation of the Agreement would have triggered. Such an invalidation would have handicapped the President's ability to effectively deal with future international crises. Thus, the Court's conclusion that the President's actions were constitutional is appropriate, but it should have been reached in the second category of Justice Jackson's framework.

B. THE TAKING OF PROPERTY UNDER THE FIFTH AMENDMENT

1. The Procedural Setting

Although the separation of powers analysis suggests that the President's suspension of the suits against Iran was valid under the circumstances,²³⁰ some claimants may later assert that their property was taken without just compensation in violation of the fifth amendment.²³¹ Because the lawsuits have been only "suspended" and not terminated,²³² the Supreme Court in *Dames & Moore* held that the

226. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

227. *See supra* note 166 and accompanying text.

228. *Id.* at 635-38 (Jackson, J., concurring).

229. *Id.* at 637 (Jackson, J., concurring).

230. *See supra* notes 161-229 and accompanying text.

231. U.S. CONST. amend. V.

232. *See supra* notes 51-56 and accompanying text.

taking issue was not ripe for review.²³³ President Reagan's Executive Order implementing the Hostage Agreement indicates that the government will move to dismiss the pending claims from the district courts only after the Arbitral Tribunal has rendered a decision on the merits.²³⁴ Only after the government moves to dismiss will the taking issue be ripe for review.²³⁵ The Supreme Court made it clear that at the appropriate time, the Court of Claims²³⁶ may exercise jurisdiction over any takings claim.²³⁷

2. *The Substantive Law*

The fifth amendment warns that "private property [shall not] be taken for public use, without just compensation."²³⁸ Unfortunately, there is no generally accepted procedure for analyzing compensable

233. 101 S. Ct. at 2991. Both circuit courts that addressed this issue agreed with the Supreme Court. *Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 448 (D.C. Cir. 1981); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 814 (1st Cir. 1981). Two district courts had earlier ruled that both the termination of the claims and the dissolution of the attachments were compensable takings. *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 518 F. Supp. 69, 93 (S.D.N.Y. 1981); *Elec. Data Sys. Corp. Iran v. Social Sec. Org. of the Gov't of Iran*, 508 F. Supp. 1350, 1364 (N.D. Tex. 1981).

234. Exec. Order No. 12,294, § 4, 46 Fed. Reg. 14,111 (1981); 31 C.F.R. § 535.222 (1981).

235. *Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 448 (D.C. Cir. 1981); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 815 (1st Cir. 1981).

236. 101 S. Ct. at 2992. The opinion of the First Circuit in *Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430 (1st Cir. 1981) seems to indicate that claimants will be permitted to assert their takings claims in the district courts rather than in the Court of Claims. *Id.* at 448. A careful reading of the Tucker Act, however, reveals that the district courts have the jurisdiction to hear only those claims against the United States not exceeding \$10,000 in amount. 28 U.S.C. § 1346(a) (1976); *see also* *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 815 (1st Cir. 1981); 14 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3657 (1976). It is doubtful that many of the claims against Iran will involve an amount small enough to qualify the claimant to proceed in the district court.

237. 101 S. Ct. at 2992. *See also* *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 815 (1st Cir. 1981).

Much of the uncertainty regarding the jurisdiction of the Court of Claims was due to the treaty exception to the Tucker Act. 28 U.S.C. § 1502 (1976) provides: "Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations." The courts have held this section applicable to international executive agreements as well as treaties. *Hughes Aircraft Co. v. United States*, 534 F.2d 889 (Ct. Cl. 1976); *Yassin v. United States*, 76 F. Supp. 509 (Ct. Cl. 1948). In order for a claim to "grow out of" or be "dependent upon" a treaty, "the *right itself*, . . . the foundation of the claim, must have its origin—derive its life and existence—from some treaty stipulation." *United States v. Weld*, 127 U.S. 51, 57 (1888). In this case, although a suit against the government for compensation would certainly be related to the agreement, the claim itself is grounded in the Constitution. *See* *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 902-06 (Ct. Cl. 1976); *S.N.T. Fratelli Gondrand v. United States*, 166 Ct. Cl. 473, 478 (1964).

