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Dames & Moore v. Regan: Congressional Power over Foreign Affairs Held Hostage by Executive Agreement with Iran

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DAMES & MOORE v. REGAN: CONGRESSIONAL POWER OVER FOREIGN AFFAIRS HELD HOSTAGE BY EXECUTIVE AGREEMENT WITH IRAN

I. INTRODUCTION

On July 2, 1981, in *Dames & Moore v. Regan,*[1] the United States Supreme Court judicially ended the fourteen-month Iranian hostage crisis of 1979-1981. The Court's decision gave legal effect to the Algerian Accords, which permitted the transfer of Iranian assets out of the United States by the required deadline of July 19, 1981.[2] In the process, the Court sanctioned the presidential nullification of prejudgment attachments on Iranian assets in the United States.[3] The majority, through Justice Rehnquist,[4] specifically held that the International

1. 453 U.S. 654 (1981). On November 4, 1979, Iranian militants seized the American Embassy in Teheran, Iran, and took 66 American nationals hostage in reaction to the admission of the former Shah of Iran into the United States for medical treatment. Continuous negotiations between the United States and Iran led to the signing in Algeria of two executive agreements on January 19, 1981 by Deputy Secretary of State Warren M. Christopher, and to the exchange of the 52 American hostages then remaining in Iran. The agreements provided for a return to Iran of approximately three to four billion dollars of Iranian assets frozen in the United States and a prohibition of legal proceedings against Iran in American courts. *See* Declaration of the Government of the Democratic and Popular Republic of Algeria *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 Algerian Accords], *reprinted in* McGreevey, *The Iranian Crisis and U.S. Law,* 2 NW. J. INT'L L. & BUS. 384, 447-54 (1980) [hereinafter cited as McGreevey]. For detailed statements of the facts and events surrounding the hostage crisis, see Dames & Moore v. Regan, 453 U.S. at 662-68; Norton & Collins, *Reflections on the Iranian Hostage Settlement,* 67 A.B.A. J. 428-33 (1981); Case Concerning United States Diplomatic and Consular Staff in Iran, 1980 I.C.J. 3, *reprinted in* M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 223 (1981); and Note, *Settlement of the Iranian Hostage Crisis: An Exercise of Constitutional and Statutory Prerogative in Foreign Affairs,* 13 N.Y.U. J. INT'L L. & POL. 993 (1981).

2. In the words of the first Algerian Accord, "the United States will act to bring about the transfer to the Central Bank [of Iran], within six months from [the] date [of the Accords], of all Iranian deposits and securities in U.S. banking institutions in the United States . . . ." Algerian Accords, *reprinted in* McGreevey, *supra* note 1, at 449.

3. 453 U.S. at 672-75. Among these prejudgment attachments was an attachment executed by a California federal district court to satisfy Dames and Moore's claim for breach of contract against the Atomic Energy Organization of Iran. For an explanation of the facts in *Dames,* see *infra* text accompanying notes 11-26.

4. Justice Rehnquist was joined by Justices Burger, Brennan, Stewart, White, Marshall, and Blackmun.

Emergency Economic Powers Act of 1977 (IEEPA)[5] gave the President express power to nullify attachments on foreign assets in declared national emergencies and transfer them out of the country.[6] The majority further held that Congress had impliedly acquiesced in the presidential use of international executive agreements to settle the claims of American nationals against foreign governments and agencies.[7]

The *Dames* decision approved the transfer of American claims, secured by attached assets, out of American courts and into the uncertain arena of an International Claims Tribunal.[8] Based on exceedingly scarce authority,[9] the Court held that the IEEPA empowered the President unilaterally to manipulate foreign assets in order to end a national emergency which he alone had discretion to declare.[10] The Court's analysis, thereby, led to the "unsettling," rather than to the settling, of American claims against Iran.

It is the thesis of this note that, although the President does possess the explicit authority under the IEEPA to attach and nullify attachments on foreign assets, no express constitutional clause empowers the President to utilize international executive agreements to accomplish these ends. The exigencies of the modern international negotiating process, however, compel the conclusion that the Chief Executive must be granted more flexibility to deal with other nations than is permitted by a strict reading of the pertinent constitutional provisions.

II. FACTS OF THE CASE

On November 14, 1979, ten days after the seizure of sixty-six

5. 50 U.S.C. §§ 1701-1706 (Supp. IV 1980) [hereinafter cited as IEEPA].

6. 453 U.S. at 675.

7. *Id.* at 688. The *Dames* Court narrowed the scope of its decision to hold merely that

> 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.

Id.

8. This is the substance of the second Algerian Accord on the establishment of an International Arbitral Tribunal to decide claims of nationals of either country against the other. *See* Algerian Accords, *reprinted in* McGreevey, *supra* note 1, at 452-54. "All decisions and awards of the Tribunal shall be final and binding." *Id.* at 453.

9. The *Dames* Court recognized that " '[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.' " 453 U.S. at 660 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).

10. IEEPA, 50 U.S.C. § 1701(a) (Supp. IV 1980), recognizes the President's broad authority to respond to foreign threats "if the President declares a national emergency with respect to such threat."

American hostages in Teheran, Iran, former President Carter, under the authority vested in him by IEEPA sections 1701-1706,[11] issued Executive Order Number 12,170,[12] which prevented the withdrawal of all Iranian property and interests from the United States.[13] The order also authorized the Secretary of the Treasury to implement the presidential directives.[14] Pursuant to this order the administration promulgated Treasury regulations on November 15, 1979 which required that attachments on Iranian assets be licensed by the Treasury Department[15] and further provided that any such license could be revoked at any time.[16] A clarifying regulation of December 19, 1979, granted a blanket license to attach Iranian property prior to judgment, although attached property could not be transferred to satisfy the claim of a judgment creditor.[17]

On December 19, 1979, Dames and Moore, a corporation, filed suit in the Federal District Court for the Central District of California against the Atomic Energy Organization of Iran, and alleged that it was owed money under a contract.[18] To secure judgment, the court ordered an attachment on certain Iranian property, pursuant to the Treasury regulation of December nineteen.[19] On January 19, 1981, the Algerian Accords were signed. The Accords provided for the transfer of Iranian assets out of the United States and the termination of all litigation against Iran.[20] The same day, President Carter issued Executive Orders Numbers 12,276-12,285, which implemented the terms of the Ac-

11. The IEEPA allows the President, after declaring a national emergency, to

> 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 . . . .

50 U.S.C. § 1702 (a)(1)(B) (Supp. IV 1980).

12. 44 Fed. Reg. 65,729 (1979).

13. The President took this action after announcements by Iran that it planned to withdraw all of its funds deposited in American banks. McGreevey, *supra* note 1, at 386.

14. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979).

15. Treas. Reg. § 535.203(e), 31 C.F.R. 667 (1980).

16. Treas. Reg. § 535.805, 31 C.F.R. 684 (1980).

17. Treas. Reg. § 535.418, 31 C.F.R. 672 (1980).

18. 453 U.S. at 663-64. The contract, to perform site studies for a nuclear power plant in Iran, was entered into between the Organization and a Dames and Moore subsidiary, Dames and Moore International, S.R.L.; upon unilateral termination of the agreement by the Atomic Energy Organization in 1979, Dames and Moore sued for approximately $3.5 million for services which it claimed it had performed prior to the termination. *Id.* at 664.

19. *Id.* The property of certain Iranian banks was attached to secure the judgment. *Id.*

20. *Id.* at 664-65; *see* the "General Principles" of the first Algerian Accord, *reprinted in* McGreevey, *supra* note 1, at 447; paras. 4-9 of the first Accord, *reprinted in* McGreevey, *supra* note 1, at 448-50.

cords.[21] President Reagan, on February 24, 1981, endorsed the Accords by providing for the suspension of all American claims against Iran, save those presented to the International Arbitral Tribunal established by the second Algerian Accord.[22]

On January 27, 1981, Dames and Moore was awarded summary judgment against Iran. However, enforcement of the judgment through levy of execution was stayed pending appeal, and the prejudgment attachments were vacated in light of the Accords and the executive orders.[23] Dames and Moore subsequently filed suit against Treasury Secretary Donald T. Regan to prevent enforcement of the Accords. It contended that the President had exceeded his statutory and constitutional authority in adversely affecting the corporation's claims against Iran.[24] The district court denied petitioner's motion, although it prohibited transfer of the Iranian property.[25] Because of the urgency of the Iranian crisis, appeal was taken directly to the Supreme Court, and certiorari was granted.[26]

III. HOLDING AND REASONING OF THE COURT

The Supreme Court focused on two central issues: (1) the power of the President to nullify the attachment of assets; and (2) the use of executive agreements to compel transfer of American claims from domestic courts to an international tribunal.[27] The majority held that the IEEPA gave the President express authority to nullify attachments and did not

21. 46 Fed. Reg. 7913-32 (1981). As the *Dames* Court persuasively argued, the President's action in these orders was also taken pursuant to Treas. Reg. § 535.805, 31 C.F.R. 684 (1980), which made the license to attach expressly revocable. 453 U.S. at 673.

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

23. 453 U.S. at 666.

24. *Id.* at 666-67.

25. *Id.* at 667.

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

27. The *Dames* Court initially formulated the second issue as whether the President may suspend claims pending in American courts, as President Reagan purported to do in Executive Order Number 12,294. 453 U.S. at 675. The Court then broadened its discussion, however, to hold that "*international agreements* settling claims by nationals of one state against the government of another 'are established international practice reflecting traditional international theory.' " *Id.* at 679 (quoting L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 262 (1972)) (emphasis added) [hereinafter cited as HENKIN]. The Court noted that "[t]hough these settlements have sometimes been made by treaty, there has also been a long-standing practice of settling such claims by executive agreement without the advice and consent of the Senate." 453 U.S. at 679 (footnote omitted). Further strengthening the Court's argument was its finding that indeed "Congress has implicitly approved the practice of claim settlement by executive agreement." *Id.* at 680. Apparently, the Court felt more comfortable in basing its decision on the Algerian Accords, the making of which by the Executive is at least arguably justified, rather than on the constitutionally novel theory that the President

limit his power to act in national emergencies.[28] By the time Dames and Moore had filed suit, the President had already frozen Iranian assets and granted the revocable licenses.[29] Relying on Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer,*[30] the *Dames* Court concluded that the President had acted pursuant to specific, express congressional authorization. Finally, from a public policy point of view, the Court persuasively argued that the President needed freedom to use frozen assets as "bargaining chips" in delicate negotiations.[31] The Court reasoned that if such power were not granted to the Executive, "the Federal Government as a whole [would] lack . . . the power exercised by the President."[32]

The majority analyzed the constitutionality of executive agreements by first holding that neither the IEEPA nor the Hostage Act of

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may dispense with the claims of American nationals against foreign entities through an executive order alone. *See supra* note 7.

