1982

The Foreign Affairs Power: The Dames & (and) Moore Case

David F. Forte

ARTICLES

THE FOREIGN AFFAIRS POWER: THE *Dames & Moore* CASE*

DAVID F. FORTE**

I. INTRODUCTION

IN 1953, EDWARD S. CORWIN WROTE AN ARTICLE CRITICAL OF THE way the Supreme Court had handled President Truman's seizure of the steel mills during the Korean War.[1] He titled the piece, *The Steel Seizure Case: A Judicial Brick Without Straw.*[2] Subsequent judicial history has demonstrated that his judgment of the case was unnecessarily harsh, particularly his view that "Justice Jackson's rather desultory opinion contains little that is of direct pertinence to the constitutional issue."[3]

In 1981, the Supreme Court decided *Dames & Moore v. Regan.*[4] According to the modest view of the majority opinion, the *Dames & Moore* case is not even a brick, with or without straw. As Justice Rehnquist stated for the Court: "We attempt to lay down no general 'guide-lines' . . . and attempt to confine the opinion only to the very questions necessary to the decision of the case."[5]

A second look, however, reveals that in *Dames & Moore*, the Supreme Court did more than resolve some of the sticky legalities that were part of a serious foreign policy crisis. It also moved the country one step forward towards a strengthened constitutional structuring of the foreign affairs power.

II. LAW AND DIPLOMACY

Dames & Moore v. Regan was the test vehicle through which the Supreme Court scrutinized the constitutionality of the settlement with

* This Article grew out of a paper presented to a meeting of the Western Political Science Association in San Diego on March 25, 1982. I am indebted to a number of colleagues for their encouragement and advice: Professor Roger Rieber of the University of Utah, and Professors Joel Finer, Stephen Steinglass and Janice Toran of the Cleveland-Marshall College of Law, Cleveland State University.

** Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. A.B., Harvard; M.A., University of Manchester; Ph.D., University of Toronto; J.D., Columbia University School of Law.

[1] He was commenting on Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[2] 53 COLUM. L. REV. 53 (1953).

[3] *Id.* at 63.

[4] 453 U.S. 654 (1981).

[5] *Id.* at 661.

Iran which permitted the release of the American hostages held by that government. On November 4, 1979, a large number of Iranians invaded the American embassy in Teheran. They took control of the entire embassy compound and held hostage all diplomatic and other captured personnel. Soon thereafter, the Iranian government signaled its approval of the capture and accepted responsibility for the continued detention of the Americans.

On November 14, 1979, asserting authority under the International Emergency Economic Powers Act (IEEPA)[6] and the National Emergencies Act,[7] President Carter declared a national emergency and blocked the transfer of all assets of the Iranian government located within the jurisdiction of the United States.[8]

Pursuant to the executive order, the Secretary of the Treasury issued enforcing regulations in November and December of 1979 and April 1980.[9] In addition to defining those assets subject to the blocking order, the regulations voided any existing attachments or judgments on any Iranian assets covered by the blocking order.[10] The regulations, however, did allow for the initiation of judicial proceedings including pre-judgment attachments against Iran in United States courts, but with the proviso that no final decree or judgment could be entered.[11] Furthermore, even those non-final attachments and proceedings were subject to change or revocation at any time.[12]

Over one year later, on January 20, 1981, the captive Americans were released according to the terms of an agreement between the United States and Iran as mediated by Algeria.[13] The terms of the agreement called for:

a) the establishment of an Iran-United States Claims Tribunal to arbitrate by "final and binding" judgment any claim not settled within six months of the agreement;

---

[6] 50 U.S.C. §§ 1701-1706 (Supp. II 1978).

[7] 50 U.S.C. §§ 1601, 1621-1622 (1976). President Carter also cited 3 U.S.C. § 301 as authority to act.

[8] Exec. Order No. 12,170, 31 C.F.R. § 535 (1981), *reprinted in* 50 U.S.C. § 1701 (Supp. III 1979).

[9] 31 C.F.R. § 535 (1981).

[10] *Id.* § 535.203(e).

[11] *Id.* § 535.504.

[12] *Id.* § 535.805.

[13] The agreement actually contained a Declaration of the Government of the Democratic and Popular Republic of Algeria, and a Declaration of the Government of the Democratic and Popular Government of Algeria Concerning the Settlement of Claims by the United States of America and the Government of the Islamic Republic of Iran. 81 DEP'T ST. BULL., No. 2047, at 1, 3 (1981).

b) the lifting of all attachments of Iranian property in United States courts;
c) the suspension of all claims by American nationals or corporations against Iran and its state enterprises in courts in the United States;
d) the payment by Iran of $3.7 billion of its blocked assets to satisfy immediately part of its bank debt while placing $1.4 billion of blocked assets in escrow to pay the negotiated settlements of the remaining bank debt;
e) the placing of $1 billion with the newly established Claims Tribunal to satisfy its judgments. If the fund fell below $500 million, Iran would replenish it until all judgments were paid;
f) the ending of United States trade sanctions against Iran;
g) the withdrawal of all United States claims before the International Court of Justice;
h) the transfer to Iran of all Iranian assets not needed for escrow; and
i) the freezing of any assets of the late Shah and his family within the United States pending any suit by the Iranian government to recover them.