238. U.S. CONST. amend. V.

takings.²³⁹ Both the courts²⁴⁰ and the commentators²⁴¹ have complained about the confusion in this area. The cases discussing the taking of Iranian claims indicate that future litigation of the taking issue will focus on three questions:²⁴² (1) Were either the pre-judgment attachments or the pending claims "private property"? (2) If these were private property interests, was this property "taken"? (3) If property was taken, do the proceedings before the Arbitral Tribunal offer "just compensation"?²⁴³

a. Have the Claimants Acquired "Property Interests"?

The federal courts that addressed the taking issue in the Iranian assets litigation suggest that there may be two property interests that the provisions of the Hostage Agreement confiscated: (1) the attach-

239. Prof. Michelman lists the four most popular approaches to takings problems as: (1) the physical invasion theory; (2) the diminution of value theory; (3) the balancing approach; and (4) the private fault and public benefit theory (more widely known as the "noxious use" theory). Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184-1201 (1967). See also Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 46-60 (1964) (criticizing each of the approaches listed above except the balancing approach).

240. The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. . . . [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government

Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978). See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) ("There is no set formula to determine where regulation ends and taking begins."); *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (whether a restriction constitutes a taking depends "upon the particular circumstances of each case"); *United States v. Caltex, Inc.*, 344 U.S. 149, 156 (1952) ("No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts.")

241. "Few legal problems have proved as resistant to analytical efforts as that posed by the Constitution's requirement that private property not be taken for public use without payment of just compensation." Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 149 (1971). "[T]he predominant characteristic of this area of the law is a welter of confusing and apparently incompatible results." Sax, *supra* note 239, at 37. See also Michelman, *supra* note 239, at 1183-1201; Note, *Reexamining the Supreme Court's View of the Taking Clause*, 58 TEX. L. REV. 1447 (1980).

242. In addition to the three issues identified in the text, there is a fourth issue that is pertinent to the analysis. To be compensable, the taking must be for a "public purpose." If the purpose of the taking is not sufficiently "public," it may be voided entirely. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 458 (1978). Because the Hostage Agreement was made, in part, to stabilize American foreign policy, it will be difficult for the government to deny that the Agreement was for a public purpose.

243. It should be emphasized that this inquiry is concerned only with whether or not the claimants should receive compensation. The traditional remedy for a fifth amendment taking is the invalidation of the ordinance or statute authorizing the confiscation of property. Note, *supra* note 241, at 1471. The Supreme Court has now held that the Hostage Agreement is valid. *Dames & Moore v. Regan*, 101 S. Ct. 2972 (1981). Thus, even if the claims have been taken, the Agreement will not be invalidated.

ments and (2) the underlying claims.²⁴⁴ The Supreme Court ruled in *Dames & Moore* that the attachments of Iranian assets did not give rise to a property interest warranting just compensation under the fifth amendment.²⁴⁵ The Court reasoned that because the Treasury Department licenses authorizing the attachments were “‘revocable,’ ‘contingent,’ and ‘in every sense subordinate to the President’s power under the IEEPA,’ ”²⁴⁶ the President could nullify the attachments without compensating the claimants.²⁴⁷

244. *Dames & Moore v. Regan*, 101 S. Ct. 2972, 2984 n.6, 2991 (1981); *Am. Int’l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430 (D.C. Cir. 1981); *Chas. T. Main Int’l, Inc. v. Khuzestan Water & Power Auth.* 651 F.2d 800 (1st Cir. 1981); *Marschalk Co. v. Iran Nat’l Airlines Corp.*, 518 F. Supp. 69 (S.D.N.Y. 1981).

245. 101 S. Ct. at 2984 n.6. The two circuit courts that addressed this issue reached the same conclusion. *Am. Int’l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 448 (D.C. Cir. 1981); *Chas. T. Main Int’l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 808 (1st Cir. 1981). The only district court to address the issue reached the opposite conclusion. *Marschalk Co. v. Iran Nat’l Airlines Corp.*, 518 F. Supp. 69, 98 (S.D.N.Y. 1981).

The analysis these courts followed regarding the taking of attachments applies only to the attachments that were obtained after President Carter froze Iranian assets on November 14, 1979. In at least one case, however, an American claimant obtained a pre-judgment attachment of Iranian assets before the freeze. *Behring Int’l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383 (D.N.J. 1979).