28. 453 U.S. at 675-80. The Court was aided by two circuit courts of appeals decisions construing the IEEPA: Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800 (1st Cir. 1981), and American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430 (D.C. Cir. 1981).

29. 453 U.S. at 673.

30. 343 U.S. 579 (1952). Justice Jackson's analysis of the division between presidential and congressional power was critical to the Court's decision in *Dames:*

> 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. . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power . . . [his action] would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
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> 2. When the President acts in absence of either a Congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . . [C]ongressional inertia, indifference or quiescence may sometimes . . . 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 . . . .
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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 . . . . Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.

Id. at 635-38 (Jackson, J., concurring) (footnotes omitted). It is interesting to note that Justice Rehnquist uses the Jackson analysis heavily when discussing the first issue, since apparently the President's power is at its height. Yet, where discussing the *implied* congressional delegation of the power to settle claims by executive agreement, a power which might reflect a "zone of twilight" or even a "lowest ebb" analysis, he virtually relegates *Youngstown* to the shelf. *See infra* notes 48-50, 143-59 and accompanying text. For a discussion of the facts and holding in *Youngstown,* see *infra* notes 194-238 and accompanying text.

31. 453 U.S. at 673-74.

32. *Id.* at 674.

1868[33] expressly authorizes the suspension of American claims against foreign entities.[34] The Court then reasoned that the fact that Congress had never affirmatively devised a method for claims settlement indicated implied legislative approval of unilateral executive action.[35] The majority then buttressed its opinion by declaring that "prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate."[36] The Court stated that Congress' failure to object expressly to the use of executive agreements could be construed to create a rule of customary constitutional law legitimizing unilateral presidential agreements.[37] There existed " 'a systematic, unbroken executive practice [of using executive agreements], long pursued to the knowledge of Congress and never before questioned.' "[38]

Finally, the *Dames* Court concluded that the establishment of the International Arbitral Tribunal rendered premature any discussion of possible due process problems.[39] This conclusion was disputed by Justice Powell.[40] The Court also held that the Foreign Sovereign Immunities Act[41] did not divest the President of the authority to settle claims, and that the Algerian Accords did not have the effect of limiting the jurisdiction of the federal courts.[42]

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33. 22 U.S.C. § 1732 (1976).

34. 453 U.S. at 677.

35. *Id.* at 679-82. The *Dames* Court used a case decided three days before *Dames,* Haig v. Agee, 453 U.S. 280 (1981), involving revocation of the passport of a former CIA agent who had made public the identities of fellow intelligence agents. The Court held that the State Department had properly revoked Agee's passport, even though Congress had not expressly authorized the executive branch to take such action. The *Dames* Court relied on *Agee* for the proposition that the "failure of Congress specifically to delegate authority does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames,* 453 U.S. at 678 (quoting Haig v. Agee, 453 U.S. at 291). Congress could scarcely have consolidated its approval or disapproval in the three days between *Haig* and *Dames. See Youngstown,* 343 U.S. at 637 (Jackson, J., concurring). The *Dames* Court found such legislative approval in Congress' adoption of the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621-1644m (1976) [hereinafter cited as ICSA].

36. 453 U.S. at 682. The "prior cases" cited by Rehnquist are one in number, United States v. Pink, 315 U.S. 203 (1942). For a discussion of the facts and holding of *Pink,* see *infra* notes 106-19 and accompanying text.

37. *See infra* text accompanying notes 157-60, 180-90.

38. 453 U.S. at 686 (quoting *Youngstown,* 343 U.S. at 610 (Frankfurter, J., concurring)).

39. 453 U.S. at 688-89.

40. *Id.* at 690-91 (Powell, J., concurring and dissenting in part).

41. 28 U.S.C. §§ 1330, 1602-1611 (1976).

42. 453 U.S. at 684-86.

IV. ANALYSIS

A. *The IEEPA and the President's Authority to Attach and Nullify Attachments of Foreign Assets*

1. The IEEPA and the Trading with the Enemy Act

The majority opinion, after recognizing that section 1702 (a)(1)(B) of the IEEPA[43] copied section 5(b) of the Trading with the Enemy Act of 1917 (TWEA),[44] determined that the legislative histories of the two Acts, as well as relevant case law, sustained the presidential nullification of attachments on foreign assets.[45] The Court, however, cited only a single Supreme Court case, *Orvis v. Brownell,*[46] in support of this executive power. The Court made no mention of either the committee reports or statements in the *Congressional Record* which explained the purpose of the IEEPA. The Court did acknowledge at one point that "Congress intended to limit the President's emergency power in peacetime . . . ."[47]

The Court's reliance on the IEEPA's legislative history was unnecessary. The statute unambiguously grants the President power to "compel, nullify, . . . prevent or prohibit, any acquisition, holding, . . . [or] transfer . . . of . . . any property in which any foreign country or a national thereof has any interest."[48] A broad definition of the word "holding" could reasonably embrace "attachments," and, because the majority determined that the President operated under an express con-

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43. IEEPA, 50 U.S.C. § 1702 (a)(1)(B) (Supp. IV 1980). For the full text of this section, see *supra* note 11.

44. 50 U.S.C. § 1702 (a)(1)(B) of the IEEPA is identical in language to 50 U.S.C. app. § 5(b)(1)(B) (1976) [hereinafter cited as TWEA]. Although the TWEA was passed in 1917 to deal only with war, (H.R. REP. No. 459, 95th Cong., 1st Sess. 4 (1977) states that the Act "did not include a provision permitting use of the act during national emergency . . ."), President Roosevelt used it to declare a bank holiday to prevent hoarding of gold. *Id; see* Comment, *Presidential Emergency Powers Related to International Economic Transactions: Congressional Recognition of Customary Authority,* 11 VAND. J. TRANSNAT'L L. 515, 518 (1978). Thereafter, between 1941 and 1971, the TWEA was used to attach assets in the United States of Axis-occupied countries, to create consumer credit controls to fight inflation, to establish foreign direct investment controls on American investors, and to impose a surcharge on imports. *See* H.R. REP. No. 459, *supra,* at 5.

45. 453 U.S. at 672-74.

46. 345 U.S. 183 (1953).

47. 453 U.S. at 672-73.

48. 50 U.S.C. § 1702(a)(1)(B) (Supp. IV 1980). Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800 (1st Cir. 1981), held that "[t]he President's actions . . . are in keeping with the language of IEEPA: initially he 'prevent[ed] and prohibit[ed]' 'transfers' of Iranian assets; later he 'direct[ed] and compel[led]' the 'transfer' and 'withdrawal' of the assets." *Id.* at 806.

gressional grant of authority,[49] the "widest latitude of judicial interpretation"[50] would readily permit such a broad definition.

Still, the legislative history of the IEEPA demonstrates that Congress was concerned with the extent of presidential power in foreign affairs. The statute was intended to give the Executive "narrow . . . powers subject to congressional review in times of 'national emergency' short of war"[51] because the President, prior to the Act, possessed unilateral power to declare such emergencies without consulting Congress.[52] Nonetheless, the Act was not intended in any way to "t[ie] the President's hands in times of crisis."[53] Thus, in adopting the IEEPA, Congress recognized the need for presidential flexibility in responding to real emergencies, a category which indisputably included the Iranian crisis. It was against this rather paradoxical background that the IEEPA was enacted in 1977.

2. Changes effected by IEEPA and *Orvis v. Brownell*

The *Dames* Court might have noted that the IEEPA did very little to limit the President's power in foreign affairs.[54] It is significant, for example, that the specific section relied upon by President Carter in issuing Executive Order Number 12,170, section 1702 (a)(1)(B), was adopted verbatim from the TWEA.[55] The Court could have refuted Dames and Moore's use of the IEEPA's legislative history by pointing out that this section was not intended to alter the scope of executive authority. As one Justice has stated, "[i]t would be not merely infelicitous draftsmanship but almost offensive gaucherie to write . . . a restriction upon the President's power in terms into a statute"[56] which

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49. 453 U.S. at 672.

50. *Youngstown,* 343 U.S. at 637 (Jackson, J., concurring).

51. H.R. REP. No. 459, *supra* note 44, at 1. The Senate report was preoccupied with use of the extensive TWEA powers "to regulate both domestic and international economic transactions unrelated to a declared state of emergency." S. REP. No. 466, 95th Cong., 1st Sess. 2 (1977). The *Dames* Court could plausibly have asserted that the powers exercised by President Carter were directly related to a real, recognized national emergency, as part of the bargaining chip theory. 453 U.S. at 673.

52. 123 CONG. REC. H6872 (daily ed. July 12, 1977) (remarks of Rep. Leggett).

53. *Id.*

54. The minimal change in substantive law lends credence to President Carter's statement upon signing the IEEPA that "[t]he bill is largely procedural . . . [and] does [not] affect the blockage of assets." Presidential War Powers Bill, Statement on Signing H.R. 7738 Into Law, 13 WEEKLY COMP. PRES. DOC. 1941 (Dec. 28, 1977). *See infra* text accompanying notes 55-59.

55. *See supra* note 44.

56. *Youngstown,* 343 U.S. at 603 (Frankfurter, J., concurring). In *Youngstown,* the issue was the *refusal* of Congress to grant the President power to seize domestic property. The

patently confers that power upon him.

The Court appeared reluctant to discuss a major substantive difference between the language of the pertinent TWEA provision and that in the IEEPA, perhaps because acknowledging the alteration would greatly have weakened the Court's reliance on *Orvis v. Brownell*[57] as authority for the President's actions at issue in *Dames.* Section 5(b)(1) of the TWEA provides in part that "any property or interest of any foreign country or national thereof shall vest . . . in such agency or person as may be designated . . . by the President, and upon such terms and conditions as the President may prescribe . . . ."[58] This provision was omitted from the IEEPA, which provides in part: "this grant of authority does not include . . . the power to vest . . . foreign property . . . ."[59] The majority might have noted that Congress was indeed serious about limiting the President's power, *but only* the power to vest foreign property, *not* the power to attach assets and then nullify these attachments.

