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Dames & Moore v. Regan: The Iranian Settlement Agreements, Supreme Court Acquiescence to Broad Presidential Discretion

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DAMES & MOORE v. REGAN: THE IRANIAN SETTLEMENT AGREEMENTS, SUPREME COURT ACQUIESCENCE TO BROAD PRESIDENTIAL DISCRETION

On November 4, 1979, the American Embassy in Tehran, Iran was seized, and approximately fifty Americans were taken hostage. As a result of that crisis, President Jimmy Carter declared a national emergency and prohibited the removal or transfer of all Iranian property within the jurisdiction of United States courts.[1] In addition, the President delegated authority to the Secretary of the Treasury to promulgate regulations necessary to enforce the blocking order.[2]

After nearly fifteen months of captivity, the Americans returned home. In exchange for their release, Iran exacted several obligations from the United States government which were embodied in two declarations by the Republic of Algeria.[3] In a statement of general principles, the United States and Iran agreed that all United States legal proceedings against Iran would be terminated, all attachments and judgments obtained would be nullified, and all future litigation against Iran would be prohibited.[4] The agreements also established an international arbitral tribunal, called the Iran-United States Claims Tribunal, to bring about the termination of all claims through binding arbitration.[5] The Agreements were implemented

1. Exec. Order No. 12,170, 44 Fed. Reg. 65,279 (1979).

2. *Id.* The Treasury Department issued a regulation that provided, in part: "[U]nless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since [November 14, 1979] there existed an interest of Iran." 31 C.F.R. § 535.203(e) (1981). These regulations also provided that any licenses or authorizations granted could be "amended, modified, or revoked at any time." 31 C.F.R. § 535.805 (1981).

3. 81 DEP'T STATE BULL. 1-4 (Feb. 1981). The two agreements are: *Declaration of the Government of the Democratic and Popular Republic of Algeria* [hereinafter cited as *Declaration I*], and *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* [hereinafter cited as *Declaration II*]. [Reference to *Declaration I* and *Declaration II* together will be hereinafter referred to as the Agreements.].

4. *Declaration I, supra* note 3, at 2.

5. *Declaration II, supra* note 3, at 3. The Tribunal is composed of nine members. Three members are from the United States, three from Iran, and the remaining three chosen by these six members. It has jurisdiction to hear all claims against both the United States

in the United States by a series of executive orders issued by President Carter[6] and one executive order issued by President Reagan.[7]

Each executive order set forth the authorization for the presidential actions taken in implementing the Agreements.[8] Presidents Reagan and Carter purported to act pursuant to the authority granted by the Constitution and several acts of Congress, most notably the International Emergency Economic Powers Act (IEEPA).[9]

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and Iran outstanding at the time of the agreement, as well as official claims against the United States and Iran by each other. The Tribunal is also empowered to interpret the terms of the Agreements. *Id.*

Some discussion has centered on the benefit, or lack thereof, of submitting pending United States claims to the tribunal. The most comprehensive discussion of this matter appeared in Chas. T. Main Int'l v. Khuzestan Water & Power Auth., 651 F.2d 800 (1st. Cir 1981).

The *Main* court saw three disadvantages from the claimant's perspective. First, because the panel was composed partly of Iranians, it might be less sympathetic toward United States claims than might a United States district court. Second, the tribunal could become stalled in procedural snarls. 651 F.2d at 815. Finally, Congress recognized that although the aggregate dollar value of all claims could be beyond comprehension at the time, it was believed that the amount far exceeds the funds held in escrow for payment of these claims. There was no assurance that Iran would honor its commitment to transfer additional funds to satisfy any inadequacy. *See The Iran Agreements: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 73 (1981) [hereinafter cited as the Iran Agreements].

The *Main* court pointed out several advantages as well. Claimants could derive some protection from the $1 billion escrow account established for payment of the claims and funded by Iran. 651 F.2d at 815. The lack of assurance that the account would be adequately funded, however, undercuts this contention. A tribunal award might be more valuable abroad, however, because the parties agreed that any award would be enforceable against them in the courts of any country. *Id.* Nevertheless, this contention assumes the absence of prejudgment attachments of Iranian property in the United States. In both *Main* and Dames & Moore v. Regan, No. CV 81-2064 LEW (Px) (C.D. Cal. May 28,1981) (available in Appendix, Petitioner's Brief for Certiorari, Davis & Moore v. Regan, 101 S. Ct. 2972 (1981)), this was not the case.

Lastly, the *Main* court asserted that Iran would be unable to present sovereign immunity and act-of-state defenses thus avoiding lengthy pretrial skirmishes. Congress has, however, outlined procedures to circumvent these frustration of suit defenses. *See infra* notes 96-108 and accompanying text.

6. Exec. Order Nos. 12,276-85, 46 Fed. Reg. 7913-31 (1981) (President Carter sought to implement all of the obligations embodied in the Agreements that became binding prior to the end of his term).

7. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981) (President Reagan suspended pending claims and provided for their arbitration in the Iran-United States Claims Tribunal).

8. An executive agreement, like a treaty, is an agreement between two nations. In the United States, such agreements are distinquished from treaties because the President enters into them without the advice and consent of the Senate. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 173 (1972). Whether negotiations are concluded by an executive agreement or a treaty has little relevance as a matter of international law. *See* 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 211 (1970).

9. 50 U.S.C. §§ 1701-06 (Supp. II 1978) [hereinafter cited as IEEPA]. The executive

Several lawsuits quickly followed the issuance of the executive orders. In one suit, Dames & Moore, on behalf of its wholly-owned subsidiary, Dames & Moore International, filed a claim against the Government of Iran and others in the United States District Court for the Central District of California. Dames & Moore contended that it was owed nearly $3.5 million under a contract for services with the Atomic Energy Organization of Iran. Initially, the district court issued prejudgment attachment orders to secure a judgment against the defendant.[10] Thereafter, the court awarded Dames & Moore the amount claimed under the contract. Following the issuance of the executive orders implementing the Iranian settlement agreements, however, the district court rescinded the prejudgment attachments.[11]

Dames & Moore filed suit against the United States and the Secretary of the Treasury seeking declaratory and injunctive relief to prevent enforcement of the executive orders. The suit was dismissed by the district court for failure to state a claim upon which relief could be granted.[12] Because of the pressing time restraints incorporated into the Iranian settlement agreement, the Supreme Court granted certiorari before judgment and set an expedited briefing and argument schedule.[13]

The Supreme Court, in *Dames & Moore v. Regan*,[14] addressed two sig-

orders also cited 3 U.S.C. § 301 (1976), 22 U.S.C. § 1732 (1976), and 50 U.S.C. § 1631 (1976) as further authority for the various executive actions. Only the IEEPA and 22 U.S.C. § 1732 directly relate to the issues addressed by the Supreme Court in *Dames & Moore*. The executive orders also cited the Constitution as authority for the actions taken. However, no specific constitutional section was mentioned either in the orders or by the parties in *Dames & Moore*.

10. Dames & Moore v. Atomic Energy Org. of Iran, No. CV 79-04918 LEW (Px) (C.D. Cal. Feb. 18, 1981) (available in Petitioner's Brief for Certiorari, at A-13, Dames & Moore v. Regan, 101 S. Ct 2972 (1981)). The President had granted a general license allowing certain judicial proceedings, including prejudgment attachments, but had disallowed the entry of any judgment or order of analogous effect. 31 C.F.R. §§ 535.504(a), 535.418 (1980). After a blocking order has been issued, no judicial proceeding is valid in the absence of a license. *See* 31 C.F.R. §§ 535.201, 535.203(a), 535.310, 535.502 (1980).