In *Behring*, Chief Judge Fisher held that although the Iran-United States Treaty of Amity is not an express waiver of attachment immunity for the purposes of FSIA § 1610(d), a reasonable reading of that Treaty indicates that it was intended to allow pre-judgment attachments and that FSIA § 1609 preserves that intention. *Id.* at 394-95. See *supra* notes 97-98 and accompanying text. Judge Duffy of the Southern District of New York reached the opposite conclusion. *Reading & Bates Corp. v. Nat’l Iranian Oil Co.*, 478 F. Supp. 724, 728 (S.D.N.Y. 1979). But if Judge Fisher properly applied the FSIA in granting the pre-judgment attachment, a strong argument may be made that *Behring International, Inc.* obtained a property interest in the attachment and that it must be compensated for the loss of that interest.

The Supreme Court has in the past demanded compensation for the destruction of similarly inchoate interests. In *Armstrong v. United States*, 364 U.S. 40 (1960), the government took title to certain manufacturing materials that were subject to a materialmen’s lien. Because the plaintiff’s lien was rendered unenforceable, the Court held that the government had taken the plaintiff’s interest in the liens, and that the government had to provide just compensation. *Id.* at 46-49. Similarly, in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), the Court held that a mortgagee suffered a compensable taking when an amendment to the Bankruptcy Act substantially impaired his right to foreclose on the mortgage. *Id.* at 601.

246. 101 S. Ct. at 2984 n.6.

247. In *Marschalk Co. v. Iran Nat’l Airlines Corp.*, 518 F. Supp. 69 (S.D.N.Y. 1981), Judge Duffy held that the attachments were not fully subordinate to the President’s power. He advanced two arguments. First, he set out to distinguish those cases in which courts held that the revocation of government licenses is not a compensable taking. Specifically, he cited *Acton v. United States*, 401 F.2d 896 (9th Cir. 1968), *cert. denied*, 395 U.S. 945 (1969) (revocable license to prospect for and develop uranium ore reserves); *Isthmian Airways, Inc. v. United States*, 94 Ct. Cl. 598 (1941) (revocable license to occupy certain land and erect hangers and shops to be used in operating an airline); *United States v. Fuller*, 409 U.S. 488 (1973) (revocation of license to permit grazing of livestock on federal lands). According to Judge Duffy, in each of these cases the revocation of the license merely prevented the claimant from conducting an activity, it did not require him to return property that he had obtained through the license. Therefore,

The analysis of the taking of the claims themselves is more complex. Although the Supreme Court has never held that an executive settlement of private claims constitutes a compensable taking,²⁴⁸ the Court in *Dames & Moore* implied that in this case the executive settlement may constitute such a taking.²⁴⁹ Thus, the Court seems to

Judge Duffy argued that the revocation of the attachment licenses could only prevent future attachments, it did not allow the President to nullify current attachments without compensating the claimant. 518 F. Supp. at 99-100. This argument ignores the unambiguous terms of the licenses. The regulations allowing the licenses clearly state that any attachments obtained thereunder might be revoked at any time. The President did not limit his authority to preventing future attachments. The President obviously reserved to himself the power to nullify the attachments at anytime. Therefore, the Supreme Court was correct in holding that no property interest grew out of the attachments.

Second, Judge Duffy argued that because claimants expended large sums of money in attorneys' fees and in obtaining the bond required by the New York attachment law, they had a reasonable expectation that their attachments would not be nullified. "To argue otherwise means that the government was using the rights and fortunes of individual citizens to create merely another bargaining chip to use in international negotiations." 518 F. Supp. at 100. This argument is weak for two reasons. First, because the regulations authorizing attachments clearly warned that the attachments were revocable at any time, it is unreasonable for the claimants to expect that they had acquired nonrevocable rights by attaching Iranian property. Second, the attachment licenses were never intended as bargaining chips in the hostage release negotiations. The government did not need the attachments to strengthen its negotiation position with Iran. The Freeze regulations prevented the transfer of assets to Iran whether or not the assets had been attached. Therefore, the attachments were probably allowed only to rank the rights to Iranian property in case the President later lifted the Freeze.