Orvis v. Brownell was the sole precedent used by the Court to support the President's powers under the TWEA. In *Orvis,* the property of Japanese nationals was vested in an Alien Property Custodian after an executive order blocked all transfers of Japanese property in the United States.[60] Between the time of the executive order and the vesting, the petitioners obtained an unlicensed attachment and judgment. The Court was asked to decide whether the attachment created a property interest sufficient to divest title in the Custodian and vest it in the petitioners.[61] Significantly, the *Orvis* Court's opinion recognized that, although the attachment of assets was not sufficient to divest the Custodian of the property,[62] "the executive freezing order did not prevent such an attachment from creating rights between the judgment creditor and the enemy debtor whom the Custodian had elected to succeed."[63] Because the vesting power was expressly nullified by the IEEPA, that part of the *Orvis* opinion which upheld the superior right in the Custodian, an executive functionary, is severely undermined. Accordingly, the *Orvis* case may mean that a creditor who obtains an at-

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argument in *Dames* is bolstered by the fact that express authority to attach foreign assets was *granted.*

57. 345 U.S. 183 (1953); *see infra* text accompanying notes 60-70.

58. 50 U.S.C. app. § 5(b)(1) (1976).

59. H.R. REP. No. 459, *supra* note 44, at 15.

60. 345 U.S. at 184-85.

61. *Id.* at 185.

62. *Id.* at 189.

63. *Id.* at 186.

tachment lien has a paramount right to the attached property once he recovers judgment.[64]

Thus, contrary to the *Dames* Court's interpretation, *Orvis* does not mean "that an American claimant may not use an attachment that is subject to a revocable license[65] and that has been obtained after the entry of a freeze order to limit . . . the actions the President may take under § 1702 respecting the frozen assets."[66] The *Dames* opinion correctly points out, however, that "[a]lthough it is true the IEEPA does not give the President the power to 'vest' . . . the assets, it does not follow that the President is not authorized . . . to otherwise permanently dispose of the assets."[67] Indeed, Congress has clearly indicated that such executive action is appropriate where "[a] national emergency [is] declared and emergency authorities [are] employed only with respect to a specific set of circumstances which constitute a real emergency."[68] That the events in Iran constituted a "real emergency" is scarcely open to question. The IEEPA, adopted in recognition of the President's need for "standby emergency authority to deal with unusual and extraordinary economic crises,"[69] was well suited for use on November 14, 1979.[70]

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64. *See id.* at 186-87. The court's opinion in Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800 (1st Cir. 1981), recognizes the difficulties in using *Orvis* as authority, but in *Main,* the President had not attempted to cause Iranian assets to vest in the executive branch, but had merely ordered their transfer without bringing about any change in title. *Id.* at 808.

65. Although the revocable license might seem to be dispositive, *Orvis* appears to hold that if the vesting procedure is invalid, even an unlicensed attachment will be valid against a foreign debtor. 345 U.S. at 186.

66. 453 U.S. at 672-73 n.5.

67. *Id.*

68. H.R. REP. NO. 459, *supra* note 44, at 10.

69. 123 CONG. REC. H6870 (daily ed. July 12, 1977) (remarks of Rep. Bingham).

70. Two other changes in the IEEPA merit brief attention. First, § 1703(a) provides that "[t]he President, in every possible instance shall consult with the Congress before exercising any of the authorities granted by this chapter." 50 U.S.C. § 1703(a) (Supp. IV 1980). Although the section need not be construed as requiring submission of a report as a prerequisite for taking action in possible emergencies, H.R. REP. NO. 459, *supra* note 44, at 16, it is curious that President Carter took no action to consult with Congress in the ten days between the seizure of the hostages and the issuance of Executive Order Number 12,170.

Second, in the original House version, Congress could veto any regulation taken by the President under the IEEPA. *See* H.R. REP. NO. 459, *supra* note 44, at 16. The Senate version, however, removed this veto power from the Congress. S. REP. NO. 466, *supra* note 51, at 2. A strong case could be made that the excision of this provision indicated that the Congress ultimately decided that the President should have the unilateral power to act under the IEEPA. The Senate, however, rejected the proposal, not because it felt that it *should not* have the power to veto presidential declarations under the IEEPA, but because it was convinced that it *already had* the power, under the National Emergencies Act, to overrule or veto the President's declaration of an emergency. 123 CONG. REC. H12,559 (daily ed. Nov.

3. Conclusions

The comprehensive language of the IEEPA gives the President the express authority to attach and dispose of foreign assets. In a national emergency the President, pursuant to express congressional authorization, may properly freeze foreign assets for use as a "bargaining chip" in delicate negotiations and expressly retain the right at any time to revoke licenses to attach these assets. The Court was aware of the serious implications of lodging such power in the Executive, however, and was constrained by the expedited briefing schedule. The Court thus acknowledged "the necessity to rest decision on the narrowest possible ground capable of deciding the case."[71] The decision nonetheless has broad implications for the division of power between the political branches in the foreign affairs arena, partially because Congress was extremely reticent to voice opposition to presidential actions regarding the volatile Iranian crisis. If Congress continues to remain silent and inactive in similar situations, *Dames* may well represent a new milestone on the way to the "Imperial Presidency."[72]

B. The Use of International Executive Agreements to Settle the Claims of American Nationals Against Foreign Governments and Their Entities

1. Possible sources of the power to conclude executive agreements

a. the Constitution and the intent of the Founders

i. the enumerated powers doctrine

Although the *Dames* Court upheld the power of the President to settle claims through the mechanism of international executive agreements,[73] the opinion never discussed the source of the power to conclude such accords. Instead, the Court cited four Supreme Court cases, *United States v. Curtiss-Wright Export Corp.*,[74] *United States v. Pink*,[75] *Youngstown Sheet & Tube Co. v. Sawyer*,[76] and *Haig v. Agee*,[77] and

30, 1977) (remarks of Rep. Bingham). It should be pointed out, however, that these are the remarks of the major sponsor of the bill while trying to gain his colleagues' approval after the Senate rejected a portion of the bill.

71. 453 U.S. at 660 (citation omitted).

72. *See* A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1974).

73. *See* discussion *supra* note 27.

74. 299 U.S. 304 (1936).

75. 315 U.S. 203 (1942).

76. 343 U.S. 579 (1952).

77. 453 U.S. 280 (1981).

discovered implied congressional acquiescence in the presidential use of executive agreements.[78] Because the Constitution contained no express grant of power to consummate international agreements other than by the *treaty* process, the President's power to conclude purely *executive* agreements was deemed to be inherent, implied, or delegated.[79]

The text and history of the Constitution are nevertheless instructive on the nature, if not on the source, of the power exercised by the Executive in the Algerian Accords. The words "executive agreement" are not found in the Constitution.[80] Those who believe that no power not expressly enumerated in the Constitution can be exercised by any branch of the Federal Government[81] might well invalidate the Algerian Accords as an unconstitutional executive use of the treaty power without the advice and consent of the Senate. Few commentators, however, seriously maintain that the President is limited to purely enumerated powers.[82] Thus, although executive agreements are not mentioned in

78. For example, the Court held that "failure of Congress specifically to delegate authority does not . . . imply 'congressional disapproval.'" *Dames,* 453 U.S. at 678 (citation omitted). The Court noted that "Congress has implicitly approved the practice of claim settlement by executive agreement." *Id.* at 680. "'[A] systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned . . . may be treated as a gloss on "Executive power" vested in the President . . . .'" *Id.* at 686 (quoting *Youngstown,* 343 U.S. at 610-11 (Frankfurter, J., concurring)).

79. *See infra* text accompanying notes 160-93. Although the Supreme Court has construed the Constitution liberally to recognize, where necessary, the existence of inherent powers, it is well to keep in mind Justice Jackson's cautionary note in *Youngstown:* "Loose and irresponsible use of adjectives colors all non-legal and much legal discussion of presidential powers. 'Inherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers, 'war' powers and 'emergency' powers are used, often interchangeably and without fixed or ascertainable meanings." 343 U.S. at 646-47 (Jackson, J., concurring).

80. *See* Berger, *The Presidential Monopoly of Foreign Relations,* 71 MICH. L.R. 1, 33 (1972) [hereinafter cited as Berger].

81. "[I]t is the unmistakable lesson of history that the President was intentionally given a few enumerated powers, no more." *Id.* at 25. Berger analyzes in depth the text of the Constitution and the purported intent of the Founders, *id.* at 22-25: "Madison stated in the Federal Convention that it was essential '*to fix the extent* of the Executive authority' and to give '*certain* powers' to the executive, and that the executive power should be 'confined and defined.'" *Id.* at 22 (quoting 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 66-67 (1966)) (emphasis added). The drafters of the Federalist papers also felt that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined." THE FEDERALIST No. 45, 237 (J. Madison) (London 1911).

82. "[T]he federal executive, unlike the Congress, could exercise power from sources not enumerated, so long as not forbidden by the constitutional text . . . ." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 159 (1978) (construing Myers v. United States, 272 U.S. 52 (1926)) [hereinafter cited as TRIBE]. Professor Tribe later cites HENKIN, *supra* note 27, at 68, for the proposition that "Congress shares in the 'unenumerated foreign affairs power.'" TRIBE, *supra,* at 166.

the Constitution, it may well be that the enumerated powers doctrine does not apply to the field of foreign affairs.[83] In light of the Founders' intent to vest the National Government with plenary authority over foreign affairs, a "sphere properly regarded as one of 'executive' power,"[84] such authority will be implied unless expressly limited by the Constitution.[85] Constitutional silence on executive agreements may therefore demonstrate the intent of the Founders to give the President the very flexibility recognized by the *Dames* Court.

ii. the treaty clause

One eminent constitutional scholar has observed that "[t]he Constitution expressly prescribes the treaty procedure and nowhere suggests that another method of making international agreements would do as well."[86] According to Alexander Hamilton:

> [I]t was understood by *all* to be the intent of the [treaty] provision to give that power the most ample latitude—to render it competent to all the stipulations which the exigencies of national affairs might require; competent to the making of treaties . . . and every other species of convention usual among nations . . . .[87]

Hamilton further remarked that "it [the treaty power] was . . . carefully guarded; the cooperation of two-thirds of the Senate, with the President, [was] required to make any treaty whatever."[88] It should be

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83. HENKIN, *supra* note 27, at 31 (footnote omitted); *see* Rovine, *Separation of Powers and International Executive Agreements,* 52 IND. L.J. 397, 412 (1977) [hereinafter cited as Rovine]: "While the Constitution does not specify that the President may enter into such agreements, . . . the several provisions which together comprise the basis for the foreign relations power of the President authorize international agreement making . . . ."

84. TRIBE, *supra* note 82, at 159. This may dispose of the supremacy clause problem in *Pink, see infra* text accompanying notes 101-24, but it does not solve the problem of the allocation of power over foreign relations between the two political branches. *See infra* text accompanying notes 194-237.