President Carter and later President Reagan issued a number of executive orders effectuating the provisions of the agreement.[14] The orders and regulations issued thereunder cancelled all rights obtained under the previously issued licenses,[15] nullified all interests in the Iranian assets that occurred after the blocking orders,[16] and ordered banks to transfer Iranian assets in accordance with the agreement.[17]

In addition to ratifying the executive orders of President Carter, President Reagan suspended all claims against Iran in United States courts that were capable of being brought before the Iran-United States Claims Tribunal.[18] His order declared that "[d]uring the period of this suspension, all such claims shall have no legal effect in any action now pending in any court in the United States . . . ."[19] A determination by the Iran-United States Tribunal of the merits of any particular claim is to be final,[20] although a claimant may revive his claim in a United

---

[14] Exec. Order Nos. 12,276-12,284, 12,294, 31 C.F.R. § 535 (1981), *reprinted in* 50 U.S.C.A. § 1701 (West Supp. 1982).

[15] 31 C.F.R. § 535.218(a) (1981).

[16] *Id.* § 535.218(b). In addition, the regulations prohibited all claims against Iran in connection with the detention of the hostages. *Id.* § 535.216.

[17] *Id.* § 535.210-.212.

[18] *Id.* § 535.222(a).

[19] *Id.*

[20] *Id.* § 535.222(f).

States court if the Tribunal finds that it has no jurisdiction over that claim.[21]

Shortly after President Carter had blocked Iranian assets and issued the revocable licenses allowing suits against Iran, Dames & Moore as assignee of its wholly-owned Iranian subsidiary, brought suit in United States District Court against Iran, the Atomic Energy Organization of Iran, and some Iranian banks. Dames & Moore asserted that the Atomic Energy Organization of Iran owed it nearly $3.5 million plus interest for services provided by its subsidiary. The district court attached property of the defendants as security for a possible judgment.[22]

Dames & Moore moved for summary judgment after President Carter had issued his executive orders enforcing the agreement with Iran. The motion was granted, but the district court stayed execution of the judgment pending appeal and vacated all pre-judgment attachments as directed by the executive orders and regulations.[23] Shortly thereafter, President Reagan issued his executive order suspending all claims against Iran and its subsidiary agencies. The effect of the suspension was to remove the Dames & Moore suit from United States court jurisdiction.

Because the executive orders of two Presidents were the only barriers to Dames & Moore executing its judgment, the claimant filed for declaratory and injunctive relief against the government and Secretary of the Treasury Regan.[24] Dames & Moore asserted that the presidential actions had no constitutional warrant and that they invaded the company's constitutional rights in pursuing its suits against Iran and the Atomic Energy Organization. The district court denied the motion, but issued an injunction forbidding the United States from transferring any Iranian property out of the country that was connected with Dames & Moore's claim.[25] Although Dames & Moore had lodged an appeal with the United States Court of Appeals for the Ninth Circuit, it also had petitioned for a writ of certiorari before judgment from the Supreme Court. The writ was granted,[26] briefing and argument were expedited and the Supreme Court issued its decision on July 2, 1981.

The petitioner did not assert that the original orders blocking the transfer of Iranian assets were invalid. Indeed, petitioner was able to attach that property since the property had been ordered to remain in the United States, and because the license to do so was granted by the executive orders and Treasury regulations subsequent to the freeze. Petitioner had no attachments on the property before the freeze had been

---

[21] *Id.* § 535.222(e).

[22] 453 U.S. at 664 n.4.

[23] *Id.* § at 666.

[24] *Id.*

[25] *Id.* at 667.

[26] 452 U.S. 932 (1981).

ordered. The facts thus obviated facing one issue at the outset: whether the President's order cancelling attachments that had been entered before the freeze violated the taking clause or the due process clause.[27] The two major issues which the Supreme Court faced were 1) whether President Carter was acting within the limits of the Constitution when he ordered the frozen Iranian property out of the country, and more significantly, 2) whether President Reagan possessed constitutional authority to suspend all claims against Iran then pending in courts throughout the United States.

III. TRANSFER OF ASSETS

The petitioner mounted its first attack on President Carter's order to transfer the frozen property after the agreement with Iran, but the Supreme Court found ample authority for the President in the IEEPA. Justice Rehnquist began his analysis by quoting from two of the most famous Supreme Court opinions dealing with the presidential foreign affairs power: *United States v. Curtiss-Wright Export Corp.*[28] and *Youngstown Sheet & Tube Co. v. Sawyer.*[29] In the former case, Justice Sutherland in dictum gave the President extremely wide latitude in foreign affairs, terming it "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of foreign relations.[30] In the *Youngstown* case, Justice Rehnquist pointed to Justice Jackson's now highly regarded formula *viz.*, that the President's power in foreign affairs is at its greatest when he "acts pursuant to an express or implied authorization from Congress,"[31] and at its weakest "when the President takes measures incompatible with the express or implied will of Congress."[32] In the latter instance, the President's actions are valid "only in disabling the Congress from acting upon the subject."[33]

Both Justice Jackson and Justice Rehnquist admit that the most difficult problem arises when the President acts without the explicit ap-

---

[27] 31 C.F.R. § 535.203(e) (1981). In his separate opinion in *Dames & Moore*, Justice Powell suggested that such attachments are indeed a species of property protectable under the taking clause of the fifth amendment. 453 U.S. at 690 n.1 (Powell, J., concurring and dissenting in part). One commentator has suggested that even if there is some protectable property interest in pre-judgment attachments, it would likely apply only to those assets that were not immune under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1611 (1976). Comment by Alan Swan, *Transcript of a Conference on The Settlement with Iran*, 13 LAW. AM. 1, 72 (1981).