11. Dames & Moore v. Atomic Energy Org. of Iran, No. CV 79-04918 LEW (Px) (C.D. Cal. Feb. 18, 1981).

12. Dames & Moore v. Regan, No. CV 81-2064 LEW (Px)(C.D. Cal. May 28, 1981). Dames & Moore contended that the executive orders and regulations promulgated thereunder were unconstitutional to the extent that they affected the final judgment it had obtained against Iran and the Atomic Energy Organization of Iran, its execution on that judgment, and its prejudgment attachments of the assets of the Iranian bank defendants, against whom judgment had not been entered.

13. Dames & Moore v. Regan, 101 S. Ct. 3071 (1981) (order granting expedited briefing and argument schedule). The Court was forced to move quickly in this matter because unless there was some government action by July 19, 1981, Iran could consider the United States to be in breach of the Agreements. 101 S. Ct. at 2981.

14. 101 S. Ct. 2972 (1981).

nificant questions. The first issue was whether the President had specific congressional authorization to nullify prejudgment attachments and order the transfer of Iranian assets. Relying on the IEEPA, the Court held that the President possessed such authority.[15] The second issue addressed by the Court was whether the President had authority to suspend United States claims pending against Iran in United States courts. Although it found no specific congressional authorization, the Court held that the actions taken were within the inherent power of the presidency.[16]

This Note will examine the analysis of presidential authority articulated by the Court in *Dames & Moore* and discuss its potential impact on private litigants. It will review the development of presidential authority in foreign affairs through the use of executive agreements, focusing on the broad scope of the President's substantive power to affect foreign claims settlement. Finally, this Note will demonstrate *Dames & Moore's* endorsement of broad presidential discretion in this area.

I. BASIS FOR PRESIDENTIAL AUTHORITY

A. Executive Agreements and Foreign Affairs

The current scope of presidential authority in foreign affairs might best be characterized as amorphous. Congressional or judicial development of the law in this area is lacking.[17] Moreover, the United States Constitution does not enumerate any comprehensive foreign affairs power scheme.[18] In many ways, current concerns over the separation of powers in foreign affairs embody the same struggles experienced in the earliest years of this country.[19] Considering only its affirmative grants of power,[20] the Consti-

15. *Id.* at 2984.

16. *Id.* at 2983, 2991.

17. *See* L. HENKIN, *supra* note 8, at 3-11.

18. Professor Corwin has observed that the Constitution merely confers general powers capable of affecting foreign relations on the President, the Senate, and Congress, leaving for events to resolve which of these organs shall have the decisive and final vote in determining the course of the nation. E. CORWIN, THE PRESIDENT—OFFICE AND POWERS 171 (1957). This can be frustrating when analyzing presidential power in foreign affairs. As Professor Henkin adds, "the lawyer is often hard-put to determine even the President's own view as to the reach of his various resources of constitutional authority. But the constitutional sum of Presidential power depends on its parts, and, however imprecisely, analysis measures them singly." L. HENKIN, *supra* note 8, at 45.

19. For example, recurrent disputes have arisen as a result of the President's authority as commander in chief of the armed forces and congressional authority to declare war. It has been estimated that on no fewer than 125 occasions, Presidents from Jefferson to Carter have asserted the right to send troops abroad on their own authority. *See Background Information on the Use of United States Armed Forces in Foreign Countries*, FOREIGN AFFAIRS DIVISION, LEGISLATIVE RESEARCH SERVICE, LIBRARY OF CONGRESS, FOR THE SUBCOMM.

tution might be said to invite conflict among the federal branches for the privilege of directing American foreign policy.[21]

The increasing interaction among nations, commercially and otherwise, intensifies the problem of defining the President's foreign affairs power. Of course, there is wide agreement that the President wields great power in the conduct of foreign relations.[22] Juxtaposed to this executive authority, Congress enjoys prevailing power to regulate foreign commerce.[23] Commercial interaction among nations necessarily touches upon both of these spheres. In such areas, Congress and the President are said to have concurrent authority.[24] With commercial interaction among nations increasing, the potential for conflict between these branches also increases.[25]

The Constitution does not explicitly authorize the President to enter into agreements other than treaties.[26] Nevertheless, Presidents have frequently used executive agreements for various purposes in effectuating interna-

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ON NATIONAL SECURITY POLICY AND SCIENTIFIC DEVELOPMENT OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 91st Cong., 2d Sess. 15 & App. I & II (1970 Revision). Professor Henkin adds: "By repeated exercise without successful opposition, Presidents have established their authority to send troops abroad probably beyond effective challenge, at least where Congress is silent, but the constitutional foundations and the constitutional limits of that authority remain in dispute." L. HENKIN, *supra* note 8, at 53.

20. The Constitution expressly confers certain powers on the President and Congress that necessarily affect the conduct of foreign affairs. For example, the President has express constitutional authority to make treaties, appoint ambassadors, consuls, and others, in addition to being commander in chief of the armed forces. U.S. CONST. art. II, § 2. Congress enjoys express authority to regulate commerce with foreign nations, establish uniform rules of naturalization, define and punish piracies and felonies committed on the high seas, declare war, grant letters of marque and reprisal, and maintain the armed forces. U.S. CONST. art. I, § 8.

21. As Professor Corwin has pointed out, the doctrine of concurrent authority of the President and Congress over foreign affairs and the reluctance of the judiciary to decide political questions have combined to keep the powers of the federal government in foreign relations "fluid and easily available." E. CORWIN, *supra* note 18, at 171-77. However, in addition, this situation promotes a constant struggle for power. *Id.* at 177.

22. The President's broad foreign affairs power was recognized long ago. In 1799, Representative John Marshall stated before the House of Representatives: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." E. CORWIN, *supra* note 18, at 177-78.

23. U.S. CONST. art. I, § 8, cl. 3.

24. *See* L. HENKIN, *supra* note 8, at 104-07.

25. Professor Tribe has maintained that "[d]octrines recognizing great presidential power in the foreign sphere rest on the increasingly dubious separation between foreign and domestic policy and an increasingly false premise that steps taken abroad have little impact at home . . . ." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-3, at 164 n.2 (1978).

26. 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 21, at 194 (1970). The President's treaty making power can be found at U.S. CONST. art. II, § 2, cl. 2. It has been pointed out, however, that the Constitution does provide for "Agreements or Compacts" between states and foreign powers, with the consent of Congress. U.S. CONST. art. I, § 10; *see also* L. HENKIN, *supra* note 8, at 173-74.

tional negotiations.[27] The utility of an executive agreement, as an instrument manifesting presidential foreign affairs power, fluctuates depending upon the substantive authority of the President in the area the agreement is intended to affect. In this way, an executive agreement may create a conflict between Congress and the President. Most of these agreements are given effect, however, under existing presidential legal or constitutional authority or through legislation approving or implementing the agreement.[28] It appears settled that when the President acts through an executive agreement pursuant to express congressional authorization, or when subsequently supported by joint resolution of Congress, the President's power is coextensive with the treaty power.[29] Similarly, the President's power to make "sole" executive agreements, pursuant to express constitutional authorization, but without the benefit of congressional support, has not been doubted.[30]

Despite, or perhaps because of, the amorphous nature of the executive power over foreign affairs, there is a dearth of case law on this subject. Nevertheless, the Supreme Court has issued a few significant decisions concerning foreign affairs actions by the executive branch. In 1937, the Court, in *United States v. Belmont*,[31] expressed its view of the effectiveness of sole executive agreements. A Russian corporation deposited money with Belmont, a New York banker, prior to 1918. In 1918, the Soviet government enacted a decree whereby it dissolved the corporation and appropriated all of its property, including the deposit with Belmont. Belmont refused to relinquish the funds. The deposit remained the property of the Soviet government until 1933, when it was released and assigned to the United States government. The executive agreement that gave rise to the assignment was part of a larger plan to normalize relations between the Soviet Union and the United States and to bring about the recognition of the Soviet government by the United States. The Supreme Court held in favor of the United States, recognizing that its external affairs are to be exercised without regard to state laws or policies.[32] In so holding, the

27. As Professor Henkin has stated, "[w]ithout the consent of the Senate, the approval of Congress, or the support of a treaty, Presidents from Washington to Nixon have made many thousands of agreements, of different degrees of formality and importance, on matters running the gamut of American foreign relations." L. HENKIN, *supra* note 8, 177.