248. L. HENKIN, *supra* note 152, at 263.

249. By ensuring that the Court of Claims has the jurisdiction to hear ripe takings claims, the Supreme Court has suggested that some claimants may successfully prove their takings claims. 101 S. Ct. at 2991-92. The First Circuit and the D.C. Circuit agree with this view. *Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 448 (D.C. Cir. 1981); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 815 (1st Cir. 1981). In *Chas. T. Main*, the First Circuit explained that

There may well be situations when the President's extinction or "settlement" of a claim against a foreign government, without the consent of the claimant, would constitute a "taking" of private property for a public "use." See U.S. Const., Amend V. Here, of course, the President has not simply "extinguished" Main's claim, but has provided alternative means for its resolution and satisfaction. Thus, his actions could at very most constitute a "taking" of property only if the alternative method of satisfying the claim (*i.e.*, submission to the Tribunal) is demonstrably and measurably inferior to the rights otherwise available to Main (*i.e.*, the right to attempt to obtain an unsecured judgment in the federal court).

651 F.2d at 814-15.

In *Marschalk, Co. v. Iran Nat'l Airlines Corp.*, 518 F. Supp. 69 (S.D.N.Y. 1981), Judge Duffy held that the Hostage Agreement has already effected a taking of the claims. "When the right to enforce a contract in the United States courts is taken away or materially lessened, the contract and the rights thereunder are taken within the meaning of the Constitution." *Id.* at 93. This court has interpreted the Hostage Agreement as taking not only the claim, but the contract as well. But it is not clear that the contract was, in fact, taken. The Hostage Agreement did not purport to affect the rights growing out of the contract. It merely changed the forum in which the contract is to be litigated. Therefore, it seems more appropriate to treat the Hostage Agreement as taking only the right to sue in federal court.

In addition, the cases that discuss the compensability of contract rights are somewhat conflicting. The Marschalk court cited two cases for this proposition. The court first

have rejected the government's contention that the claims are the sole property of the government.²⁵⁰

Several cases suggest that legal claims are property protected by the fifth amendment.²⁵¹ *Gray v. United States*²⁵² is the most persuasive of these cases. *Gray* arose out of the "French Spoilation

commented on *Lynch v. United States*, 292 U.S. 571 (1934), where the Supreme Court held that the government's amendment of a life insurance policy constituted a fifth amendment taking. "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property . . ." 292 U.S. at 579. The second case, *United States v. N. Pac. Ry.*, 256 U.S. 51 (1921), did not involve fifth amendment issues. But the passage the *Marschalk* court cited makes it clear that the U.S. government must uphold its contracts. *Id.* at 64-67.

There are, however, several cases in which governmental interference with private contracts has been upheld. *Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935) (prohibition of "gold clauses" was constitutional); *Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467 (1911) (prohibition of lifetime free railroad passes was constitutional); *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) (Portal-to-Portal Act, which effectively amended labor contracts, was constitutional). Therefore, if the taking of the contract was the only issue, the outcome would be uncertain.

The other case that held that the Hostage Agreement effected a taking had already proceeded to judgment. In that case it was the judgment, not the claim, which had been taken. *Elec. Data Sys. Corp. Iran v. Social Sec. Org. of the Gov't of Iran*, 508 F. Supp. 1350 (N.D. Tex. 1981).

250. *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 518 F. Supp. 69, 92 (S.D.N.Y. 1981); See Statement of Interest of the Justice Department, *supra* note 48, at 14.

251. Significantly, the Second Circuit has noted that congressional removals of jurisdiction may constitute takings under the fifth amendment:

[T]he exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts . . . it must not so exercise that power as . . . to take private property without just compensation.

Battaglia v. Gen. Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948). *A fortiori*, presidential removals of jurisdiction are also subject to fifth amendment requirements.

Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955) presents a more closely analogous case. In *Seery* the government had alleged that an executive agreement with Austria, which purported to relieve the United States of responsibility for damage to Austrian property, prevented *Seery*, an American citizen owning property in Austria, from suing the government to recover compensation for the damage to her property. In effect, the executive agreement would have prevented *Seery* from exercising her right to sue in the Court of Claims. Holding that an executive agreement may not impair constitutional rights, the court rejected the government's argument. The court explained that "[i]t would be indeed incongruous if the Executive Department alone, without even the limited participation by Congress which is present when a treaty is ratified, could not only nullify the Act of Congress consenting to suit on Constitutional claims, but, by nullifying that Act of Congress, destroy the Constitutional right of a citizen." *Id.* at 607. See also Note, *supra* note 170; Comment, *Executive Agreements and Emanations from the Fifth Amendment*, 49 AM. J. INT'L L. 362 (1955).