[28] 299 U.S. 304 (1926).

[29] 343 U.S. 579 (1952) (Jackson, J., concurring).

[30] 299 U.S. at 319-20.

[31] 343 U.S. at 635 (Jackson, J., concurring).

[32] *Id.* at 637.

[33] *Id.* at 638-39.

proval or disapproval of Congress. In such a case, the Court must examine whether the circumstances of the case give any clue as to whether the silence of the legislature stems from tacit approval or tacit disapproval.[34] In Justice Jackson's three categories of congressional authorization, congressional silence, or congressional prohibition, the hardest case could arise when silence occurred because of a conflict of views within the legislative branch, or because the legislative branch had never seriously considered the issue.

In the *Dames & Moore* case, Justice Rehnquist explicitly favored the use of Justice Jackson's formula over Justice Sutherland's. As such, this case represents a somewhat different emphasis for Justice Rehnquist, for previously he had relied more on Justice Sutherland's conception of the inherent power of the Presidency in dealing with foreign affairs. In *Goldwater v. Carter*,[35] for example, Justice Rehnquist rejected *Youngstown* as the appropriate precedent in favor of *Curtiss-Wright*. He opined that the dispute between Congress and the President over the power to denounce treaties involved an issue whose effect was "entirely external to the United States, and [falls] within the category of foreign affairs."[36] Earlier, in *First National City Bank v. Banco Nacional de Cuba*,[37] speaking for a plurality, Justice Rehnquist asserted that the President had complete power to direct a court not to apply the Act of State doctrine in any case in which it was raised. Once again, he cited *Curtiss-Wright* as authority. Similarly, in dissenting in *Nixon v. Administrator of General Services*,[38] he spoke of the necessity of maintaining confidentiality in the executive branch, particularly "in the area of foreign affairs and international relations," citing *Curtiss-Wright*.[39]

Although Justice Rehnquist's opinion in *Dames & Moore* embraces the Jackson formula, he does not entirely cast himself off from *Curtiss-Wright*. First he notes pointedly that both parties as well as the lower courts argued their respective opinions on the basis of Jackson's opinion in *Youngstown*.[40] Second, he quoted Justice Jackson as admitting that the tripartite analysis was "a somewhat over-simplified grouping."[41] Finally as noted above, Justice Rehnquist insisted that this case did not "attempt to lay down [any] general 'guide-lines' covering other situa-

---

[34] 453 U.S. at 668-69.

[35] 444 U.S. 966 (1979).

[36] *Id.* at 1005 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1926)).

[37] 406 U.S. 759 (1972).

[38] 433 U.S. 425 (1977) (Rehnquist, J., dissenting).

[39] *Id.* at 551 n.6.

[40] 453 U.S. at 668.

[41] *Id.* at 669 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)).

tions not involved here."[42] As will be demonstrated later, Justice Rehnquist is moving towards a structure in which both *Youngstown* and *Curtiss-Wright* have a place.

Nonetheless, Justice Rehnquist found that President Carter's right to nullify the earlier attachments and transfer Iranian funds fit squarely in Justice Jackson's first category, *i.e.*, the President was acting pursuant to an explicit act of Congress.[43] The IEEPA, as a partial revision of the Trading With the Enemy Act (TWEA),[44] authorizes the President not only to "prohibit" the "transfer" of "any property" of the foreign country, following the declaration of a national emergency, but also permits the President to "direct and compel" or "void" any such transfer, and to "void" the exercise of "any right, power or privilege with respect to . . . any property in which any foreign country . . . has any interest . . . ."[45] The Court held that the plain meaning of the statute authorized the President to void any rights derived from the attachment of Iranian property after the freeze. Indeed the plain meaning would cover the voiding of attachments that took place before the freeze was instituted.[46]

Beyond the plain meaning of the IEEPA, Justice Rehnquist found that the purpose of the statute was to give the President a "bargaining chip" in his dealings with a hostile country.[47] As such, the President was operating in the area of international negotiations, clearly an article II power. If Dames & Moore had prevailed, the result would remove a tool that Congress had decided the President should have in his role as chief negotiator.

Since the President's action was justified as a proper exercise of his and Congress foreign affairs power, the only possible limitations are in the due process or taking clauses. Justice Rehnquist dismissed the claim of a procedural due process violation by noting that the claimant was on notice because the very license that allowed it to attach the property was announced as revocable.[48] Moreover, the same provision of revoca-

---

[42] *Id.* at 661.

[43] 453 U.S. at 674.

[44] 50 U.S.C. app §§ 1-44 (1976 & Supp. III 1979).

[45] The text of 50 U.S.C. § 1702(a)(1)(B) (Supp. II 1978) mandates that:

> [The President may] 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.

[46] Apparently the TWEA, from which this section of the IEEPA derives, was utilized in such a manner for many decades. *Transcript of a Conference on The Settlement with Iran*, 13 LAW. AM. 1, 86 (1981).