28. *See* 14 M. WHITEMAN, *supra* note 26, § 20, at 185.

29. Such congressional-executive agreements are the law of the land, superceding inconsistent state or federal laws. *See* L. TRIBE, *supra* note 25, § 4-4, at 170; 14 M. WHITEMAN, *supra* note 26, § 23, at 216-17; L. HENKIN, *supra* note 8, at 174-75.

30. *See* L. HENKIN, *supra* note 8, at 174-75.

31. 301 U.S. 324 (1937).

32. *Id.* at 331. Belmont argued that the appropriation of the deposit by the soviet gov-

Court observed that the executive agreement was within the authority of the President.[33] The Court took judicial notice of the fact that the assignment was part of a larger plan to recognize the Soviet government.[34]

The Court was confronted with basically the same issue five years later in *United States v. Pink*.[35] The Court held that the presidential power to recognize the Soviet government included the power to remove obstacles to recognition such as the settlement of claims against American nationals.[36] Relying on *Belmont*, the Court observed: "A treaty is a 'Law of the Land' under the supremacy clause . . . of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity."[37]

Belmont and *Pink* clearly acknowledge the President's power to enter into executive agreements. These cases, however, have shed little light on the scope of that power.[38] The recognition of a foreign government, a necessary concomitant of sovereignty, is commonly acknowledged to be solely within the purview of the executive of the recognizing nation.[39] In the United States, recognition has been viewed as "an 'enumerated' power implied in the President's express powers to appoint and receive Ambassadors."[40]

A more complicated problem is presented when an executive agreement is not supported by either the Constitution or an act of Congress, but is entered into pursuant to the President's inherent or plenary power over the

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ernment amounted to an act of confiscation and, thus, was contrary to New York state public policy.

33. *Id.*

34. *Id.* at 330.

35. 315 U.S. 203 (1942).

36. *Id.* at 229.

37. *Id.* at 230. Although never specifically referred to as the Litvinov Assignment, the assignment of claims that concerned the court in *Belmont* was the same assignment as in *Pink*. *Id.* at 229.

38. In his dissenting opinion in *Pink*, Chief Justice Stone pointed out the weakness in relying on *Belmont*. He asserted that the Court's proclamations in *Belmont*, other than those concerning the narrow holding of that case, were dicta. *Id.* at 243-44. His argument is fortified by an analysis of Justice Sutherland's majority opinion in *Belmont* which expressly restricted the holding to the facts of the case:

> In so holding, we deal only with the case as now presented and with the parties now before us. We do not consider the status of adverse claims, if there be any, of others not parties to this action. . . . We decide only that the complaint alleges facts sufficient to constitute a cause of action against the respondents.

301 U.S. at 332-33.

39. 1 J. MOORE, DIGEST OF INTERNATIONAL LAW § 75, at 243-44 (1906); *see also Belmont*, 301 U.S. at 330.

40. L. HENKIN, *supra* note 8, at 178.

subject matter.[41] Congress has never successfully defined the President's power in this area, although much legislation has been introduced.[42] While the Supreme Court has never invalidated an executive agreement for lack of Senate consent, it has provided little guidance on the President's power to act alone.[43] The little guidance that does exist was furnished by Justice Jackson in the landmark case of *Youngstown Sheet & Tube Co. v. Sawyer*.[44]

B. The Youngstown Analysis of Presidential Authority

In late 1951, steel companies and their employees engaged in a labor dispute concerning the terms and conditions omitted in new collective bargaining agreements. After protracted negotiation, the employees gave notice of an intention to strike. The indispensability of steel as a component of virtually all war materials led President Truman to issue an executive order directing the Secretary of Commerce to take possession of the steel mills and keep them operating.[45]

The Supreme Court, in *Youngstown Sheet & Tube Co. v. Sawyer*,[46] sustained a challenge to the President's authority and the government was forced to relinquish control of the steel mills.[47] Justice Black, writing for

41. Although the Government argued otherwise, the Supreme Court, in *Dames & Moore*, found that with regard to the suspension of pending United States claims in United States courts, the President acted pursuant only to inherent authority. *See infra* notes 140-55 and accompanying text. *See generally* E. CORWIN, *supra* note 18, at 171-77.

42. The *Dames & Moore* Court was quick to point this out:

> In 1972, Congress entertained legislation relating to congressional oversight of such agreements. But Congress took only limited action, requiring that the text of significant executive agreements be transmitted to Congress. . . . Likewise in this case, Congress, though legislating in the area, has left 'untouched' the authority of the President to enter into settlement agreements.

101 S. Ct. at 2988 n.10. Arguably, a sole executive agreement, unlike a treaty, cannot override a prior act of Congress. In United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955), the Fourth Circuit invalidated an agreement with Canada regarding the importation of potatoes on the ground that the agreement conflicted with a prior enactment by Congress in an exercise of its power to regulate foreign commerce. *See* L. TRIBE, *supra* note 25, § 4-4, at 171.

43. L. HENKIN, *supra* note 8, at 179. The Supreme Court, in United States v. Curtis-Wright Export, 299 U.S. 304 (1936), spoke of the President as the "sole organ" of the government in foreign affairs. Critics of that comment point to the Senate's constitutional role in ratifying treaties and enumerated congressional powers that touch upon international affairs. *See, e.g.*, Comment, *Self-executing Executive Agreements: A Separation of Powers Problem*, 24 BUFFALO L. REV. 137 (1975). *See generally* L. HENKIN, *supra* note 8, at 45-50; L. TRIBE, *supra* note 25, § 4-2, at 159-61.

44. 343 U.S. 579 (1952).

45. Exec. Order No. 10,340, 17 Fed. Reg. 3139 (1952).

46. 343 U.S. 579 (1952).

47. *Id.* at 589.

the Court, recognized that neither an act of Congress nor the Constitution authorized President Truman's action;[48] thus, the Court invalidated the seizure order.[49] More importantly, Justice Jackson's concurring opinion[50] provided the guidelines within which courts have frequently analyzed subsequent presidential actions.[51]

Justice Jackson divided presidential power into three categories that varied according to the source of the President's authority and the level of scrutiny applied by a court in analyzing presidential actions varied for each category. If the President acted pursuant to congressional authorization, his authority was at its maximum.[52] If he acted in an area lacking congressional guidance, he could rely only upon his own independent authority.[53] If he took measures incompatible with the will of Congress, he could rely only upon his own constitutional power less Congress' constitutional power, if any, over the matter.[54]

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48. *Id.* at 585.

49. *Id.* at 589.

50. *Id.* at 634 (Jackson, J., concurring).

51. Justice Jackson's opinion has been widely recognized and frequently applied. *See* L. TRIBE, *supra* note 25, § 4-7, at 181-83; Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 10-13 (1982).

52. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 635.

53. *Id.* at 637.