But see R. LILLICH & G. CHRISTENSON, *supra* note 170, at 95 which suggests that the President may settle claims of United States nationals against foreign governments without effecting a taking under the fifth amendment.

252. 21 Ct. Cl. 340 (1886). See generally L. HENKIN, *supra* note 152, at 263-65.

Claims."²⁵³ Treaties of 1778 bound America and France in reciprocal obligations,²⁵⁴ but the French revolutionary government later claimed that America violated the treaty.²⁵⁵ In addition, between 1791-1800 France authorized the seizure on the high seas of neutral American vessels with neutral cargo.²⁵⁶ These seizures constituted violations not only of the treaties of 1778, but of customary international law as well.²⁵⁷ An executive agreement in 1800 resolved the dispute. According to the agreement, France agreed not to press its claims of American treaty violations while the United States agreed not to pursue the claims of its citizens who had been harmed by the French seizures.²⁵⁸ In effect, then, the United States settled the claims of its nationals by abandoning those claims in exchange for France's agreement to overlook American treaty violations.

The court never questioned the President's authority to sacrifice private claims in such a manner.²⁵⁹ The court noted, however, that the United States government had decided to espouse the private claims long before it reached the Agreement with France.²⁶⁰ Therefore, the court reasoned that when the government trades "individual" claims (such as those that the government was committed to espouse) for "national" purposes (such as the release from treaty obligations), a taking under the fifth amendment occurs, and the harmed individuals are entitled to just compensation.²⁶¹

253. The French Spoilation Claims is the name coined to refer to the claims of Americans whose vessels were seized by the French during the French Revolution. See L. HENKIN, *supra* note 152, at 263-65.

254. 21 Ct. Cl. at 350-51.

255. *Id.* at 352-60.

256. *Id.* at 365-66.

257. *Id.* at 366.

258. *Id.* at 392-93.

259. *Id.*

260. *Id.*

261. [I]n the negotiation of 1800 we used "individual" claims against "national" claims, and the set-off was of French national claims against American individual claims. That any Government has the right to do this . . . is too clear for discussion. Nevertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere be given him. . . .

It seems to us that this "bargain" . . . by which the present peace and quiet of the United States, as well as their future prosperity and greatness were largely secured, and which was brought about by the sacrifice of the interests of individual citizens, falls within the intent and meaning of the Constitution, which prohibits the taking of private property for public use without just compensation. We do not say that for all purposes these claims were "property" in the ordinarily accepted and in the legal sense of the word; but they were rights which had value, a value inchoate. . . .

Id.

It should be noted that *Gray* was merely an advisory opinion. At the time, the Supreme Court often requested advisory opinions of the Court of Claims. These opin-

In addition, although the Restatement (Second) of Foreign Relations Law recognizes the President's ability to settle suits of American citizens against foreign governments,²⁶² the drafters of the Restatement were clearly sensitive to the rights of the individual claimants. Accordingly, the Reporter's note suggests that such settlement agreements might be considered takings under the fifth amendment.²⁶³

This discussion indicates that under appropriate circumstances, private claims, even if not yet filed, may be considered property interests protected by the fifth amendment. Therefore, the claimants whose pending suits against Iran may be terminated can make a strong argument for fifth amendment protection.

b. Has the Property Been "Taken"?

There is a great deal of confusion surrounding the taking requirement of the fifth amendment. Besides Justice Holmes' vague admonition that regulation will be considered a taking when it "goes too far,"²⁶⁴ the courts have offered little guidance on this issue. The Supreme Court has consistently decided taking claims on the basis of "essentially ad hoc, factual inquiries."²⁶⁵ Accordingly, the taking claims of Americans who sued Iran will be decided more by reference to the circumstances of the Hostage Agreement and the various cases than by reference to legal doctrines.

There is widespread agreement that while the claims remain suspended, the government has not effected a taking.²⁶⁶ Yet even after the district court dismisses a claim from its docket, the government and the claimant may disagree on whether the claim has been taken. The claimant will point out that he had a right to avail him-

ions were not binding. *See* *Aris Gloves, Inc. v. United States*, 420 F.2d 1386, 1395 (Ct. Cl. 1970) (Nichols, J., concurring) (distinguishing and criticizing *Gray*).

262. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1965).