[47] 453 U.S. at 673.

[48] *Id.*

bility effectively prevented the claimant from gaining any permanent interest in the attached property. Dames & Moore, therefore, did not gain any property interest that qualified under the taking clause.[49]

IV. SUSPENSION OF CLAIMS

The major issue which the Court had to face was the validity of President Reagan's executive order suspending all claims against the Iranian government in American courts and allowing such claims to be adjudicated only before the Iran-United States Claims Tribunal.

The government claimed that the President possessed statutory authority to suspend claims under the IEEPA and the "Hostage Act."[50] In addition, the government asserted that the President also had inherent power under his foreign relations power. Justice Rehnquist rejected the argument that either the IEEPA or the Hostage Act gave specific presidential authority to suspend the claims. The IEEPA dealt only with interests in property, not with the right to bring *in personam* lawsuits, and the legislative history of the Hostage Act indicates that it was designed to protect naturalized Americans from being repatriated against their will by their former states of nationality.[51] In addition, Justice Rehnquist denied that the President has "plenary power" to settle claims.[52]

Justice Rehnquist, however, did not find that the President was acting contrary to the will of Congress. It was not a case of Justice Jackson's third category where the President's power must occupy the field entirely to the exclusion of Congress. Rather, there was evidence that Congress knowingly and affirmatively acquiesced in the President's power to settle claims.

The two congressional statutes indicate a willingness on the part of Congress to permit the President to use wide discretion in dealing with an international emergency, particularly when it concerns a hostile power. Thus, Justice Rehnquist grounds the President's general foreign relations power in international emergencies not on an inherent right per *Curtiss-Wright*, but on a knowing congressional acquiescence or even an "invitation" for him to act as he sees fit.[53] However, it is not enough

---

[49] *Id.* at 674 n.6. Justice Powell dissented from this part of the Court's holding. He believed that in ordinary circumstances an attachment was a compensable property right. Even a revocable license to attach defendant's property may not necessarily void the property interest in the attachment itself. Compensation may still be due. *Id.* at 690 n.1.

[50] 22 U.S.C. § 1732 (1972).

[51] 453 U.S. at 675-76. The First Circuit had found that the President possessed independent executive power to settle claims. Charles T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, 651 F.2d 800 (1st Cir. 1981).

[52] 453 U.S. at 688.

[53] *Id.* at 678.

that there is a general congressional acquiescence. Even if there is a general congressional permission, a second question must still be answered. Although Congress has approved such *general* discretionary action, is there any indication that Congress wanted to exclude the *particular* tactic of settling private claims against a foreign power? On the contrary, states Justice Rehnquist, there has been a long-standing presidential practice in settling such claims.[54] Where Congress invites general presidential discretion and where it has known and never objected to a particular assertion of presidential power, then there can be no grounds for holding that the President either acted contrary to the will of Congress or even in the absence of any indication of the will of Congress. Thus, although there was no explicit or implicit congressional *authorization* of the presidential action, there was an implicit congressional *approval* of the presidential practice of settling claims.[55]

This was not a case where congressional opinion was simply unknown either because the issue was new to Congress or because Congress never had an opportunity to consider the presidential action. In this situation, there was an actual legislative moment of consideration where Congress did have the occasion to direct presidential action and where it chose not to. True, Congress did not explicitly disapprove an amendment which would have limited the President's claims settlement powers (as Congress had, in the *Youngstown* case, specifically disapproved an amendment *granting* the President the right to seize industries crippled by a labor strike). No such limiting bill or amendment was even offered. But Congress did consider executive action in situations where the issue of the President's power to settle claims would have been apposite. It chose not to limit the President. There was a knowing acquiescence. On a spectrum of total and explicit congressional approval at one end to total and explicit congressional disapproval at the other end, the presidential action in this case is far closer to the former pole.[56]

In his reasoning, Justice Rehnquist did far more than give a tentative approval of the *Youngstown* analysis over that of *Curtiss-Wright*. He refined and developed the *Youngstown* approach into a better tool than it has been in the past. Part of his accomplishment lay in his skillful melding of Justice Frankfurter's opinion in *Youngstown* with that of Justice Jackson.[57]

In *Youngstown*, Justice Frankfurter suggested that historical practice could furnish the "gloss" on the President's inherent executive

---

[54] Justice Rehnquist traced the power back to 1799. *Id.* n.8. *See* Hardwick, *The Iranian Hostage Agreement Cases: The Evolving Presidential Claims Settlement Power*, 35 SW. L.J. 1055 (1982).

[55] 453 U.S. at 680.

[56] *Cf. id.* at 669.

[57] 343 U.S. 579, 593 (1952).

power in conducting foreign relations.[58] Article II does not identify the parameters of executive power in the way that article I sets the limits to the legislative power. The executive power is presumed to have a content, but for the most part it is undefined. The only other governmental agency which possesses part of the foreign relations power and which can be expected to defend itself against executive encroachment is Congress. Congressional acquiescence therefore points to an acceptance of certain inherent executive powers.