54. Because the Supreme Court, in *Dames & Moore*, analyzed the President's actions in bringing about the Iranian settlement agreements within this framework, a lengthy text of Justice Jackson's concurrence is set out below:

> [The Constitution] enjoins upon its branches of government separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.
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> 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. In these circumstances, and in these only, he may be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . .
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> 2. *When the President acts in the 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*. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
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> 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.*

Justice Jackson thus recognized several considerations regarding the analysis of presidential powers. First, only when the President acts with congressional authorization does he personify the federal sovereignty.[55] Second, the ultimate consideration in any analysis should be the maintenance of the separation of powers within the federal government.[56] Finally, a large measure of power to make national policy is fixed neither in the President nor Congress, but fluctuates with the initiatives and actions of each branch.[57]

Although Justice Jackson realized that these groupings were oversimplified,[58] his opinion has enjoyed frequent use in subsequent analyses of presidential actions.[59] Since *Youngstown*, however, Congress has sought to define presidential options more precisely.

C. Congressional Guidance and the President's Foreign Affairs Power

Congressional response to the exigencies of foreign relations has been varied.[60] Congress has provided guidance with regard to the conduct of

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Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 635-38 (emphasis supplied; citations omitted).

55. *Id.*

56. *Id.* at 655.

57. *See The Yale Paper—Indochina: The Constitutional Crisis, reprinted in* W. LOCKHART, Y. KAMISAR, & J. CHOPER, CONSTITUTIONAL LAW 231-34 (5th Ed. 1980).

58. *Youngstown*, 343 U.S. at 635.

59. *See* Bruff, *supra* note 51.

60. A complete discussion in this regard is beyond the scope of this note. In *Dames & Moore*, the President relied on the IEEPA and 22 U.S.C. § 1732 (1976) as authority for the actions embodied in the executive orders. In its analysis of the issues presented in the case, the Court also discussed the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 (1976) [hereinafter referred to as FSIA], and the International Claims Settlement Act, 22 U.S.C. § 1621-1627 (1976 & Supp. IV 1980). The IEEPA and the FSIA are discussed subsequently in the text. *See infra* notes 62-108 and accompanying text.

In 1868, Congress enacted 22 U.S.C. § 1732, the so called Hostage Act. Following the Civil War, several countries refused to recognize the citizenship of naturalized Americans and thereby repatriated these United States citizens against their will. In an effort to curtail their activities, Congress gave the President virtually unlimited power, short of war, to effectuate their release. The Act, however, has virtually no direct applicability in the context of the Iranian settlement agreements.

In 1949, Congress enacted the International Claims Settlement Act to provide for the allocation of funds received from an executive claims settlement with Yugoslavia. Through amendment, this Act has been used in the allocation of funds received from subsequent claims settlements. Most recently, the Act has been used in the settlement of claims with the People's Republic of China, 22 U.S.C. § 1627 (1976 & Supp. IV 1980), and Vietnam, 22 U.S.C. §§ 1645, 1645a(5) (Supp. IV 1980). The Act does not, however, contain explicit congressional authorization for the President's exercise of exclusive authority in foreign claims

foreign affairs when practicable. With regard to the Iranian settlement agreements, congressional guidance takes two forms. First, the IEEPA is important for the authority it gives the President concerning foreign claims settlement. Second, the Foreign Sovereign Immunities Act[61] (FSIA) is important because it imposes limitations on the President's authority in this area.

1. The Evolution of the IEEPA

In 1977, Congress enacted the IEEPA with the intent to redefine the President's authority over international economic transactions.[62] Through usage and amendment, its predecessor, the Trading With the Enemy Act (TWEA),[63] conferred on the President unusually broad powers that Congress believed he should not normally possess.[64]

Originally enacted in 1917 to "define, regulate, and punish trading with the enemy,"[65] the TWEA was limited by its terms to the regulation of foreign economic transactions during wartime. These powers were provided for and defined in section 5(b) of the Act. Primarily in response to immediate needs, Congress frequently amended the TWEA, offering the President greater latitude than was envisioned by the framers of this legislation.[66] Thus, section 5(b) essentially became an unlimited grant of

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settlement. As a result, it adds little in defining the President's power in this area. *See infra* notes 150-54 and accompanying text.

61. 28 U.S.C. §§ 1330, 1602 (1976).

62. *See* H.R. REP. No. 459, 95th Cong., 1st Sess. 1 (1977) [hereinafter referred to as IEEPA Report].

63. 50 U.S.C. app. § 5 (1976 & Supp. III 1979) [hereinafter referred to as the TWEA].

64. The history of the use of the TWEA as authority for various presidential actions supports this view. *See* IEEPA Report, *supra* note 62, at 3-6.

65. *Id.* at 3.

66. Prior to the enactment of the IEEPA, the TWEA had been expanded by amendment to give a President authority in times of national emergency similar to that which he was previously allowed to exercise only in wartime. In addition, several actions alleged pursuant to the TWEA were wholly domestic in nature. For example, in 1933, President Roosevelt, citing the TWEA as authority, declared a national emergency and a bank holiday to prevent the hoarding of gold. Proclamation No. 2039, 48 Stat. 1689 (1933). At that time, section 5(b) was explicitly limited by its terms to wartime use. Congress, however, ratified the President's actions by amending the TWEA on March 9, 1933, just three days later. *See* IEEPA Report, *supra* note 62, at 3-6. Immediately prior to the enactment of the IEEPA, section 5(b)(1) of TWEA read, in pertinent part:

> During the time of war or during any other period of national emergency declared by the President, the President may . . . .
>
> . . . .
>
> (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 privi-

authority, enabling the President to exercise broad discretionary powers in both domestic and foreign economic areas without congressional review.[67]

Congressional dissatisfaction with the TWEA was convincingly expressed by the House Committee on International Relations in its report on the IEEPA reform legislation. Quoting from the hearings conducted by the Committee, the report stated: "[TWEA] is a prime example of the unchecked proliferation of Presidential power for purposes totally unforeseen by the creators of that power."[68] The report further noted that the Carter Administration supported the reform of section 5(b).[69] It is clear from the legislative history that the purpose of the IEEPA was to limit presidential power to regulate foreign economic transactions in future times of national emergency.

To achieve this end, the reform legislation distinguished between the President's authority during wartime and during a national emergency: his power during wartime remained intact; but, Congress redefined his authority to act during a national emergency. Although the wording of section 5(b) was largely unchanged, the IEEPA included substantive restrictions and procedural limitations on the President's power.[70] Moreover, the legislative history distinguished the IEEPA from section 5(b) of the TWEA.[71] Congress was unwilling to grant to the President the same

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lege 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 . . . .

50 U.S.C. app. § 5 (1976).

67. IEEPA Report, *supra* note 62, at 7.

68. *Id.* at 9.

69. The report stated:

In testimony before the Subcommittee on International Economic Policy and Trade, the administration admitted the need for changes in section 5(b). Assistant Secretary of the Treasury C. Fred Bergsten testified as follows:

* * * we recognize that the 60-year history of the section has revealed the desirability of reforms in the way its nonwartime national emergency powers are exercised. Indeed, the authority of the section is so broad that this administration strongly believes that the powers should only be used on a truly emergency basis.

IEEPA Report, *supra* note 62, at 9.

70. In addition to a general grant of authority, the IEEPA includes five sections outlining procedural limits and providing congressional review of presidential action. 50 U.S.C. §§ 1701, 1703-1706 (1977).

71. Regarding presidential authority under IEEPA, the report stated:

This grant of authorities does not include the following authorities which, under section 5(b) of the Trading With the Enemy Act, as amended by Title I of this bill, are available to the President in time of declared war: (1) *the power to vest, i.e. to take title to foreign property*; (2) the power to regulate purely domestic transactions; (3) the power to regulate gold or bullion; and (4) the power to seize records.