85. TRIBE, *supra* note 82, at 159. For a discussion of the *Curtiss-Wright* Court's use of the inherent powers doctrine in foreign affairs, see *infra* text accompanying notes 172-75.

86. HENKIN, *supra* note 27, at 172. He later adds, however, that "the argument that the Constitution permits international agreements by treaty only was long ago rejected." *Id.* at 421 n.5. The relevant constitutional provision, the treaty clause, provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present Concur." U.S. CONST. art. II, § 2, cl. 2.

87. Berger, *supra* note 80, at 35 (quoting 6 A. HAMILTON, THE WORKS OF ALEXANDER HAMILTON 183 (H. Lodge ed. 1904)) (emphasis in original).

88. *Id.* Hamilton later changed his views and came to believe that the President should be accorded greater latitude in foreign affairs. *See* Berger, *supra* note 80, at 17-19; E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 216 (3d ed. 1948); *see also* Ohly, *Advice and Consent: International Claims Settlement Agreements,* 5 CAL. W. INT'L L.J. 271 (1975) [here-

borne in mind, however, that this was the opinion of but one Founder, who should not be regarded as the "sole organ" of the Framers' intent any more than a single individual should be regarded as the "sole organ" of American foreign policy.[89]

"It was the President . . . who was finally made a participant in the treaty-making process, which had been initially lodged . . . in the Senate alone."[90] Despite the initial preference shown the Senate, the "plain language" of the Constitution made the President a full and equal partner in the treaty-making process and placed this power under article II, dealing with executive authority, not under article I, dealing with legislative powers. This may appear to be "infelicitous draftsmanship,"[91] but it is not a basis for denying the President power which is expressly granted him.[92] On the other hand, making the President an equal partner is not equivalent to giving him blanket permission to conclude international agreements solely on his own initiative.

iii. other sources in the Constitution: congressional power

The Constitution grants Congress the power "[t]o regulate Com-

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inafter cited as Ohly]. Berger goes on to conclude that treaties entirely "preempt the field," and that as a result, "the presidential claim to power is clearly eliminated." Berger, *supra* note 80, at 36 (construing *Youngstown,* 343 U.S. at 639 (Jackson, J., concurring)). Berger takes Jackson's remarks out of context, however, and inappropriately uses *Congress'* refusal to authorize President Truman to seize steel mills to bolster his assertion that the *Constitution,* as interpreted by a single Founder, did not sanction the use of any mechanism other than treaties. Berger bases his claim of original constitutional intent solely on the interpretation of Hamilton.

89. *See infra* text accompanying notes 176-78.

90. *See* Berger, *supra* note 80, at 10-11; *see also* Ohly, *supra* note 88, at 282 n.15.

91. *Youngstown,* 343 U.S. at 603 (Frankfurter, J., concurring).

92. As a curious sidelight, Rovine, a legal adviser for the State Department, analyzes the differences between treaties and executive agreements in a manner which might render the Algerian Accords a treaty, at least for international law purposes. After initially stating that "[f]or purposes of international law, there is no distinction between treaties and executive agreements," Rovine, *supra* note 83, at 402, he adds that "[t]he most fundamental requirement [for an international agreement] is that the parties intend their undertaking to be legally binding and to be governed by international law." *Id.* at 403. However, an instrument silent on controlling law is presumably governed by international law. *Id.* The Algerian Accords made no mention of governing law, nor has there been a claim that they were not intended to be legally binding. Under Rovine's analysis, therefore, the Algerian Accords constitute an international agreement, which, under international law, is equivalent to a treaty. This might make them invalid without the advice and consent of the Senate were it not for the fact that "domestic law distinctions . . . remain legally valid under United States law." *Id.* at 402. Domestic law, of course, includes judicial, if not constitutional, approval of executive agreements without Senate participation. *See infra* text accompanying notes 108-09.

merce with foreign Nations."[93] In *Gibbons v. Ogden,*[94] the Supreme Court defined commerce as "the commercial intercourse between nations, and parts of nations, in all its branches."[95] Significantly, "the power over commerce with foreign nations . . . is vested in Congress . . . absolutely."[96]

The important issue here is whether the congressional power to regulate foreign commerce extends to the assets involved in *Dames,* and if so, whether the absolute power of Congress precludes presidential action through executive agreement. The Supreme Court has held that the congressional power to regulate international commerce includes every species of commercial intercourse.[97] If commerce is considered " '[t]he exchange of goods, productions, or property of any kind,' "[98] Congress could clearly pass legislation affecting the disposition of the assets in *Dames.*

The *Gibbons* Court recognized exclusive power in Congress with respect to a purely interstate claim. In the area of "commerce with *foreign nations,"* however, a modern Court might recognize concurrent, rather than exclusive, power in either of the branches charged with the foreign relations power. The issue would not be permitting the *President* to act in an area of otherwise exclusive congressional competence, but allowing or disallowing *Congress* to act in what might otherwise be an exclusively executive domain.[99] Because the *Dames* Court found that the Congress *had* acted through the adoption of the IEEPA and the International Claims Settlement Act (ICSA), it held that the President had not usurped Congress' commerce clause power in concluding the executive agreement. The Chief Executive was merely acting pursuant to a legislative delegation of power.[100]

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93. U.S. CONST. art. I, § 8, cl. 3.

94. 22 U.S. (9 Wheat.) 1 (1824).

95. *Id.* at 189-90.

96. *Id.* at 197; *see* Ohly, *supra* note 88, at 275 n.25.

97. Board of Trustees v. United States, 289 U.S. 48, 56-57 (1933) (Congress held to have exclusive power to regulate taxes paid by state instrumentalities on foreign imports).

98. Anderson v. Humble Oil & Ref. Co., 226 Ga. 252, 174 S.E.2d 415, 417 (1970) (quoting BLACK'S LAW DICTIONARY 336-37 (4th ed. 1968)).

99. "The . . . objection . . . that a matter was within the President's exclusive power over our foreign relations, was disposed of by the Supreme Court with the statement that: 'The subject was one in which Congress had an interest, and in respect to which it could give directions by means of a legislative enactment.' " Ohly, *supra* note 88, at 276 (quoting Banco Nacional de Cuba v. Farr, 383 F.2d 166, 182 (2d Cir. 1967), *cert. denied,* 390 U.S. 956, *rehearing denied,* 390 U.S. 1037 (1968) (footnote omitted)); *see* HENKIN, *supra* note 27, at 95: "[The President] cannot unilaterally regulate . . . commerce with foreign nations . . . ."

100. Another possible source of congressional power is the property clause. U.S. CONST. art. IV, § 3, cl. 2, gives Congress "[p]ower to dispose of . . . Property belonging to the

iv. other constitutional sources: presidential power of recognition and *United States v. Pink*

According to one authority, "constitutional history and clauses vest in the President virtually plenary power in international relations."[101] To the extent that the President enjoys such plenary power, it is the history of the Constitution, not its clauses, which recognizes this power; and this history includes Supreme Court precedents which serve as the primary authority for the *Dames* opinion.

The Constitution vests in the President the power to "appoint Ambassadors, other public Ministers and Consuls,"[102] and to "receive Ambassadors and other public Ministers."[103] Although this power was

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United States" which might enable it to enact necessary and proper legislation to settle claims by American nationals against foreign nations. Ohly, *supra* note 88, at 278-79. Under the reforms of the IEEPA, however, the assets in *Dames* could not vest in the United States. Accordingly, the assets were not "[p]roperty belonging to the United States." *See supra* text accompanying notes 57-67.

The other major source of congressional authority relevant to the adoption of international agreements, the necessary and proper clause, gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18. Ohly has suggested that this clause may allow Congress to " 'define and codify the powers of the government as a whole, including those of the President as its principal officer.' " Ohly, *supra* note 88, at 274 (quoting S. REP. No. 606, 92d Cong., 2d Sess. 15-16 (1972)). Although the Supreme Court would hold otherwise, particularly in the area of foreign relations, this broad congressional power that Ohly suggests might preclude the President from concluding executive agreements without the express authorization of Congress. That Congress possesses the "necessary and proper" clause power does not automatically prohibit the President from authoring executive agreements, however, unless the term "all" laws is considered as a grant of exclusive authority regardless of the sphere to which these laws are to be applied.

Finally, it is interesting to note that article II, § 2, is an *affirmative* grant of powers to the President, with no expressed limitation on what he or she can do within the exercise of those powers. Article I, §§ 9 and 10, on the other hand, contain multiple express limitations on the powers of Congress and the states. This dichotomy could well support a theory that the Founders intended the Executive to be empowered to act in a "quasi-sovereign" fashion with great freedom in exercising his foreign affairs powers, while the Congress was to be more limited. The argument that "the colonists' revulsion against the king and the judiciary found expression in the power given to the Congress, as the legislature, of almost complete authority in foreign relations and affairs," Forkosch, *The United States Constitution and International Relations: Some Powers and Limitations Explored,* 5 CAL. W. INT'L L.J. 219, 222 (1975) [hereinafter cited as Forkosch], must thus deal with the failure of the Founders to limit in express terms the power of the Executive in the face of the expressly restricted legislative power.

101. Forkosch, *supra* note 100, at 231; *see* HENKIN, *supra* note 27, at 50: "[T]he broader theories and recurrent practice lend support to the view that the President's powers in foreign affairs are 'plenary' . . . and that nothing is inherently outside his domain."

102. U.S. CONST. art. II, § 2, cl. 2.

103. *Id.* art. II, § 3.

considered by Hamilton to be "more a matter of dignity than of authority,"[104] it has come to serve as the "basis for the authority of the President to recognize foreign governments and to enter into recognition agreements."[105] This recognition power, judicially implied from the power to receive ambassadors, has in turn led to a further expansion of executive authority. *United States v. Pink*[106] can be interpreted to mean that "[t]he recognition power supports the corollary power to enter into agreements for settling outstanding problems, such as claims, at the time of recognition."[107] The *Dames* Court relied on *Pink* for the proposition that "the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate."[108] To the extent that the majority relied on *Pink,* it would appear that the Court would agree with one commentator that, although *Pink* focused on the recognition by the President of the government of the Soviet Union, "the language of the reasoning of [*Pink*] would apply as well to any executive agreement."[109]

Pink arose when New York state courts refused to give effect under state law to the Litvinov assignment,[110] which purported to dispose of the assets of a pre-Russian revolution insurance company nationalized upon the accession of the Soviet Government.[111] The case presented the specific issue of whether, under the supremacy clause,[112] a state law could constitutionally supersede an executive agreement settling claims in return for recognition of a foreign government.