Justice Rehnquist did not use Justice Frankfurter's analysis to find an inherent executive power to settle claims against foreign states. Instead he combined it with Justice Jackson's tripartite structure. In doing so, he helped to make actions that fall within Justice Jackson's second category more practicable and definable. Heretofore, that category was the widest and most unclear. In the context of an approval of general presidential discretion, the long-standing acquiescence in a particular practice subsumes it under the general congressional permission. The thrust of Justice Rehnquist's opinion is not to disable Congress from acting on claims settlements altogether. That might be the result if long-standing practice were used to give the President inherent and exclusive power to settle claims. Rather, Justice Rehnquist's opinion anchors the congressional role in foreign policy more securely by making practice to be a permission of Congress and not a right of the President.

Although Justice Rehnquist does not go so far as to deny that the President has an inherent power to deal with international emergencies, he states a number of times how congressional acquiescence to the President's claims settlement power by executive agreement is "crucial" to the decision.[59]

> We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities . . . . But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.[60]

Justice Rehnquist insists, however, that congressional acquiescence to the President's claims settlement power is enough: there is no requirement in the Constitution for an explicit congressional authorization. For example, incident to his power of recognition of foreign governments and states, the President may make use of an executive agreement to settle claims free of the Senate's power of advice and consent.[61] In addi-

[58] *Id.* at 610-11.

[59] 453 U.S. at 680.

[60] *Id.* at 688.

[61] *Id.* at 682.

tion, Justice Rehnquist approvingly quoted Judge Hand who had stated that "it would be unreasonable to circumscribe" the power to settle claims merely as an incident to recognition.[62] Thus, if the petitioner was to prove its case, it had to show more than that the President acted without an explicit and formal congressional authorization. The petitioner must at least demonstrate that the evidence indicating an implicit congressional approval of the power to settle claims was not truly probative in this instance.

In fact, the petitioner did attempt to show that the President acted either in the face of congressional silence or in the face of congressional opposition. Dames & Moore argued that the past history of presidential practice in settling claims was no longer legally relevant.[63] Its position was that until recent years, foreign states enjoyed absolute immunity in American courts. Consequently, diplomacy was the only mechanism legally available to redress wrongs committed by foreign states against American citizens and American companies. In a sense, the executive branch was the only governmental agency with the requisite "jurisdiction" to settle these claims. However, since the publication of the Tate letter in 1952, the United States has adopted the restrictive theory of sovereign immunity whereby foreign sovereigns became suable in American courts in terms of their commercial activities. More particularly, The Foreign Sovereign Immunities Act of 1976[64] specifically gave the federal courts jurisdiction to adjudicate commercial claims against foreign sovereigns. Therefore, both by the development of restrictive immunity and by specific congressional enactment, the President lost the power to settle claims on his own.

Justice Rehnquist dismissed the arguments by pointing to ten settlements made by the President, without congressional objection, since the Tate letter.[65] In addition, Congress implicitly approved continuing presidential power in the field by enacting the International Claims Settlement Act of 1949[66] and by devising formulas for distribution of proceeds from presidential settlements subsequent to 1949.[67] Although Justice Rehnquist did not mention it, even after the publication of the Tate letter, the President retained and exercised the power of having courts grant immunity to foreign sovereigns upon his suggestion.[68] The Tate letter, therefore, does not represent the revision of presidential power to settle claims by the executive agreement.

---

[62] *Id.* at 683 (quoting Ozanic v. United States, 188 F.2d 228, 231 (2d Cir. 1951)).

[63] Brief for Petitioners at 9-16.

[64] 28 U.S.C. §§ 1330, 1602-1611 (1976).

[65] 453 U.S. at 689 n.9.

[66] 22 U.S.C. § 1621 (1976).

[67] 453 U.S. at 680-81.

[68] *See, e.g.*, Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

Dames & Moore also argued that the FSIA statutorily removed the power from the President to settle claims against foreign states. Before turning to this critical point, first consider how Justice Rehnquist would resolve a direct conflict between the President and Congress, if one arose, as Dames & Moore claimed.

V. TOWARDS A NEW STRUCTURE OF THE FOREIGN AFFAIRS POWER

Dames & Moore gives a further recognition of the place of Congress in the exercise of the foreign affairs power. It must not be concluded, however, that Justice Rehnquist intended to disable the President from any independent exercise of his constitutional power in international affairs. Quite the contrary. Indeed, if we relate Justice Rehnquist's opinion in *Dames & Moore* with his opinion in *Goldwater v. Carter*,[69] we find that he is beginning to develop a comprehensive structure of the foreign relations power.

In *Goldwater v. Carter*, Justice Rehnquist argued that the political question doctrine precluded the Court from deciding whether the President had the power to terminate treaties without the advice and consent of the Senate. He based his position on the presence of two necessary conditions. First, the effect of the President's action in terminating the Mutual Assistance Treaty with the Republic of China[70] was "entirely external to the United States."[71] Second, the Constitution is silent as to the method of terminating treaties. In fact there are a number of mechanisms legally available to Congress to assert its will.[72] If Congress has constitutional authority to enter the field, and the Constitution does not prescribe a single method of handling the problem, then Congress is free to use its political resources including statutory authority and its power over the purse to direct a solution. In *Goldwater v. Carter*, Congress had plenty of independent methods of asserting its will. The Court should not, in effect, take over Congress role.[73]

With this background, one can discern the constitutional structure in the realm of foreign affairs that Justice Rehnquist has begun to develop. This structure has the following skeletal form:

1) Where the presidential action has a domestic effect, the *Youngstown* analysis as refined by *Dames & Moore* will be applied.
   a) The President acts with the explicit or implicit

---

[69] 444 U.S. 966 (1979).