263. The question whether the United States must pay a national of the United States for waiving, or settling for less than full value, his claim for injury by a foreign state may arise in situations where the government may determine that other factors, such as political considerations, affecting the relations of the United States with the foreign state, call for a settlement less favorable to the United States than it would seek if it were concerned only with the economic considerations arising out of the claim and similar claims of other United States nationals.

Id. reporter's note.

264. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

265. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

266. *Dames & Moore v. Regan*, 101 S. Ct. 2972, 2991 (1981); *Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 447 (D.C. Cir. 1981); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 815 (1st Cir. 1981).

Only the *Marschalk* court disagrees. *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 518 F. Supp. 69, 93 (S.D.N.Y. 1981).

self of the domestic forum, that he properly instituted suit, and that his right to progress with the suit was taken. This, according to the claimant, clearly constitutes a taking.²⁶⁷ On the other hand, the government will argue that the President had the unfettered right to settle the claim,²⁶⁸ but that, in any event, the Arbitral Tribunal was in fact a more favorable forum for the claimant than the district court.²⁶⁹ Therefore, according to the government, the claimant's right to have his claim litigated—his legal cause of action—has not been taken; the Hostage Agreement has merely provided for an alternative forum for his suit.²⁷⁰

The government's argument seems misdirected. Although the Hostage Agreement has not impaired the claimant's legal cause of action, before the Hostage Agreement was signed the claimant also had a right to a suit in a United States district court. Surely the right to sue in the district court is worth something. After the district court dismisses the case, this right will have been taken. If the Hostage Agreement has provided for a more favorable alternative forum, this does not indicate that the right to the suit in the United States court was not taken, but merely suggests that the government has provided "just compensation" for the taking.

c. Have the Claimants Received "Just Compensation"?

The preceding sections indicate (1) that the claims against Iran are protected property interests, and (2) that after the suits against Iran are dismissed from the federal courts pursuant to the Hostage Agreement, these claims will have been taken. Therefore, the critical question is whether the Hostage Agreement has provided just compensation for this taking.²⁷¹

There are three possible methods that a court may employ in analyzing the just compensation issue. First, the court may attempt to determine the amount of damages the claimant would have recovered if he was able to sue in the federal court. If this amount exceeds the award rendered by the Arbitral Tribunal, the government would be required to make up the difference. This is perhaps the fairest of the three possibilities. It recognizes that the right to sue in federal court is valuable because it may result in a greater award for the

267. See e.g., Brief of Plaintiff Electronic Data Systems Corp., *supra* note 48, at 40.

268. See e.g., Statement of Interest of the Justice Department, *supra* note 48, at 10-21.

269. See *infra* note 273.

270. See *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 814 (1st Cir. 1981).

271. Because this inquiry asks only whether the claimants have received just compensation, while the traditional remedy for a prohibited taking is invalidation of the taking, the courts offer no guidance on the issue. See *supra* note 243.

plaintiff. Unfortunately, there is an enormous disadvantage to this process. The only way to precisely determine what a claimant would have recovered in a federal court is by requiring a full relitigation of the case. The time, expense, and the inconvenience of full relitigation are too high a price to pay for the fairness that this option offers.

Second, the court may acknowledge that at the time the suits against Iran were interrupted, their value was uncertain. The value of the claims depended on: (1) whether the suit was properly before the federal court under the FSIA; (2) the merit of the claimant's legal theories and his ability to prove his factual contentions; (3) the merit of the defendants' theories and their ability to prove their contentions; and (4) many other uncertainties. Taking these uncertainties into account, the court may attempt to determine the dollar value of the claim at the time it was taken,²⁷² and compare this amount to the award rendered by the Arbitral Tribunal. If the award of the Arbitral Tribunal is less than the dollar value of the claim at the time the suit was interrupted by the Hostage Agreement, the government would make up the difference. This method more accurately reflects the value of what was taken than the first method, and it does not require full relitigation. However, it also poses a serious practical problem. Specifically, under this method the court will be faced with the difficulty of attaching a dollar value to an inchoate, extremely speculative interest. The results may turn out to be arbitrary, and the courts may be tempted to ask for extensive arguments or offers of proof on the various uncertainties before they assess the valuations. Therefore, this method is no more desirable than the first.