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104. THE FEDERALIST No. 69, 354 (A. Hamilton) (London 1911); *see* Berger, *supra* note 80, at 5; Ohly, *supra* note 88, at 280-81 (quoting HENKIN, *supra* note 27, at 41: this power was considered more "a function rather than a 'power,' a ceremony which in many countries is performed by a figurehead").

105. Rovine, *supra* note 83, at 415.

106. 315 U.S. 203 (1942).

107. Rovine, *supra* note 83, at 415.

108. *Dames,* 453 U.S. at 682.

109. HENKIN, *supra* note 27, at 185.

110. In exchange for an executive agreement according recognition by the United States to the Soviet government, the People's Commissar for Foreign Affairs, Maxim Litvinov, sent President Franklin D. Roosevelt a letter on November 16, 1933, assigning to the United States government all rights to pursue claims for property resulting from the nationalization of all Russian insurance companies in 1918 and 1919. *Pink,* 315 U.S. at 210-12.

111. *Id.* at 210-13.

112. U.S. CONST. art. VI, cl. 2, reads in part: "This Constitution, and the Laws of the United States . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." The Court in *Pink* held that "A treaty is a 'Law of the Land' under the supremacy clause . . . . Such international compacts and agreements as the Litvinov Assignment have a similar dignity." *Pink,* 315 U.S. at 230.

Like the earlier case of *United States v. Belmont*,[113] *Pink* can be narrowly construed to hold merely that "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."[114] The *Dames* Court, however, broadly construed *Pink* clearly to establish the President, and not the Congress, as the primary authority in foreign relations.[115] Thus, the *Dames* Court concluded that the "[p]ower to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.' "[116]

The Court's objective in *Pink* was to communicate strongly to the states their absolute impotence in the foreign relations field. *Dames,* however, involved no issue of state law or federal preemption.[117] Accordingly, *Pink* is inapplicable to a determination of the extent of presidential authority to use executive agreements without the consent of Congress. The case thus stands more for the proposition that the *states* may not act inconsistently with an executive agreement, than that the *President* is allowed to settle American claims without prior congressional advice and consent.[118] *Pink* might also be read as authorizing the President to settle claims unilaterally *only where recognition is involved:* "Unless such a power exists, the power of recognition might be thwarted or seriously diluted. No such obstacle can be placed in the way of rehabilitation of relations between this country and another na-

113. 301 U.S. 324 (1937). In *Belmont*, the United States sued to recover money deposited with banker August Belmont by a Russian corporation prior to the Russian revolution. The Court held that the Litvinov Assignment effectively vested title to the money in the United States, that the executive agreement was valid without Senate participation, and that foreign affairs were the exclusive province of the National Government.

114. *Id.* at 331.

115. 453 U.S. at 682-83.

116. *Pink,* 315 U.S. at 229 (quoting *Curtiss-Wright,* 299 U.S. at 320). See *Dames,* 453 U.S. at 682-83, for the Supreme Court's analysis of *Pink,* and *id.* at 661, for its discussion of *Curtiss-Wright.*

117. All of the cases cited by McGreevey, *supra* note 1, at 388 nn.14-22, and *Dames* itself were initially filed in federal court. In none of these cases was there an argument of federal preemption of a state law. McGreevey raises the issue of possible problems of state law in reference to the Iranian asset freeze, *id.* at 435, but these problems were never addressed by the Supreme Court.

118. *Pink* should thus be limited to hold that "whatever the division of foreign policy responsibility *within* the national government, *all* such responsibility is reposed at the national level rather than dispersed among the states and localities." TRIBE, *supra* note 82, at 172 (emphasis in original). The case does *not* address the question of the allocation of the foreign affairs power between the two political branches of the government. *See* Ohly, *supra* note 88, at 282 n.53.

tion, unless . . . the powers and responsibilities of the President . . . in the conduct of foreign affairs . . . [are] to be drastically revised."[119]

Dames lacked the elements of state-federal conflict and recognition.[120] Nonetheless, the Algerian Accords could be viewed as involving "the rehabilitation of relations between this country and another nation,"[121] in that they led to a termination of the hostage crisis. The decision clearly involves international relations, " 'the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.' "[122] To allow foreign affairs to be conducted expeditiously, the Court will be inclined to find that the political branches have implicitly agreed on a policy allowing the President unilateral authority to act in international emergency situations, which "Congress cannot anticipate and [respond to by] legislat[ing] with regard to every possible action the President may find it necessary to take . . . ."[123] The Court clearly prefers such an accommodation to creating friction between the political branches by an attempt to delimit the parameters of their authority to act in foreign affairs.

Even if *Pink* is limited so that "the not so 'modest implied power' of the President to enter into such agreements with the tacit consent of Congress amounts to no more than a concurrent power that Congress can curtail by statute,"[124] the Court might well find such congressional "curtailment" in the adoption of the IEEPA and the ICSA. Any complaint that these statutes work an enhancement, rather than a curtailment, of executive power is another criticism of the legislature's "infelicitous draftsmanship," which is not sufficient grounds for denying the Executive the power so clearly granted him.

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119. *Pink,* 315 U.S. at 229-30; *see* McGreevey, *supra* note 1, at 436.

120. McGreevey asserts that "the recognition power was not used during the Iranian crisis," McGreevey, *supra* note 1, at 436, because the Islamic Republic of Iran succeeded the Shah's government without need of a formal declaration. He therefore concludes that, although "[t]he Accord may have been part of a 'complicated negotiation to restore normal relations,' . . . it was not entered into in order to 'remove . . . obstacles to full recognition.' " *Id.* (footnote omitted).

121. *Pink,* 315 U.S. at 230.

122. *Id.* at 232 (quoting Hines v. Davidowitz, 312 U.S. 52, 68 (1941)).

123. *Dames,* 453 U.S. at 678. McGreevey, *supra* note 1, at 436-37, further narrows the applicability of *Pink* and *Belmont* only to situations involving alien claimants and refusals by state courts to apply the act of state doctrine to foreign decrees, but he cites no language from either case to support his theory.

124. Berger, *supra* note 80, at 48 (quoting *Youngstown,* 343 U.S. at 637-39 (Jackson, J., concurring)).

v. other constitutional sources: the President's power as Chief Executive

The other major arguable source[125] of presidential power to conclude executive agreements stems from the President's status as Chief Executive[126] and his constitutional obligation to execute the laws.[127] Professor Tribe has observed that attempts to limit this power, based on the separation of powers and delegation of powers doctrines, have rarely been successful, and illustrate that "it is only by an extraordinary triumph of constitutional imagination that the Commander in Chief is conceived as commanded by law."[128]

The theory which advocates strict limitations on executive power is closely related to the now generally discredited enumerated powers doctrine.[129] This theory would confine the executive function to "faithfully execut[ing] laws necessarily and properly enacted by the Congress."[130] At the other extreme, one commentator feels that the executive power clause gives the President broad authority to conclude executive agreements unilaterally,[131] particularly when Congress has not intervened.[132] This scholar even has taken the position that Con-

125. U.S. CONST. art. II, § 2, cl. 1 (the Commander-in-Chief clause), is another possible source, available at least in time of war, where under the rationale of Hirabayashi v. United States, 320 U.S. 81 (1943), executive agreements could be seen as a legitimate exercise of the war power of the national government, which encompasses every activity related to war and which affects its progress. *Id.* at 93. In such circumstances, the political branches possess broad discretion in determining the nature and extent of the national danger and in selecting the means for resisting it. *Id.* Even in war, however, the President's power as Commander-in-Chief "would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy," THE FEDERALIST No. 69, 352 (A. Hamilton) (London 1911), and might thus not give him authority to conclude executive agreements. Because the situation in *Dames* did not involve a declared war, and because President Carter had invoked provisions of a statute designed to distinguish between war and national emergency, which gave him more limited powers in the latter instance, there is but a weak case supporting use of the Commander-in-Chief clause under the facts of *Dames*. *See supra* text accompanying notes 51-53.

126. U.S. CONST. art. II, § 1, cl. 1, provides that "[t]he executive Power shall be vested in a President of the United States of America."

127. *Id.* art. II, § 3, provides that "he shall take Care that the Laws be faithfully executed."

128. TRIBE, *supra* note 82, at 157.

129. *See supra* text accompanying notes 73-85.

130. Ohly, *supra* note 88, at 284.

131. Rovine, *supra* note 83, at 413.

132. *Id.* at 414. Although Rovine lists a number of agreements concluded by virtue of this power, *id.* at 414 n.86, he fails to discuss how the executive power clause has been interpreted, and how the separation and delegation of powers problems are involved. Rovine merely states that "the scope of the President's power to conclude such agreements is a very difficult question which has not yet been settled." *Id.* at 415.

gress is impotent to act in the field because it is given no express power by the Constitution to conclude executive agreements.[133]

Faced with the absence in the Constitution of a grant of such broad authority, the *Dames* Court held that the President had not encroached on congressional prerogatives in concluding the Algerian Accords because Congress had both expressly[134] and impliedly[135] approved the steps taken by the President to secure the release of the American hostages. The Court was unwilling to restrain the Executive in the "resolution of a major foreign policy dispute between our country and another"[136] and eagerly grasped at some indication of congressional cooperation.

vi. a constitutional source of implied federal power to conclude international agreements

Article I, section 10, of the Constitution specifically limits state action in foreign affairs and is occasionally viewed as a source of implied national power to conclude international agreements. This section provides in part that "[n]o State shall enter into any Treaty, Alliance, or Confederation,"[137] and that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with . . . a foreign Power."[138] These provisions support two arguments. The first argument is that because these powers are specifically prohibited to the states, they must reside in the Federal Government.[139] Second, the words "agreement or Compact with a foreign Power" demonstrate the Framers' recognition of agreements short of treaties. If this power is denied the states, and if the Federal Government possesses all the normal powers and functions of a sovereign state, the power to conclude international agreements necessarily resides in the National Government. This argument supports the assertion that to deny the Federal Government the power to act, where the states are clearly prohibited

133. *Id.* at 423.

134. "[T]he IEEPA constitutes specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets . . . ." *Dames,* 453 U.S. at 675.

135. "Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement." *Id.* at 680.

136. *Id.* at 688.

137. U.S. CONST. art. I, § 10, cl. 1.

138. *Id.* § 10, cl. 3.