[70] Mutual Defense Treaty with the Republic of China, Dec. 2, 1954, United States-China, 6 U.S.T. 433, T.I.A.S. No. 3178.

[71] 444 U.S. at 1005 (citing United States v. Curtiss-Wright Corp., 299 U.S. 304, 315 (1936)).

[72] *Id.* at 1003 (citing the example of Coleman v. Miller, 307 U.S. 433 (1939)).

[73] *Id.* at 1004 n.1. The assumption, of course, is that once Congress constitutionally asserts its will through statute, the Court will enforce the domestic effects of the statute.

authorization of Congress. The action is valid.

b) The President acts with congressional acquiescence of a long-standing practice, and within that practice, there is no indication of congressional disapproval of the particular type of tactic the President is using. The action is valid.

c) The President acts where there is an explicit or implicit congressional prohibition. The action is invalid unless Congress is disabled "from acting upon the subject" in which case the presidential action is valid.

2) Where the effect of presidential action is entirely external to the United States, the *Curtiss-Wright* analysis as developed in *Goldwater v. Carter* will be employed.

a) The Constitution mandates a particular form the action must take. The Court will hold the President to the prescribed form.

(b) No particular method is required and Congress has a number of political options at its disposal. The Court will not decide the case as it is a political question.

Arguably, any action with an effect that is partly internal would be analyzed under the first, or *Youngstown* part of the formula, because the second part of Justice Rehnquist's structure is triggered only when the effects of a presidential action are "entirely external" to the United States. As most foreign affairs actions by the President possess both internal and external effects, it would seem that this case has strengthened Congress overall position in the foreign affairs power. On the other hand, two caveats should be entered. First, it is possible in theory to separate the effects of a presidential action in international affairs into a domestic component and an external component. In such a case, it may come about that the domestic effect of a presidential action will be governed by the *Youngstown* formula while the foreign effect will be governed by *Curtiss-Wright*. Congressional attempts to control the President's use of military forces outside of the United States may possibly be one such issue.[74] Second, even under the *Youngstown* part of the structure, Justice Rehnquist maintains that some actions of the President are valid even in the face of explicit congressional disapproval if Congress is constitutionally disabled from acting upon the subject at all. For example, according to Justice Rehnquist's dissenting opinion in *Nixon v. Administrator of General Services*,[75] executive privilege is one aspect of the separation of powers that would disable Congress from acting in certain circumstances. Thus, while Justice Rehnquist has begun to refine the Court's analysis of the foreign affairs power, many issues remain to be elucidated.

[74] *See, e.g.*, Thomas & Thomas, Jr., *Presidential War-Making Power: A Political Question?* 35 Sw. L.J. 879 (1981).

[75] 443 U.S. 425, 545 (1977).

Applying the new structure to the instant case, we find that since Justice Rehnquist has accepted the proposition that Congress does have independent power to regulate claims settlements, we must conclude that if the President had acted directly contrary to the will of Congress in this area, Justice Rehnquist would have enforced the congressional enactment.

VI. JURISDICTION VERSUS CAUSE OF ACTION

This brings us back to the most interesting part of the petitioner's argument and the Court's response. In fact, the petitioner in *Dames & Moore* had asked the Court to face the issue of presidential action in the face of congressional opposition. Petitioner asserted that the FSIA[76] had removed the President and the State Department from the adjudication of claims against foreign states arising out of commercial dealings. By suspending claims, the President was unilaterally divesting the federal courts of their jurisdiction over the cases. Under article III, only Congress can do that. Thus, the petitioner claimed, the President committed two constitutional wrongs. He engaged in activities prohibited to him by Congress, and at the same time he invaded Congress article III power to regulate the jurisdiction of the federal courts.[77]

Justice Rehnquist interpreted the FSIA differently. He read the executive order not as divesting the federal courts of their jurisdiction, but of changing the substantive law under which the claims are adjudicated.[78] In removing the cases against Iran from the federal courts, the President was not acting contrary to the FSIA. It is true that the FSIA no longer permits a President to accord immunity to a foreign sovereign vel non by mere fiat as he could previously. Now the courts determine the applicability of immunity according to the standards written into the Act. The FSIA removes one barrier to suit: sovereign immunity. The statute, however, does not remove another barrier which may still be instituted, namely, a settlement of the underlying cause of action.[79] True, under the settlement Iran is as free from domestic suit as it would be under sovereign immunity. The result, however, derives from the exercise of a different power, the one the Court found that Congress had permitted.

The question as to whether the President altered the jurisdiction of

[76] 28 U.S.C. §§ 1330, 1602-1611 (1976).

[77] Brief for Petitioners at 9-16. Here Justice Rehnquist made an error in the law. He wrote: "The FSIA granted personal and subject matter jurisdiction in the federal courts over commercial suits brought by claimants against those foreign states which have waived immunity." 453 U.S. at 684. In fact, a commercial activity by a foreign state and voluntary waiver are separate bases for denying immunity. *Compare* 28 U.S.C. § 1605(a)(1) (1976) (jurisdiction is invoked where immunity is explicitly or implicitly waived), *with id.* § 1605(a)(2) (commercial activity automatically invokes jurisdiction).