IEEPA Report, *supra* note 62, at 15 (emphasis supplied).

broad powers over foreign assets in times of national emergency that he previously possessed.[72]

Unlike the TWEA, the President's authority under the IEEPA has not benefitted from extensive judicial interpretation.[73] However, because relevant sections of the TWEA were incorporated into the IEEPA, a review of cases interpreting the TWEA is helpful.[74]

In 1940 and 1941, pursuant to section 5(b) of the TWEA, President Franklin D. Roosevelt issued executive orders to prohibit certain transactions affecting property of foreign nationals, except when licensed by the Secretary of the Treasury.[75] Several cases were filed challenging the President's actions under the TWEA and were decided by the Supreme Court.

In *Propper v. Clark*,[76] President Roosevelt's executive order was applied to Austria, thus preventing unlicensed transfers of Austrian property.[77] The Court considered whether the freeze order barred a subsequent, unlicensed judicial transfer of an interest in property. While recognizing the validity of the order, the Court limited its holding, stating: "We do not now undertake to say whether every determination of rights concerning blocked property in unlicensed litigation is voidable."[78] The Court hastened to add that the congressional purpose behind the TWEA favored

72. For example, presidential authority no longer includes the power to vest title to property, or to regulate purely domestic transactions. The former is of direct relevance to the holding in *Dames & Moore, see infra* notes 119-39 and accompanying text. The latter prohibition was of concern in at least one district court case: *see* The Marschalk Co. v. Iran Nat'l Airlines Corp., 518 F. Supp. 69 (S.D.N.Y. 1981) (advertising services rendered solely within the United States).

73. The lower courts litigating issues related to the Iranian settlement have, however, addressed the President's authority under the IEEPA, as has the Supreme Court in *Dames & Moore. See infra* notes 110-15 & 119-39 and accompanying text.

74. In addition, these cases were cited by the Court in *Dames & Moore, see infra* notes 127-39 and accompanying text. They are especially useful in isolating the factors important in an analysis of presidential authority in this area.

75. Exec. Order No. 8389, 5 Fed. Reg. 1400 (1940); Exec. Order No. 8785, 6 Fed. Reg. 2897 (1941).

76. 337 U.S. 472 (1949).

77. This action, commonly referred to as a freeze order, is precisely what President Carter did with regard to Iranian property within the jurisdiction of the United States courts. *See* Exec. Order No. 12,170, 44 Fed. Reg. 65,279 (1979).

Under the TWEA, if the President chose to permanently transfer title to property previously frozen, he did so by means of a vesting order. Frequently this was done to satisfy outstanding United States claims against the country whose property was frozen. In *Dames & Moore*, it was contended that the President's actions constituted a vesting when he forced the transfer of property, previously allowed to be attached, back to Iran. *See infra* notes 120-39 and accompanying text. It will be recalled that through the reform of the TWEA, the IEEPA prohibited the President from vesting title to foreign property. *See supra* notes 62-74 and accompanying text.

78. *Propper*, 337 U.S. at 486.

federal determination of the rights in blocked assets.[79]

The Court later decided two cases, both entitled *Zittman v. McGrath*,[80] involving essentially the same facts. Americans holding claims against German banks obtained attachments on the debtor's accounts in a New York state court. Previously, the President had ordered the German assets frozen but did not specifically forbid the issuance of attachment orders until after the attachments in these cases had been obtained.[81]

In *Zittman I*, the government claimed that petitioners obtained no lien or other interest in the attached accounts by virtue of the freeze order. Refusing to give retroactive effect to the government's subsequent clarification of the freeze order, however, the Court validated the attachment orders.[82] The Court emphasized that an attachment was similar in effect to the presidential freeze order[83] and, therefore, consistent with the congressional purpose of the TWEA. Moreover, the Court noted that execution in satisfaction of judgment was clearly prohibited, and thus the attachment could never effect a transfer without first being authorized by the President.[84]

Subsequent to the freeze order, the government issued a vesting order which required the turnover of the German property so that it could be accounted for as provided by law. In *Zittman II*, the Court sustained the government's request that the accounts be seized in order to be administered.[85] In so holding, the *Zittman II* Court highlighted the fact that the government was making a request for the protection of American credi-

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79. In this regard, Justice Reed stated:

> The congressional purpose to put control of foreign assets in the hands of the President . . . so that there might be a unified national policy in the administration of the Act, argues strongly for federal determination of issues of rights in the blocked assets. Comity does not require abnegation to the extent that a federal court cannot adjudicate rights to the claim involved.

Id. at 493. Thus, *Propper* may be viewed, in part, as involving the supremacy of federal legislation over state law, while leaving open any future determination of the effect of a freeze order where facts and legal issues may differ.

80. 341 U.S. 446 (1951) (Zittman I); 341 U.S. 471 (1951) (Zittman II).

81. 341 U.S. 446, 452 (1951).

82. *Id.* at 463.

83. In this regard, the Court stated:

> [T]he effect of the State's action, like that of the federal, was to freeze these funds, to prevent their withdrawal or transfer to use of the German nationals. There is no suggestion that these attachment proceedings could in any manner benefit the enemy. *The sole beneficiaries are American citizens* whose liens are not derived from the enemy but are adverse to any enemy interests.

Id. at 463 (emphasis supplied).

84. *Id.* at 451.

85. 341 U.S. 471, 472-74 (1951).

tors[86] and therefore furthering the purposes of the TWEA.

Two observations outline the significance of the divergent holdings in both *Zittman* cases. First, *Zittman II* involved the effect of a vesting order, whereas *Zittman I* was concerned with the impact on the attachments of a freeze order under the TWEA. Second, the Court was committed to render a decision that would further the purposes of the program to take control of the assets.[87] Since petitioner's actions in *Zittman I* and the government's actions in *Zittman II* were consistent with those purposes, they both obtained favorable judgments.

In 1953, the Supreme Court elaborated on the effect of presidential actions taken pursuant to the TWEA in *Orvis v. Brownell*.[88] After President Roosevelt's executive order was enforced against Japanese assets, petitioners obtained an unlicensed attachment in a New York court of a credit owed to Japanese debtors. Thereafter, a vesting order was issued transferring title to the credit to the United States government. Petitioners filed notice of their claim with the government, pursuant to section 9(a) of the TWEA.[89] The Court was called upon to decide whether the freeze order prevented a creditor from attaching an interest or right in property that would support a claim against the government under section 9 of the Act and held that the order had such an effect.[90] Pointing out the clarity of the

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86. The Court said:

> While the statute . . . authorizes the vesting of such foreign-owned property in the Custodian and its administration 'in the interest of and for the benefit of the United States,' it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds 'shall be equitably applied' for the payment of debts.

Id. at 473-74 (citations omitted).

87. The Court noted the purposes of the federal program:

> 1. Protecting property of persons in occupied countries; 2. Preventing the Axis, now our enemy, from acquiring any benefit from these blocked assets; 3. Facilitating the use of blocked assets in the United Nations war effort and protecting American banks and business institutions; 4. *Protecting American creditors*; 5. Foreign relations, including post-war negotiations and settlements.

341 U.S. at 453-54 (emphasis supplied).

88. 345 U.S. 183 (1953).

89. *Id.* at 185. Section 9(a) of the TWEA provides for filing claims against property transferred to the United States government and reads, in pertinent part:

> Any person not an enemy or ally of an enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the . . . [government] or seized . . . may file with [the government] a notice of his claims under oath . . . and the President . . . may order the payment . . . or delivery to said claimant of the money or other property.