139. But *id.* amend. X reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

from acting, would improperly create a void.[140]

The contrasting view is that the omission from the treaty clause of the words "agreement" or "compact" was *intentional.* Under this view, those who claim that the power to conclude international agreements resides in the Federal Government must seek authority for such power solely in the treaty process. Thus, as one commentator has mentioned, article I, section 10 might show that "the fact that the Framers explicitly authorized the States to enter into 'agreements' but omitted to do so in the case of the President implies a deliberate decision to withhold that power from him."[141] One might well conclude that because the treaty clause is silent about executive agreements, the power to conclude them was not granted to the Federal Government. Furthermore, because the states are prohibited by the tenth amendment from entering into executive agreements, whatever power does exist to make them resides only in the people.[142] The Supreme Court, however, most likely will not construe a clause that is silent on the matter as an implied prohibition of presidential power to make executive agreements.

b. the International Claims Settlement Act of 1949

The *Dames* Court, apparently comfortable with the idea of plenary executive power in foreign affairs, sanctioned the President's attachment of Iranian assets by finding congressional cooperation. Whereas the IEEPA gave the President *express* authority to attach the assets, the Court determined that the International Claims Settlement Act of 1949 (ICSA)[143] gave him the *implied* power to use executive agreements to dispose of them.[144]

The Court acknowledged that the ICSA was intended to create a commission in the State Department to disburse to American claimants funds received through executive agreements with foreign countries.[145] The Court held that this rather limited purpose evidenced congres-

140. " 'For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.' " TRIBE, *supra* note 82, at 172 (quoting Chae Chin Ping v. United States, 130 U.S. 581, 606 (1889)).

141. Berger, *supra* note 80, at 39-40 (footnote omitted).

142. *See* U.S. CONST. amend. X.

143. 22 U.S.C. §§ 1621-1644m (1976).

144. *Dames,* 453 U.S. at 680.

145. Initially, the statute dealt with procedures for distributing funds obtained through an executive agreement with Yugoslavia in 1948, but it was later amended to allow for disbursement of funds received through settlements with the People's Republic of China, East Germany, and Viet Nam. *See id.* at 680-81. It should be noted that each time a new country was to be included, specific congressional action was necessary. This indicates a desire by

sional intent to approve the use of executive agreements themselves.[146] The majority opinion cited legislative history and concluded that "Congress did not question the fact of the settlement [of claims by executive agreement] or the power of the President to have concluded it."[147] In fact, however, the legislative history is generally silent on the President's power to utilize executive agreements. It is much more concerned with how to allocate funds received through settlements than with the process by which these funds are appropriated. The statute thus offers little help in determining whether Congress has impliedly acquiesced in the use of executive agreements.

The ICSA offers some insight into congressional intent. Originally, the three members of the claims commission "were made subject to appointment by the Secretary of State rather than subject to Presidential appointment with Senatorial confirmation."[148] The House version was changed by the Senate "[to] provid[e] that the members of the Commission be appointed by the President with the advice and consent of the Senate."[149] This change, which was ultimately adopted, clearly illustrates that Congress was *not* passively acquiescing in a unilateral executive role in the claims settlement procedure. Accordingly, this statute may be inappropriate to prove "the history of acquiescence in executive claims settlement."[150]

The text of the ICSA discloses clearly that it was intended to apply in situations far different from that involved in *Dames:*

> The Commission shall have jurisdiction to receive, examine, adjudicate, and render final decisions with respect to claims of the Government of the United States and of nationals of the United States . . . included within the terms of any claims agreement . . . concluded between the Government of the United States and a foreign government . . . *arising out of the nationalization or other taking of property,* by the agreement of the Government of the United States to accept from that government a sum in en bloc settlement thereof.[151]

The legislative history confirms the Act's purpose, *viz.,* to dis-

Congress not to leave this matter entirely in the hands of the President, thus refuting somewhat the theory of implied congressional acquiescence.

146. "By creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements." *Id.* at 680.

147. *Id.* at 681.

148. H.R. REP. No. 770, 81st Cong., 1st Sess. 6 (1949).

149. S. REP. No. 800, 81st Cong., 1st Sess. 5 (1949).

150. *Dames,* 453 U.S. at 686.

151. 22 U.S.C. § 1623(a) (1976) (emphasis added).

charge American claims "in full settlement for American property nationalized or otherwise taken over by [a foreign government]."[152] Under a typical application of the Act, the "[i]nterposition by the [United States] Government in behalf of claimant Americans is obviously necessary. If such interposition were not made, the American whose position and interest are prejudiced by the acquisitive action of a foreign government would have recourse to local courts as his only opportunity for relief."[153]

Congress' supposition that under these circumstances a claimant would be delighted with executive action, because in its absence "this [recourse to local courts] would amount to no relief at all,"[154] simply does not apply in *Dames.* First, *Dames* involved no issue of nationalization: Dames and Moore sued under a contract for services, not for an accounting of property expropriated by Iran. Furthermore, there was no need for United States Government intervention because Iranian assets sufficient to cover Dames and Moore's claim were already in the United States and subject to attachment. In short, *Dames* did not involve a situation where, if the Government did not interfere, the claimant would receive nothing; to the contrary, *as a result of* the Government's action—sanctioned by the Supreme Court—the claimant may receive nothing, or at least substantially less than he or she might otherwise have received had the judicial process at the district court level been allowed to stand.

Ironically, *Dames* places a claimant who initially was in a position substantially superior to that of the contemplated ICSA claimant in, at best, a position on a level with the ICSA claimant: his judicially protected claim must now be pressed before a claims commission. The *Dames* plaintiff may indeed be in a worse position than an ICSA petitioner because he or she is by no means assured of enjoying as sympathetic a hearing from an international arbitral tribunal as from a State Department commission.[155] The ICSA should not be construed as an implied authorization for the President to conclude executive agreements arising out of circumstances so dissimilar to those which the Act was intended to remedy.

Nevertheless, references in the *Congressional Record* do illustrate that Congress recognized executive prerogative in the claims settlement

152. H.R. REP. No. 770, *supra* note 148, at 2.

153. *Id.* at 3-4; *see* S. REP. No. 800, *supra* note 149, at 3.

154. H.R. REP. No. 770, *supra* note 148, at 4.

155. For the composition and operations of the International Arbitral Tribunal, see the second Algerian Accord, *reprinted in* McGreevey, *supra* note 1, at 452-54.

arena. One congressman stated that "it is the executive and not the Congress which has primary power in the conduct of foreign relations."[156]

The assurance derived from an express grant of authority is absent in considering the ICSA. The authority for unilateral executive agreements that the Court *inferred* from a reading of the ICSA and its legislative history may entail a shift into Justice Jackson's "zone of twilight."[157] Under Justice Jackson's analysis, therefore, the *Dames* Court, in finding authority for the President's unilateral international agreements, was confronted with a situation where the extent of presidential power sanctioned by the Court depended more on the exigencies of a particular emergency than on the terms of an express provision.[158] Responding to this dilemma, the Court in *Dames* resorted to its ultimate rationale: "[C]ongressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures on independent presidential responsibility."[159] The Court was ready to navigate the perilous waters of delegation of powers, buoyed up by the singular case of *Curtiss-Wright.*

2. Delegation of powers problems and *United States v. Curtiss-Wright Export Corp.*

The *Dames* Court reasoned that the "failure of Congress specifically to delegate authority does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive."[160] Furthermore, in holding that " 'long-

156. 95 CONG. REC. 8837 (1949). The *Congressional Record* also reveals that Congress cannot bind the President on the substance of future foreign claims agreements because such agreements are not within the enumerated constitutional powers of Congress. *Id.* Another congressman acknowledged that the Framers of the Constitution wisely gave the executive branch discretion in the field of claims settlements. *Id.* at 8847. One member lamented that "the Congress of the United States continually bows to the State Department on every question that they raise," *id.* at 8851, and another felt that Congress should prevent "such high-handed [executive] action." *Id.* at 8845. The majority of the members of Congress, however, recognized the power of the executive to settle claims against foreign countries. *Id.* at 8840. It is interesting to note what one member felt to be the constitutional authority for such a broad executive power: "From the time of John Marshall right down to the recent Curtiss-Wright case the courts have held that agreements of this kind are the function of the executive department of the United States and you cannot take it away from them." 96 CONG. REC. 2969 (1950); *see infra* text accompanying notes 160-93.

157. *See supra* note 30.

158. *See Youngstown,* 343 U.S. at 637 (Jackson, J., concurring). For Justice Jackson's discussion of the "zone of twilight," see *supra* note 30.

159. *Youngstown,* 343 U.S. at 637 (Jackson, J., concurring); *see Dames,* 453 U.S. at 678.

160. 453 U.S. at 678 (quoting Haig v. Agee, 453 U.S. at 291).

continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] has been [taken] in pursuance of its consent,' "[161] the Court virtually created a rule of customary constitutional law permitting Congress to delegate to the President, over time, the power to settle the claims of American nationals by executive agreement. This delegation need not be express: Congress may "implicitly [approve] the practice of claim settlement by executive agreement."[162] By allowing the delegation of power from one branch of government to another through implication alone, *Dames* broadened the *Curtiss-Wright* Court's holding that the prohibition against delegations by one branch to another does not apply to foreign affairs.[163]

In *United States v. Curtiss-Wright Export Corp.*,[164] the defendant munitions manufacturer had conspired to sell American machine guns to Bolivia, which was then fighting in the Chaco.[165] The conspiracy began the day after Congress passed a joint resolution authorizing the President to ban the sale of arms to Bolivia if, in his discretion, he determined that peace might result from such a prohibition.[166] The resolution provided that it would be unlawful to conclude any sales once the President issued a ban on such transactions.[167] Pursuant to the authority granted him by the resolution, President Roosevelt issued a prohibitory proclamation,[168] and the defendants were indicted for its violation. In its defense, Curtiss-Wright contended that the joint resolution was an unconstitutional delegation of legislative power to the Executive.[169] Curtiss-Wright reasoned that the language of the resolution made criminal the violation of the executive proclamation, rather than the violation of the congressional resolution. According to this theory, this language effectively converted the proclamation into a law, which only Congress could constitutionally enact. The *Curtiss-Wright* Court rejected this contention and held the delegation valid.[170] The Court proceeded to analyze the source of the foreign affairs power and how it was allocated among the branches of the Federal Government.[171] In searching for a rationale for broad executive power in foreign affairs,

161. 453 U.S. at 686 (quoting United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915)).
162. 453 U.S. at 680.
163. *See* HENKIN, *supra* note 27, at 32.
164. 299 U.S. 304 (1936).
165. *Id.* at 311.
166. *Id.* at 311-12.
167. *Id.*
168. *Id.* at 312-13.
169. *Id.* at 314.
170. *Id.* at 322.
171. *See* TRIBE, *supra* note 82, at 159 (footnote omitted).

the Court held that the President's powers were not exhausted by the enumerated powers doctrine because enumerated powers were only those delegated by the states, acting severally, to the Federal Government.[172] The foreign affairs power, on the other hand, originated elsewhere as a direct "grant" of sovereign power from the Crown to the states collectively.[173] Because the power was collective, it devolved upon the Federal Government as a whole upon its establishment. As a result, the President was not deprived of inherent authority to act in foreign affairs. Nor was the President restricted by the express language of the Constitution[174] although, of course, his conduct had to conform to constitutional standards.[175]

Because of the extra-constitutional derivation of the foreign affairs power, the *Curtiss-Wright* Court allocated its exercise in a way which might have violated the separation of powers and checks and balances doctrines had the subject been purely domestic. The Court held that because " '[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,' "[176] he could exercise greater discretion in international than in national affairs.[177] The *Dames* Court recognized the power of the "sole organ" theory in legitimating unilateral presidential action in foreign affairs, while it acknowledged the reluctance of the *Youngstown* Court to extend such substantial power to the domestic arena.[178]

Although the Court in *Curtiss-Wright* never mentioned the origins of the "sole organ" concept, the theory was merely intended by its author, John Marshall, as an acknowledgment that the President is the sole means of *communication* with other nations, *not* the sole *formula-*

172. 299 U.S. at 316.