[78] 453 U.S. at 685.

[79] *Id.*

the federal court or whether he is "directing the courts to apply a different rule of law"[80] is critical to the issues. If the President modified the jurisdiction of the courts, the issues are: did he invade Congress jurisdiction granting power under article III; has he, by the same token, invaded the judicial branch by taking away its jurisdiction; and concomitantly, has he denied claimant's due process rights to access to an article III court? On the other hand, if the President has changed the substantive law governing the case, then the only issues are: did he have the authority to effectuate such a change in the substantive law; and, was there a taking of the plaintiff's property without just compensation?

Why is suspending the claims and transferring the cases to the Iran-United States Claims Tribunal not a change in jurisdiction? Substituting one forum for another certainly seems to be a jurisdictional change. The best way to understand the Court's point is to see the Iran-United States Claims Tribunal not as a "court" which has taken over the "jurisdiction" of the federal courts in these cases. Rather, the tribunal is more closely akin to an agency empowered to distribute funds to claimants upon the showing of entitlement as defined by the substantive rules guiding the agency. Such commissions have existed, and although these agencies were most often established by Congress, the Court still regards those examples and the instant Claims Tribunal more as administrative agencies enforcing particular sets of rules than as different courts. In fact, the Iran-United States Tribunal has a fund for distribution, and rules for determining entitlement and allocation. Furthermore, the lower court is not divested of *in personam* jurisdiction by the removal of Iran as defendant. Nor is it divested of subject matter jurisdiction by giving another tribunal the power to adjudicate on the underlying cause of action. Rather, the case is dismissed from the lower federal court because there is no longer any claim upon which relief can be granted.[81] The claim has been settled by the President, not merely "suspended" despite the infelicitous phrasing of the executive order. The Tribunal "executes" the settlement by allocating the funds to claimants who can prove their entitlement. If the claimant is held by the Tribunal to have an entitlement or if he is held to have no entitlement, that judgment is final and binding. On the other hand, if as a threshold issue the claimant does not qualify to be heard by the Tribunal, his case falls outside of the settlement and remains alive for federal court adjudications. The issue therefore refocuses the right of the President to effectuate a change in the substantive law of the claim by means of a settlement, the issue which the Court disposed of above.

The petitioner's argument also falls for two other reasons. First, at the same time that Congress was limiting the President's power to

[80] *Id.*

[81] Such was the opinion of the District of Columbia Circuit in American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430 (D.C. Cir. 1981) cited in Respondent's Brief at 54.

grant sovereign immunity, it was also debating and rejecting limitations on his power to reach settlements. The FSIA cannot therefore be regarded as a congressional limitation on the settlement power.[82] Secondly, petitioner's argument suffers from an internal inconsistency. If, as petitioner claims, the President's action in suspending claims is truly a grant of sovereign immunity divesting the courts of jurisdiction contrary to article III of the Constitution, then every federal court which permitted the President to impose sovereign immunity prior to the FSIA was likewise tolerating an invasion of its article III jurisdiction. Congress never believed presidential settlement to be an invasion of its article III rights, and neither did the federal courts.

As Justice Rehnquist put it, "No one would suggest that a determination of sovereign immunity divests the federal courts of 'jurisdiction.' "[83] What was the legal effect then of past presidential orders shielding foreign sovereigns from suit in United States courts? Sovereign immunity was not, properly speaking, immunity from either *in personam* or subject matter jurisdiction. The claimant's suit was dismissed for the same reason that a final settlement is dispositive, namely, that there was a failure to state a claim upon which relief can be granted.[84] As with actual settlements with foreign powers, immunity goes to the substantive law underlying the case. Until Congress exercised its foreign affairs power in the FSIA, the President, with congressional acquiescence, had exercised his article II diplomatic powers to effectuate a change in the underlying cause of action. Thus, both the grants of sovereign immunity and claims settlement powers go to the President's ability to regulate the substantive law in the foreign relations area subject to congressional regulation. On the question of sovereign immunity, Congress has chosen to regulate the area through the FSIA. On the question of the definitive settlement of claims, Congress has chosen to leave the President free.

[82] 453 U.S. at 686.

[83] *Id.* at 685.

[84] Justice Rehnquist expanded on the distinction between lack of jurisdiction and failure to state a claim in his dissent from the denial of certiorari in Yazoo County Indus. Dev. Corp. v. Suthoff, No. 80-1975, 50 U.S.L.W. 3545 (1982). There he noted that Bell v. Hood, 327 U.S. 678 (1946), had created three tiers of federal review in claims for recovery under the U.S. Constitution or federal laws. In the first tier, where the claim was "wholly insubstantial and frivolous," it was dismissed for lack of subject matter jurisdiction. In the second tier, where the claim was "*not* wholly insubstantial and frivolous" but where the laws or the Constitution provided no triable issue, the case could be dismissed for failure to state a claim upon which relief can be granted. At the third tier, the court may proceed to the trial on the merits. 50 U.S.L.W. 3545.