50 U.S.C. app. § 9(a) (1976). This section also provides that if the President does not order the payment, the claimant may bring an action in equity to establish a right to the property and force payment. *Id.*

90. *Orvis*, 345 U.S. at 186.

freeze order, the Court stated that petitioners were on notice that the creation of a lien on the property was prohibited.[91] Thus, the attachment, as obtained, was invalid against the federal government.[92]

Judicial construction of the freeze power under the TWEA has endorsed the President's broad authority to determine the disposition of frozen assets and, therefore, the viability of any underlying attachments. Today, however, this power is not without limit. Principally, Congress intended to redefine the President's power by enacting the IEEPA. Any insight derived from *Propper*, *Orvis*, and the *Zittman* cases is necessarily qualified by this reform legislation. More importantly, the Supreme Court clearly intended to enforce the purposes of TWEA by providing for the protection of American creditors in each case. Two further observations with regard to these cases provide additional understanding of the context within which these opinions were issued.

Less than one month after President Roosevelt issued the executive orders that spawned this litigation, Congress ratified the President's actions by joint resolution.[93] Thus, long before these cases reached the Supreme Court, the President enjoyed legislative approval of the steps taken.[94] In addition, *Propper*, *Orvis*, and the *Zittman* cases involved state court proceedings that conflicted with federal law, thus presenting a supremacy clause problem. The Court particularly emphasized this factor in *Orvis*.[95]

In the context of the Iranian settlement agreements, the congressional grant of substantive authority is somewhat obscure. Prior to the Agree-

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91. *Id.* at 186-87.

92. The Court stated:

> But the question is not whether a lien, concededly valid because obtained prior to the freezing order, may be 'annulled' by the [government], but rather whether the freezing order prevented the subsequent acquisition, by attachment, of such a property interest as the [government] would have to recognize under § 9 of the Act. Because of the supremacy of the Federal Government on matters within its competence, the freezing order, while permitting an attachment for jurisdiction and other state law purposes, prevented the subsequent acquisition of a lien which would bind the [government] under § 9.

Id. at 188. Like *Propper* and the *Zittman* cases, in *Orvis* the conflict was between state and federal policy.

93. Pub. Res. No. 69, 54 Stat. 179 (1940).

94. The value of congressional approval is particularly relevant to the analysis of presidential power to affect the Iranian settlement agreements. In light of *Youngstown*, when the President acts with the support of Congress, his power is at its maximum. *See supra* notes 52-54 and accompanying text. Although hearings were held involving the Iranian settlement agreements, Congress has taken no formal action.

95. The issue that developed as a result of the Iranian settlement agreements had no connection with the supremacy clause of the Constitution. *Dames & Moore* concerned a separation of powers conflict, a question never addressed by the Supreme Court in *Propper, Orvis*, or the *Zittman* cases.

ments, the President's power to act pursuant to the IEEPA was largely untested. In addition, the circumstances presented a separation of powers problem that would tend to limit the applicability of prior case law interpreting the TWEA. The separation of powers conflict involved the role of the judiciary in settling claims pursuant to the Foreign Sovereign Immunities Act. Whether directly intended to do so or not, this legislation was another congressional attempt to clarify the President's power to settle foreign claims.

2. The Foreign Sovereign Immunities Act

For nearly a century and a half, the United States recognized and applied the absolute theory of sovereign immunity.[96] Under this doctrine, foreign states were immune from suit and courts would adhere to suggestions of immunity offered by the executive branch on behalf of a defendant foreign state.[97]

In 1952, the United States informally adopted the so called restrictive principle of sovereign immunity.[98] "[T]he immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)."[99] Under the restrictive theory, however, the executive branch remained in control of sovereign immunity determinations by continuing to suggest immunity to the courts. As a practical matter, the executive branch did so when prompted by diplomatic pressure from the foreign entity.[100]

Problems with this approach continued. Execution against foreign property was not permitted.[101] In addition, the private litigant's high de-

96. *See, e.g.*, Schooner Exchange v. McFadden, 11 U.S. (7 Branch) 116 (1812); H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6606-07 [the Foreign Sovereign Immunities Act Report will be hereinafter referred to as FSIA Report].

97. *Cf. Ex Parte* Republic of Peru, 318 U.S. 578, 587 (1943).

98. Letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to the Acting Attorney General (May 19, 1952), 26 DEP'T STATE BULL. 984 (1952).

99. FSIA Report, *supra* note 96, at 6605.

100. The FSIA Report stated:

> From a foreign relations standpoint, the initiative is left to the foreign state. The foreign state chooses which sovereign immunity determinations it will leave to the courts, and which it will take to the State Department. The foreign state also decides when it will attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria.

Id. at 6607.

101. *Id.* at 6625-26.

gree of uncertainty resulting from this approach[102] inspired congressional action.

Enacted "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States,"[103] the Foreign Sovereign Immunities Act (FSIA) was intended to solve these problems.[104] By virtue of its authority to regulate foreign commerce and the jurisdiction of Article III courts, Congress extended the jurisdiction of federal district courts to commercial lawsuits brought by United States claimants against foreign states or an entity thereof.[105]

FSIA codifies the restrictive theory of sovereign immunity and provides for the liability of nonimmune foreign states.[106] The Act sets forth a means to effect service of process on foreign states, guidelines for attachment in certain cases, and the right of United States claimants to execution in satisfaction of judgment on the commercial property of foreign states.[107] The Act is designed to bar executive branch interference in commercial lawsuits involving foreign states[108] and, in so doing, it has enhanced the judiciary's role in foreign claims settlement. Court decisions in this area were to be unaffected by the political pressures of the executive branch.

Like the IEEPA, the FSIA was a congressional attempt to limit broad presidential authority. The context of the Iranian settlement agreements brought about the confluence of these acts. This area of presidential authority, however, is characterized by legislation and case law that is neither definitive nor comprehensive.[109] *Youngstown* remains valuable because of the framework of analysis it provides. No other case law directly addresses separation of powers within the federal government to settle

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102. The FSIA Report stated: "A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided as the basis of nonlegal considerations through the foreign government's intercession with the Department of State." *Id.* at 6607.

103. *Id.* at 6604.

104. 28 U.S.C. §§ 1330, 1602-1611 (1976).

105. *Id.* § 1330.

106. *Id.* § 1606.

107. *Id.* §§ 1608-1611.

108. The FSIA Report stated:

> A principle purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

See supra note 96, at 6606.

109. Justice Jackson, in *Youngstown*, stated: [A] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves." 343 U.S. at 634 (Jackson, J., concurring).

claims. Although Congress has provided guidance in limited situations, its legislation does not indicate complimentary authority within the executive and judicial branches to effect claims settlement, and it appears that the prospect that the two branches may conflict was unanticipated in the statutory enactments. In short, foreign claims settlement power is characterized by a great chasm in the traditional guides a court would call upon to resolve the issues raised by the Iranian settlement agreements.

D. United States Claims Against Iran in Lower Courts

Although it has been estimated that over 450 major United States claims[110] had been filed in federal district courts against Iran or its entities, only two cases were reviewed at the court of appeals level before the Supreme Court decided the issues involved.

On May 22, 1981, the First Circuit decided *Chas. T. Main International, Inc. v. Khuzestan Water & Power Authority*.[111] On the same day, the District of Columbia Circuit decided *American International Group, Inc. v. Islamic Republic of Iran*.[112] Notwithstanding the difference between the facts of these cases,[113] the courts framed the issues in a similar manner.