Third, the court may compare the Arbitral Tribunal to the United States district court and attempt to determine whether the Arbitral Tribunal was an adequate substitute for the domestic forum. The claimants and the government have already argued at length over whether the Arbitral Tribunal or a district court is the more desirable forum for these claims.²⁷³ It is too soon, however, to

272. The value contemplated here is the amount that a claimant would have recovered if he had sold his claim. But it would be difficult to determine the fairest date for valuation. Because of the difficulties in the negotiation of the settlement, the value of the claims at the time of the Agreement, and indeed throughout the hostage crisis, was extremely uncertain.

273. The government has argued that American claimants have a better chance of prevailing on their claims before the Arbitral Tribunal than they would have had before the United States courts. In support of this, the government pointed out that under the Agreement, Iran agreed to replenish the claims settlement account to assure full payment on all awards of the Arbitral Tribunal. Declaration, *supra* note 1, Points II and III, para. 7. In addition, the Agreement states that any awards granted by the Arbitral Tribunal may be enforced in the courts of any nation. Claims Settlement Declaration, *supra* note 1, Art. IV. For these reasons, the American claimants may, indeed, be better off in the Arbitral Tribunal. See *Chas. T. Main Int'l, Ins. v. Khuzestan Water & Power Auth.*, 615

conclude this debate. Only after the Arbitral Tribunal has rendered decisions will it be possible to evaluate its work.²⁷⁴ Yet, in light of the difficulties the first two methods of evaluating "just compensation" present, this may be the most attractive alternative. Under this approach, the Court of Claims would evaluate the workings of the Arbitral Tribunal on a case by case basis. If the claimant has had a reasonable opportunity to present his claim, and the arbitrators do not seem to have been overtly prejudiced against the claimant, the court should hold that the claimant has been justly compensated regardless of the amount of the award he receives. But, if it appears that the Arbitral Tribunal has not rendered substantial justice, the court should hold that the claimant has not received just compensation. In these cases, the parties will have to relitigate the case before the Court of Claims in order for the court to determine the value of the claim.

CONCLUSION

By attempting to terminate federal litigation, the Hostage Agreement represents an attempt to do something that has never been done in the course of international claims settlement. The Supreme Court in *Dames & Moore v. Regan* upheld the Hostage Agreement, but this Note suggests that its decision should have rested on other grounds. Although the IEEPA may be considered specific statutory authority for the President's nullification of the pre-judgment attachments, this Note suggests that the President's action interrupting the suits already in federal courts was neither expressly authorized nor expressly prohibited by the relevant statutes. Therefore, the President was acting within the middle category of Justice

F.2d 800, 815 (1st Cir. 1981); *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 815 F. Supp. 69, 93 (S.D.N.Y. 1981).

Yet there are also indications that the claimants have not gained anything through the Agreement. For instance, because the FSIA did not entitle Iran to sovereign immunity for the claims that were terminated, the waiver of sovereign immunity is not a major concession. In addition, it will be much more expensive for litigants to pursue their claims abroad before the Arbitral Tribunal, an "overtly political tribunal," instead of availing themselves of the procedures of a nearby federal court. Finally, given the continuing instability of the Iranian government, there is no guarantee that Iran will uphold the Hostage Agreement by replenishing the settlement account. American claimants may then recover no more than thirty cents on the dollar from the settlement account. See *Senate Foreign Relations Hearings*, *supra* note 1, at 75 (prepared statement of Lawrence W. Newman, attorney from Baker & McKenzie); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 615 F.2d 800, 815 (1st Cir. 1981); *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 815 F. Supp. 69, 93 (S.D.N.Y. 1981).

274. At last report the arbitrators, staff members, and representatives from the United States and Iran were still trying to resolve knotty procedural and administrative matters. The arbitration process itself is due to begin in the fall of 1982. *N.Y. Times*, Mar. 8, 1982, at A11, col. 1.

Jackson's framework in which the distribution of powers between Congress and the President is uncertain. But even if the Court had agreed that the President's actions fell within this category—rather than in the category characterized by express congressional authorization—it should have upheld the Hostage Agreement.

Dames & Moore v. Regan is not the last chapter in the litigation involving the Hostage Agreement. Claimants who are unhappy with the outcome of their cases before the Arbitral Tribunal are certain to seek compensation in the Court of Claims. This Note suggests how the Court of Claims is likely to deal with certain taking issues. It indicates that, more than anything else, the Court of Claims will be required to make a series of enormously difficult factual determinations.

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