Under this scheme the former presidential action in granting sovereign immunity and the continuing presidential power to settle claims fall into the second tier. Such conclusion is also harmonious with Rule 12(b) of the Federal Rules of Civil Procedure although Justice Rehnquist believes that Rule 12(b) contains only the second and third tiers of the current interpretation of *Bell v. Hood* and that *Bell* should accordingly be reexamined. 50 U.S.L.W. 3545-46.

In one sense then, the petitioner was correct in asserting that the claims settlement power is an end run around the restrictions of the FSIA. The petitioner was in error, however, in terming both sovereign immunity and claims settlement as acts supplanting federal court jurisdiction. Both sovereign immunity and claims settlement are acts of substantive lawmaking power, but there is a difference between the two. A grant of sovereign immunity indefinitely suspends claims in United States courts leaving a possible future settlement indeterminately up to the President and the foreign sovereign. A settlement of claims is definitive of the rights of the parties and permanently removes the claim from adjudication by United States courts (although distribution may be effectuated by governmental agencies). What Congress has done, in effect, is to permit the President to avoid the limitations placed on him by the FSIA through his retained capacity to settle claims definitively. The claimant is no longer left in limbo as when sovereign immunity was given by the President. Now, in a commercial case, his claim is resolved either through judicial adjudication (via the FSIA), or by settlement of the claim by the President.

That is why it is so vital to the case that President Reagan's "suspension" of the claims against Iran not be seen as indeterminative of the rights of the parties. That kind of "suspension" is now governed by the FSIA. The presidential action is a definitive settlement of claims with Iran with the distribution of assets lodged with the Iran-United States Claims Tribunal. As Justice Rehnquist put it: "[T]here does appear to be a real 'settlement' here . . . ."[85] The claims are "suspended" only in a narrow sense of the word: If the Tribunal finds that the claim cannot be definitively settled under its rules one way or the other, then the claim can be "revived" in court in the United States. In fact, such a claim is not really "revived." It has been found to have been outside the settlement altogether and consequently the substantive law governing it has not been changed by presidential order.

Finally, Justice Rehnquist spoke of the possibility that by means of the suspension of claims, the government may have taken property for a valid public purpose, but would still be obligated to provide compensation. Unlike previous settlements where claimants have traditionally requested the government to espouse their claims, under the agreement with Iran, the President settled the claims contrary to the wishes of many of the claimants. The Court did not decide the merits of the taking issue but held that the Court of Claims would have jurisdiction under

[85] 453 U.S. at 687 (contradicting the United States District Court for the Southern District of New York in Marshalk v. Iran Nat'l Airlines Corp., 518 F. Supp. 69 (S.D.N.Y.), *rev'd and remanded*, 657 F.2d 3 (2d Cir. 1981)).

In Persinger v. Islamic Republic of Iran, No. 81-2003 (D.C. Cir. Oct. 8, 1982), the court of appeals extended Justice Rehnquist's definition of "settlement" to include a suspension of claims where no recompense is provided. Persinger, a former hostage, had contested President Carter's executive order forbidding any claim against Iran "in any court within the United States or elsewhere" by any person who had been held hostage by Iran. *Id.* slip op. at 5 n.5.

the Tucker Act[86] to hear such a claim.[87]

VII. CONCLUSION

In debates which preceded the *Dames & Moore* case, commentators expressed the opinion that decades of progress towards resolving ordinary contract disputes with foreign states would be undone if the Court acknowledged the right of the President to settle claims on his own. The very large area of state relations with private parties would be politicized once again, bringing new pressures on the State Department, and causing greater friction with foreign states. At the same time, there would be a halt in progress away from the old Vattelian[88] system whereby the individual had no rights in international law, and only states had legally cognizable existence.[89] On the other side, the government feared that without the broadest discretion to operate in the international sphere, the President would be incapable of peacefully resolving a serious crisis like that with Iran.

Even though its decision was stated to be extremely narrow, the Court not only avoided both problems, it helped forge tools for future analysis of foreign policy disputes that will be of great utility. By denying that the President has plenary power to settle claims, the Court avoided undermining the recent trend to depoliticize commercial relations between foreign states and private individuals. By pointing out that claimants had opportunities to obtain satisfaction from the Claims Tribunal, the Court noted that the reasonable expectations of private individuals in their dealing with foreign states were not dashed. In addition, by permitting suits to be brought before the Court of Claims on the basis of the taking clause, the Supreme Court retained the vitality of the Constitution's guarantees.

At the same time, by permitting the President to exercise claims settlement powers with the acquiescence of Congress, if not its explicit approval, the Court allowed that department primarily in charge of the conduct of foreign policy to resolve a complex, serious and delicate international crisis. On the way to this result, Justice Rehnquist refined the principles of *Curtiss-Wright* and *Youngstown* into a more mature structure in which the roles and the relationships of the President, the Congress, and the judiciary in foreign policy questions begin to be delineated more clearly. He also took an additional step in distinguishing jurisdictional questions from those of substantive law. By these mechanisms, the Court was able to harmonize all of these vital values in a decision that will be of enduring benefit to the constitutional order in this country.

[86] 28 U.S.C. § 1491 (Supp. III 1979).

[87] 453 U.S. at 689.

[88] Named after Emerich de Vattel whose famous treatise, LAW OF NATIONS (1758), influenced international law for so long.

[89] *See Transcript of a Conference on the Settlement with Iran*, 13 LAW. AM. 1 (1981).