Both courts concluded that the President enjoyed specific congressional authorization under the IEEPA to nullify prejudgment attachments and order the transfer of assets back to Iran.[114] In addition, they found that the President had inherent authority to order the suspension of claims pending in Article III courts.[115] The Supreme Court accorded great weight to the analysis in these cases in *Dames & Moore*.

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110. A major claim has been characterized as one in excess of $250,000. It is believed that as many as 1700 minor claims, those less than $250,000 were filed. *See The Iran Agreements, supra* note 5, at 74 (statement of Lawrence Newman from the law firm of Baker & McKenzie), 164 (statement of Larry L. Simms, Acting Attorney General, Dep't of Justice) (1981).

111. 651 F.2d 800 (1st Cir. 1981).

112. 657 F.2d 430 (D.C. Cir. 1981).

113. In *Main*, the dispute arose out of the alleged failure by Iran to pay for services by Main in connection with an Iranian electrification project. 651 F.2d at 802.

In *AIG*, a consolidation of two cases, Iran was sued for losses incurred as a result of the nationalization of United States enterprises in Iran. 657 F.2d at 434.

In both cases, the claimants alleged that the President lacked the necessary authority to issue the executive orders as a means of proving a claim for just compensation. 651 F.2d at 805; 657 F.2d at 437.

114. 651 F.2d at 808; 657 F.2d at 441.

115. 651 F.2d at 809-13; 657 F.2d at 441-45.

II. *Dames & Moore v. Regan*: ENDORSING THE PRESIDENT'S BROAD DISCRETION

Justice Rehnquist's majority opinion was quick to highlight the dearth of black letter law in this area of presidential authority.[116] In addition, he stressed that the Court was issuing a narrow holding.[117] However limited the holding will be viewed outside of the context of the Iranian settlement agreements, this case had direct application to several thousand claims pending at the time of the decision.

Petitioner's contentions were threefold. In addition to arguing that the President lacked authority to transfer the Iranian assets and to suspend the pending United States claims, petitioner contended in the alternative that the President's actions constituted a taking of property without just compensation.[118]

A. Nullification of Prejudgment Attachments

In *Dames & Moore*, the government relied principally on section 1702 of the IEEPA as authorization for the President's nullification of prejudgment attachments and subsequent transfer of assets back to Iran.[119] The Court sustained the government's position, finding specific congressional authorization for the President's actions in the IEEPA.[120] The nullification of prejudgment attachments and transfer of assets, therefore, manifested presidential power at its maximum.[121] In support of this conclusion, the Court made two further observations.

First, the conditional nature of the general license issued by President Carter made the subsequent attachments obtained thereunder subordinate to further actions by the President.[122] The opinion posits that since the license could be modified or revoked, any attachment issued would suffer the same fate.[123] In other words, the viability of the prejudgment attach-

116. The first section of Justice Rehnquist's opinion contains an overview that emphasized the continuing debate over this area of the law. 101 S. Ct. at 2977-78.

117. Justice Rehnquist stated: "We attempt to lay down no general 'guide-lines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to the decision of the case." 101 S. Ct. at 2977.

118. Brief for Petitioner at 33, Dames & Moore v. Regan, 101 S. Ct. 2972 (1981).

119. 101 S. Ct. at 2982.

120. *Id.* at 2984.

121. *See supra* notes 45-59 and accompanying text.

122. 101 S. Ct. at 2983.

123. 31 C.F.R. § 535.805 (1981) states: "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."

ments was to be determined at the discretion of the executive branch.[124]

This argument is initially suspect because neither the Court nor the government cited any controlling authority for the proposition.[125] In addition, it was arguably the intent of Congress, by enacting the FSIA, to prevent executive branch interference in judicial claims settlement.[126]

The Court's second observation in support of its holding was that the congressional purpose in authorizing blocking orders was "to put control of foreign assets in the hands of the President."[127] The case that supports this view, *Propper v. Clark*, interpreted the authorization under section 5(b) of the TWEA.[128] Notwithstanding express congressional approval of the President's actions in that case, Congress modified the President's authority by enacting the IEEPA. The Court's holding, therefore, necessarily turns on its interpretation of the President's power under the IEEPA.

Dames & Moore contended that the legislative history of the IEEPA indicated that Congress did not intend the President to have the extensive power he exercised in the Iranian settlement.[129] Arguing that the vesting of title to the Iranian property was contrary to the congressional intent of the Act, petitioner contended that the President could do no more than freeze the assets or discontinue controls.[130] The Court rejected this interpretation, stating:

> Nothing in the legislative history of either [section] 1702 or [section] 5(b) of the TWEA requires such a result. To the contrary, we think both the legislative history and cases interpreting the TWEA fully sustain the broad authority of the Executive when acting under this congressional grant of power.[131]

Conceding, however, that the President has no authority to vest title to foreign assets under the IEEPA, Justice Rehnquist concluded that from "the plain language of the statute," the President was authorized to "other-

124. Indeed, the Court refers to the frozen assets as a "bargaining chip" of the President. 101 S. Ct. at 2984.

125. As noted previously, *Propper, Orvis* and the *Zittman* cases dealt with attachments that were initially invalid because they were obtained without a license. In *Dames & Moore*, the attachments were validly obtained. The precise issue, therefore, was what the quality of each of the many attachments was after the issuance of the executive orders. Recognizing that many of the over 2000 claims may have varying facts, Justice Powell dissented from this portion of the opinion. *See infra* notes 137-39 and accompanying text.

126. *See supra* notes 96-108 and accompanying text.

127. 101 S. Ct. at 2984 (citing 337 U.S. 472, 493 (1949)).

128. *See supra* notes 75-79 and accompanying text.

129. *See* Brief for Petitioner at 23-33, Dames & Moore v. Regan, 101 S. Ct. 2972 (1981).

130. *Id.*

131. 101 S. Ct. at 2983. The Court cited Orvis v. Brownell, 345 U.S. 183 (1953) as supporting authority.

wise permanently dispose of the assets in the manner done here."[132]

The opinion does not explain how the President's actions did not constitute a vesting. No attempt was made to define the phrase "otherwise permanently dispose" nor the circumstances that gave rise to such authority. The Court's position can only be supported by a literal reading of the IEEPA, contrary to previous holdings regarding this wording.[133]

The Court's position is defective for two additional reasons. First, the President may have the requisite authority under TWEA, but only in wartime. Second, Congress expressly authorized the presidential actions that fostered the *Orvis* case, as it had in *Propper v. Clark*.[134] In these cases, as in the *Zittman* cases, the Supreme Court upheld the purposes of the TWEA and provided for the protection of American creditors.[135] Arguably, this was not the outcome in *Dames & Moore*.[136]

Moreover, as Justice Powell pointed out,[137] the Court rejected the view that the act of nullifying attachments may give rise to claims for just compensation.[138] Recognizing that the facts of several hundred lower court cases may differ, Justice Powell dissented from this portion of the opinion because he felt that "taking" questions should be resolved on a case-by-case basis.[139]

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132. *Id.* at 2983 n.5.

133. In several cases, the Supreme Court has disregarded a literal application of the TWEA's terms because they were inconsistent with legislative intent. For example, in Guessefeldt v. McGrath, 342 U.S. 308 (1952), the Court warned:

> The concern of the Trading With the Enemy Act is with problems at once complicated and far-reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes.

342 U.S. at 319.

134. *See supra* note 93 and accompanying text.

135. *See supra* notes 75-95 and accompanying text.

136. The benefit to private litigants of having claims subordinated to the Claims Tribunal remains in debate. In the absence of attachments of Iranian property in this country, the Claims Tribunal is, of course, appealing, but the new forum may have many more disadvantages than a comparable district court. *See supra* note 5.