173. *Id.* at 316-17. Berger contends that the foreign affairs power was derived from the states severally, rather than collectively, and then delegated to the Federal Government, thus binding the President to the exercise of enumerated powers only. He noted that the Articles of Confederation of 1777 expressly granted the power to make treaties to "[t]he United States in Congress *assembled,*" and that the states had *severally* agreed to enter into a league of friendship. Berger, *supra* note 80, at 29 (emphasis added). According to Berger, therefore, Justice Sutherland's theory that enumerated powers consisted only of those possessed severally by the states prior to the Constitution, *see Curtiss-Wright,* 299 U.S. at 316, would include the foreign affairs power. As a result, the President could only exercise enumerated, not inherent, power in this field.

174. *See Curtiss-Wright,* 299 U.S. at 318.

175. *See id.* at 319.

176. *Id.* (quoting then Representative John Marshall in 10 ANNALS OF CONGRESS 613 (1851)).

177. 299 U.S. at 320.

178. 453 U.S. at 661-62. *See infra* text accompanying notes 194-238 for a discussion of *Youngstown*.

tor of foreign policy.[179] The President was merely granted the power to speak on behalf of the nation. The *Curtiss-Wright* Court, however, construed the theory as giving the President substantive power to conclude international agreements on his own.[180] The Court thus virtually sanctioned the power of the President to ignore the treaty process and bind the United States domestically and internationally through mere use of his inherent powers.[181] To the extent that *Dames* relies on *Curtiss-Wright,* the sole organ may well have drowned out the players in the congressional orchestra.[182]

The *Dames* Court rejected the executive branch's theory that the absence of express power in Congress to conclude international agreements unilaterally precluded Congress from delegating such power to the President.[183] The Court held that Congress actually had delegated this authority by implication alone. Although the Court thus acknowledged the foreign affairs power as *concurrent,*[184] it refrained from determining the allocation of this power between the political branches and from disabling the Executive from acting on his or her sole initiative.[185] Although one commentator notes that all presidential power, including that over foreign affairs, was originally a derogation from

179. HENKIN, *supra* note 27, at 300 n.18. Henkin also refers to a letter by Thomas Jefferson describing the President as "the only channel of communication between this country and foreign nations . . . ." *Id.* (quoting 6 T. JEFFERSON, WRITINGS 451 (P. Ford ed. 1895)); *see* Berger, *supra* note 80, at 17; TRIBE, *supra* note 82, at 164 n.4.

180. HENKIN, *supra* note 27, at 300 n.18.

181. Ohly, *supra* note 88, at 285.

182. The debate over Justice Sutherland's famous pronouncements on the powers of the President in foreign affairs will probably continue for some time. *Compare* HENKIN, *supra* note 27, at 32: "Delegations by Congress to the President have been extensive and constant and *Curtiss-Wright* tells us that in foreign affairs the principle of separation [of powers] does not bar them," *with* Forkosch, *supra* note 100, at 234 n.87: "This case [*Curtiss-Wright*] 'contains a famous though now rejected dictum that the rule against the delegation of legislative power does not apply in foreign affairs.' " (quoting Wormuth, *The Nixon Theory of the War Power: A Critique,* 60 CALIF. L. REV. 623, 685 (1972)).

183. Rovine, *supra* note 83, at 423; *see* HENKIN, *supra* note 27, at 174: "Congress, also, has no authority to negotiate with foreign governments: it cannot, then, delegate any to the President."; Forkosch, *supra* note 100, at 244 n.129. TRIBE, *supra* note 82, at 285, refers to cases in which delegation is not possible: "[C]ertain congressional powers are simply not delegable - as when it is clear from the language of the Constitution that the purposes underlying certain powers would not be served if Congress delegated its responsibility." The *Dames* Court held that in the Iranian case "the purposes" were served.

184. Monaco v. Mississippi, 292 U.S. 313, 331 (1934).

185. *See* Berger, *supra* note 80, at 45; *see also Youngstown,* 343 U.S. at 603-04 (Frankfurter, J., concurring); Ohly, *supra* note 88, at 285: "The Court [in *Curtiss-Wright*] properly noted that if such 'inherent power' exists . . . it was 'vested in the federal government' and not in any individual branch thereof." (footnotes omitted).

congressional power,[186] he concedes that today there are virtually no limitations on the powers which can be delegated.[187]

Although ostensibly "the Court 'narrowly construes' federal statutes to avoid broad delegations,"[188] the *Dames* Court's finding of congressional approval in the working of executive agreements, through inertia and acquiescence, further adds to "[t]he murkiness of the judicial waters [and enables] the determined executive branch to accomplish what it otherwise might be unable to do . . . ."[189] The decision in *Dames* will nonetheless cause little damage if, in a future case, the Court agrees that "delegations do not result in transfers of power but only in utilizations as granted and limited temporarily."[190] There is little threat to the Constitution if the Supreme Court holds that only in extraordinary circumstances will Congress be found to have delegated power and that that power can always be recalled.[191]

Danger lies ahead if *Dames* is interpreted as holding that the President is empowered to act unilaterally without the consent of Congress.[192] This is unlikely to happen if the Court remains mindful that " '[a]n agent [the President] cannot new model his own commission' "[193] and recognizes that the branches of government can remain separate and still survive any valid presidential need to respond flexibly to a national emergency.

3. Separation of powers problems and *Youngstown Sheet & Tube Co. v. Sawyer*

Youngstown Sheet & Tube Co. v. Sawyer[194] arose when, to avert a nationwide strike of steelworkers during the Korean War, President Truman issued an executive order authorizing the Secretary of Commerce to seize most of the country's steel mills and keep them running.[195] The Secretary ordered the presidents of the seized companies to continue in operation on behalf of the United States.[196] Because the President believed that national defense and the war effort gave him

186. HENKIN, *supra* note 27, at 33.
187. *Id.* at 120.
188. TRIBE, *supra* note 82, at 289.
189. Forkosch, *supra* note 100, at 269.
190. *Id.* at 270.
191. *Id.*
192. Berger, *supra* note 80, at 53.
193. *Id.* at 54 (quoting 6 A. HAMILTON, THE WORKS OF ALEXANDER HAMILTON 166 (H. Lodge ed. 1904)) (emphasis deleted).
194. 343 U.S. 579 (1952).
195. *Id.* at 583.
196. *Id.*

inherent emergency authority to take extraordinary measures, he acted without consulting Congress.[197] The steel companies filed suit, complaining that the seizures were neither congressionally authorized nor within the constitutional powers of the President. The Government responded by arguing that the President had "inherent power" to accomplish the seizure.[198]

The *Youngstown* Court ruled the seizures unlawful, holding that they were not within the President's constitutional power.[199] In this seminal case, the Supreme Court Justices expounded at great length on the separation of powers between the Executive and the Legislature. The same problems presented in *Youngstown* are certain to arise if *Dames* is applied to future emergencies. The majority in *Youngstown,* through Justice Black, dismissed the Government's inherent powers theory, and found that Congress had patently rejected the idea that the Executive could seize domestic property in emergency situations.[200] Justice Black explained that neither the President's authority as Commander-in-Chief nor his authority to execute the laws gave him "the ultimate power . . . to take possession of private property in order to keep labor disputes from stopping production."[201] The Court emphasized two points critical to an analysis of *Dames.* First, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker,"[202] this legislative function being the exclusive province of Congress. Second, even if prior Presidents had seized private property without congressional consent, Congress, nonetheless, remained the sole lawmaker.[203]

In a concurring opinion, Justice Frankfurter declared that mere recognition that power is national in scope does not work an automatic

197. *Id.*

198. *Id.* at 584.

199. *Id.* at 586-89.

200. *Id.* at 586. To the extent that *Youngstown* may be read as a limitation on the President's power to seize property during wartime, it should operate as a severe limitation on the power of the President to do as he or she pleases with property during "mere" national emergencies of the type in *Dames,* even though *Youngstown* dealt with domestic property and *Dames* with foreign assets. The *Dames* Court avoided this conflict with *Youngstown* by holding that the revocable license to attach did not give the petitioners any property rights in the assets; the assets thus did not constitute "domestic" property. 453 U.S. at 674 n.6. In addition, by virtue of the changes from the TWEA adopted in the IEEPA, the President was not seizing property and placing it under executive branch control, but merely "disposing" of it. *Id.* at 672 n.5.

201. 343 U.S. at 587.