137. *Dames & Moore*, 101 S. Ct. at 2992 (Powell, J., concurring and dissenting in part).

138. *Id.*

139. Justice Powell may have made the most practical argument of all. Recognizing that, simply because of the sheer number of claims involved, the Court may not have all the facts before it, his position was to preserve the right to bring a "taking" claim against the United States for the lost attachments. The Court, however, preserved this right only with regard to the suspension of litigation. *Id.* There are claims that do not fit the facts of the *Dames & Moore* holding which the Court did not address, but which may nevertheless be bound by it. *See, e.g.*, Electronic Data Syst. Corp. Iran v. Social Security Org. of Iran, 508 F. Supp 1350 (N.D. Texas 1981) (attachments obtained prior to the freeze order not subject to the Treasury Regulations regarding nullification), and Marschalk Co. v. Iran Nat'l Airlines Corp., 518

B. Suspension of Pending United States Court Claims

As with the nullification of attachments, the government relied on the President's authority under the IEEPA to support the proposition that the suspension of pending United States claims enjoyed express congressional authorization.[140] The Court acknowledged, however, that such claims have a separate existence from the attachments that accompanied them.[141] As such, the claims could not be considered transactions involving Iranian property or representing an interest in such property until reduced to a judgment. The Court concluded, therefore, that no such express congressional authorization for the President's actions existed under the IEEPA.[142]

Under the *Youngstown* analysis, the President's power was not at its maximum when he suspended the claims,[143] but the Court sustained the President's actions. Justice Rehnquist examined closely related legislation and concluded that Congress had acquiesed to the President's exercise of such broad discretion. It was exercised, according to Justice Jackson's own words, in a zone of twilight.[144] Therefore, the President's power was considered concurrent with that of Congress.

Dames & Moore argued that Congress, in passing the FSIA, intended to divest the President of authority to settle claims and that the President's actions were contrary to the congressional intent to depoliticize legal proceedings in Article III courts involving foreign claims.[145] Thus, Dames & Moore asserted, these actions were incompatible with the will of Congress and represented presidential power at its lowest ebb.[146] To constitute an express violation of the FSIA, however, it is necessary to demonstrate that the President circumscribed the jurisdiction of Article III courts by his actions. Although petitioner's argument was convincing in this regard, the Court failed to accept its position.

Justice Rehnquist's response to this argument forms the crux of the Court's holding on this issue. He posited that the President did not modify

F. Supp. 69 (S.D.N.Y. 1981) (purely domestic transactions not within the power of the President under the IEEPA).

140. 101 S. Ct. at 2984. The Government also relied on the Hostage Act to buttress this argument, since this act is included in the executive orders issued by Presidents Reagan and Carter as authority for their actions. *See supra* note 9.

141. 101 S. Ct. at 2984.

142. *Id.* at 2984-85. In addition, the Court found no express congressional authorization in any other legislation, including the Hostage Act, 22 U.S.C. § 1732 (1976).

143. *See supra* notes 45-59 and accompanying text.

144. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. at 637.

145. *See supra* notes 96-108 and accompanying text.

146. *See supra* notes 45-59 and accompanying text.

federal court jurisdiction, but only directed the courts to apply a different rule of law.[147] Because the executive orders only purported to suspend United States claims, "those claims not within the jurisdiction of the Claims Tribunal [would] 'revive' and become judicially enforceable in United States courts."[148] As authority for this proposition, Justice Rehnquist cited *United States v. Schooner Peggy*,[149] but those facts are clearly distinquishable from *Dames & Moore*.

Schooner Peggy involved treaties entered into by the President and ratified by the United States Senate. As counsel for Dames & Moore pointed out, *Schooner Peggy* indicated that a treaty may amend substantive law, but it does not necessarily follow that the President may unilaterally change substantive law by executive agreement.[150] The Court's review of other legislation and case law was also unconvincing in this regard.

Claims settlement by executive action has been, in some cases, inevitable.[151] The precise issue here, therefore, is what effect a presidential action should have in the face of a pending federal court claim brought pursuant to the FSIA. At the heart of this question is the separation of powers within the federal government.[152]

The Court's review of closely related legislation, however, lends little insight into how the foreign claims settlement power has been defined in this regard. Through examination of the Hostage Act, the International Claims Settlement Act, the IEEPA, and the FSIA, the only conclusion drawn is that the President has the power to affect claims settlement.[153] The implication that this power entitles the President to override judicial claims settlements is literally unsupported.[154] Perhaps most importantly, the two most recent congressional enactments touching on the President's power in this area, the IEEPA and the FSIA, indicate Congress' intent to

147. 101 S. Ct. at 2989.

148. *Id.*

149. 5 U.S. 103 (1801).

150. Brief for Petitioner at 19, Dames & Moore v. Regan, 101 S. Ct. 2972 (1981).

151. In many cases, claims settlement by the President has been the only means of satisfying outstanding United States claims. This was the case prior to the enactment of the FSIA, for without the many protections provided by the Act, claims settlement by a private litigant was more difficult. *See supra* notes 96-108 and accompanying text.

152. The Court recognized the separation of powers conflict, 101 S. Ct. at 2977-78, but seemed to ignore the problem of accomodating the conflicting roles of the President and the judiciary.

153. Express authority for the President's actions is not found in the plain language of these statutes, nor has the subordination of judicial claims pursuant to these acts been a practice in the past.

154. Of course, some of the lower court cases generated by the Iranian settlement agreements are in accord with the Supreme Court. *See, e.g., supra* notes 110-15 and accompanying text.

limit, not expand, the President's authority.[155]

C. The "Taking" Claims Against the United States

The two agreements with Iran clearly express the United States' obligation to *terminate* all legal proceedings against Iran.[156] The executive order issued by President Reagan, however, purported only to *suspend* this litigation.[157] The Court, therefore, held that the "taking" issue was not ripe for review because the claims litigation might be revived if the Claims Tribunal found it did not have jurisdiction over the matter.[158] Nevertheless, the Court stated that if the issue became justiciable, claimants would have a right of action against the United States in the Court of Claims.[159]

The Court's opinion on this issue may have overlooked the most fundamental conflict in the Iranian ordeal. If the litigation were revived, logic would support any Iranian contention that the United States breached the agreements. Iran's reaction would likely include terminating the funding of the Claims Tribunal escrow account.[160] American claim holders would then be faced with potentially unenforceable judgments resulting from the revived litigation in United States courts because of the absence of Iranian property in this country. In addition, those unsatisfied judgments of the Claims Tribunal may lead to some form of recourse against the United States government.

VI. CONCLUSION

It cannot be denied that the Iranian settlement agreements manifest the culmination of a unique situation. This may best explain the Supreme Court's analysis in *Dames & Moore*. Little accord was given to the history, either legislative or otherwise, regarding the nullification of attachments. Yet, favorable historical presupposition was the mainstay of the argument that the President had authority to suspend pending federal litigation. *Dames & Moore* indicates the Supreme Court's intent to leave the definition of presidential authority in its traditionally obscure state, to be clarified only to fit the imperatives of the moment.

In failing to delineate boundaries for the President's authority in this

155. *See supra* notes 62-108 and accompanying text.

156. *See supra* notes 3-5 and accompanying text.

157. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

158. 101 S. Ct. at 2991-92.

159. *Id.*

160. The fear that Iran may not honor its commitment to fund the Claims Tribunal is shared by many of those who participated in the congressional hearings on the Iranian settlement agreements. *See The Iran Agreements, supra* note 5, at 73.

area, the Court's holding provides little insight into the future use of claims settlement either by the executive or by the judiciary. In light of the increasing interaction among nations, this can only mean further uncertainty for the private litigant.

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