202. *Id.*

203. *Id.* at 588-89.

allocation of it to either the President or Congress.[204] He then addressed the problem of what inferences may properly be drawn from congressional silence on a given issue. He stated: "[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents . . . may be treated as a gloss on 'executive Power' vested in the President . . . ."[205]

Justice Douglas believed that *all* lawmaking power resided in Congress alone.[206] He warned that "[i]f we sanctioned the present exercise of power by the President, we would be expanding Article II of the Constitution and rewriting it to suit the political conveniences of the present emergency."[207] He concluded that the President's power to execute the laws was limited to those laws which Congress enacted.[208]

Justice Jackson felt that the executive branch possessed only delegated powers, which, however, should be broadly construed.[209] He was, therefore, unimpressed at the Government's attempt to use nebulous inherent powers resulting from the practice of previous administrations as justification for President Truman's seizure of the steel mills.[210] Although Justice Jackson acknowledged that Congress could delegate extraordinary emergency power in times of crisis,[211] he stressed that, nevertheless, "emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them."[212]

The *Dames* Court utilized the *Youngstown* analysis to give "the strongest of presumptions and the widest latitude of judicial interpretation"[213] to the Executive's action, because it found that the President had acted pursuant to specific legislative authorization.[214] Although this conclusion might legitimately apply to the IEEPA, Congress had not *expressly* approved of executive agreements. Furthermore, because Congress is the sole lawmaker and international agreements have been

204. *Id.* at 603-04 (Frankfurter, J., concurring).
205. *Id.* at 610-11 (Frankfurter, J., concurring).
206. *Id.* at 630 (Douglas, J., concurring).
207. *Id.* at 632 (Douglas, J., concurring).
208. *Id.* at 633 (Douglas, J., concurring).
209. *Id.* at 640 (Jackson, J., concurring).
210. *Id.* at 646 (Jackson, J., concurring).
211. *Id.* at 652 (Jackson, J., concurring).
212. *Id.* (Jackson, J., concurring).
213. *Dames,* 453 U.S. at 674 (quoting *Youngstown,* 343 U.S. at 637 (Jackson, J., concurring)).
214. 453 U.S. at 675.

accorded the same legal status as treaties,[215] an executive agreement is in effect an act of legislation. Additionally, it has never been held that the President's foreign affairs power enables him to issue orders having the force of law where they directly regulate property within the United States;[216] this is peculiarly the role reserved for Congress. Unless the separation of powers problems discussed in *Youngstown* are limited to presidential usurpations of *domestic* lawmaking authority in the absence of congressional delegation, *Dames* may involve some executive encroachment on legislative powers.

The *Dames* Court encountered further difficulties in relying upon *Youngstown* as authority for the holding that Congress' knowing acquiescence in past presidential actions implied approval of the Algerian Accords.[217] Because "usage has long been regarded as an inadequate source of constitutional authority,"[218] a history of presidential action in the face of congressional inertia is insufficient authority for the creation of a customary constitutional rule of law, and a failure by Congress to exercise its acknowledged powers does not enable another branch not granted those powers to act in its place.[219] To put the matter simply, Congress' failure to utilize its concurrent foreign affairs power does not automatically sanction unilateral presidential decisions.[220]

In addition, the notion that executive agreements are a practice which Congress has never questioned is erroneous. To the contrary, Congress has repeatedly protested against such exercises of executive power. For example, the Senate believed that the Rush-Bagot Agreement of 1817 should have been consummated through the treaty process.[221] In addition, the Senate in 1972 voted eighty-one to zero for the Case Bill, which would have required congressional input into the process of making international agreements.[222] There has thus developed a continuing struggle between Congress and the President over the latter's capacity to conclude such accords without legislative approval.[223]

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215. *Pink,* 315 U.S. at 230; *see* Berger, *supra* note 80, at 48, however: "Article VI . . . makes only 'Laws' and 'Treaties' the 'supreme law of the land', binding upon the states. It would require a constitutional amendment . . . to make an executive agreement, concluded by the President alone, equally binding." (footnote omitted).

216. HENKIN, *supra* note 27, at 57.

217. 453 U.S. at 686.

218. Ohly, *supra* note 88, at 286.

219. Forkosch, *supra* note 100, at 246 n.138.

220. See *Dames,* 453 U.S. at 678, for the Court's theory that congressional inertia in foreign affairs *does* enable the President to act independently.

221. Rovine, *supra* note 83, at 411.

222. Berger, *supra* note 80, at 3 (footnotes omitted).

223. Rovine, *supra* note 83, at 397. Rovine devotes four pages, 397-401, to discussing

Indeed, Congress "has especially resented Presidential *faits accomplis* committing the U.S. before the world and compelling Congress to rubber-stamp his initiatives."[224] Although, in the Iranian hostages affair, Congress seemed quite content to serve as a "rubber-stamp" by voicing no disapproval of the Algerian agreements,[225] it has nonetheless repeatedly expressed its dissatisfaction with executive agreements in general.

Because *Dames* did not involve express congressional approval of executive agreements, the *Dames* Court discarded Justice Jackson's tripartite analysis in that part of the opinion dealing with their constitutionality. The Court did find, however, that Congress' failure to enact a statute expressing *disapproval* was equivalent to an invitation to the President to act on his own.[226] In *Dames* congressional silence was held equivalent to approval of presidential initiatives, whereas in *Youngstown* the Court refused to imply approval from Congress' failure to grant President Truman the power he was seeking. In holding that the ICSA showed implied congressional approval of claims settlements by executive agreement,[227] where neither the express language of the statute nor its legislative history sanctioned executive agreements, the *Dames* Court virtually found "secreted in the interstices of legislation the very grant of power which Congress consciously withheld."[228]

That approval of executive agreements *was* consciously withheld is evident from the long history of congressional efforts to exert control over the international agreement process.[229] The ICSA is inappropriate authority for a contrary finding. Congress is on record as expressing as much dissatisfaction with the executive agreement method of reaching international accord as with the assertion of presidential power to seize property which was at issue in *Youngstown. Youngstown* therefore stands for the proposition that the absence in a statute of an express grant of power to the President may *not* be used to create that power implicitly. Thus, the ICSA's silence on executive agreements does not imply approval of such agreements. Given the history of congressional protest, the President's use of executive agreements may well be incom-

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Senate unhappiness with executive use of solo international agreements. *See* HENKIN, *supra* note 27, at 179.

224. HENKIN, *supra* note 27, at 91.

225. 453 U.S. at 687-88.

226. *See id.* at 678 (citing *Youngstown,* 343 U.S. at 637 (Jackson, J., concurring)).

227. 453 U.S. at 680.

228. *Youngstown,* 343 U.S. at 609 (Frankfurter, J., concurring); *see supra* text accompanying notes 144-59.

229. *See supra* text accompanying notes 221-25. But see *Dames,* 453 U.S. at 682 n.10, for the theory that Congress deliberately refrained from exercising supervisory controls over executive agreements.

patible with Congress' implied will, thus placing his power "at its lowest ebb."[230]

Nevertheless, the *Youngstown* Court never questioned the President's ability to rely on his own independent constitutional powers.[231] The *Dames* Court believed that the President possessed sufficient power, whether express or implied, to act in the Iranian crisis because the crisis involved foreign affairs. By contrast, the domestic issues involved in *Youngstown* did not fall within the scope of the Executive's independent authority. The powers disputed in *Dames* were concurrent. Where it is understood that power is to be shared concurrently, the President's authority to act, unpalatable though it may be to some senators, will go unquestioned by the courts.[232]

Because *Youngstown* involved domestic policy, Congress had exclusive authority to make the laws; thus, the President did not possess unchecked discretion to act in the domestic arena, even in furtherance of international military policy.[233] If *Youngstown* is limited only to domestic situations, however, its utility as a restriction on presidential power in foreign affairs is minimal since the opinion does not directly address the question of whether the President may possess inherent powers in the international arena.[234]

Applying *Youngstown*'s separation of powers theories to the area of foreign policy and international agreements leads to paradox. On the one hand, allowing the branch which is to execute the laws the power to conclude international agreements, which are admittedly laws of the land, gives the President a legislative function which is clearly unconstitutional.[235] On the other hand, the Senate Subcommittee on Separation of Powers of the Senate Judiciary Committee determined in 1973 that the Executive possessed the power both to conclude international negotiations *and* to choose the instrument for their conclusion.[236] Giv-

230. *Youngstown,* 343 U.S. at 638-39 (Jackson, J., concurring). See *supra* note 30 for discussion of Justice Jackson's theory of the interplay between presidential and congressional power.

231. *Youngstown,* 343 U.S. at 635 (Jackson, J., concurring).

232. *See* Forkosch, *supra* note 100, at 229: "In the field of foreign relations . . . 'the power to determine the substantive content of American foreign policy is a *divided* power, with the lion's share falling usually to the President, though by no means always.' " (quoting E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 308 (3d ed. 1948)) (emphasis in original).

233. TRIBE, *supra* note 82, at 181.

234. *Id.* at 182.

235. Berger, *supra* note 80, at 23 n.127.

236. Rovine, *supra* note 83, at 429 (citing SUBCOMM. ON SEPARATION OF POWERS OF THE SENATE COMM. ON THE JUDICIARY, 93d Cong., 1st Sess., CONGRESSIONAL OVERSIGHT OF EXECUTIVE AGREEMENTS 6 (Comm. Print 1973)).

ing the Executive such untrammeled authority flies in the face of the protest expressed by one Founder that "[i]n theory this is an absurdity - in practice a tyranny."[237] Those concerned about the expansion of presidential power can only hope that *Dames* will do little more than add to the "century and a half of partisan debate and scholarly speculation yield[ing] no net result but only supply[ing] more or less apt quotations from respected sources on each side of any question. They largely cancel each other."[238]

4. Public policy rationales for the legitimacy of executive agreements

Although the text of the Constitution does not authorize the conclusion of executive agreements, there exist compelling public policy reasons why the Algerian Accords in particular should be honored, given the unique facts out of which the *Dames* opinion arose. It is not the thesis of this note that public policy considerations are alone sufficient to render constitutional otherwise unsanctioned executive actions; nevertheless, the political exigencies of the Iranian hostage crisis indicate that the *Dames* decision was at least correct *politically,* if not *constitutionally.*

In the past, the Court has not hesitated to utilize political grounds as aids in its decisions, particularly in nationally-perceived emergencies. The *Curtiss-Wright* Court, for instance, acknowledged that in foreign affairs the President possessed far broader powers than in the domestic field because of the "important, complicated, delicate and manifold problems"[239] associated with foreign relations. The *Pink* Court also felt that the President must be accorded the implied power to settle claims in order effectively to "handl[e] the delicate problems of foreign relations."[240] Although Justice Jackson cautioned against the "ready pretext for usurpation"[241] of power by the Executive which emergencies afford, the Court has been inclined to give the President broad power in such situations, based more on political than constitutional considerations.

The *Dames* Court recognized that the claims settlement agreement at issue was necessary to the resolution of a major foreign policy dis-

237. Berger, *supra* note 80, at 23 n.127 (quoting 6 J. MADISON, THE WRITINGS OF JAMES MADISON 145 (G. Hunt ed. 1906)).

238. *Youngstown,* 343 U.S. at 634-35 (Jackson, J., concurring).

239. *Curtiss-Wright,* 299 U.S. at 319.

240. *Pink,* 315 U.S. at 229.

241. *Youngstown,* 343 U.S. at 650 (Jackson, J., concurring).

pute[242] and acknowledged that its decision was "one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live."[243] The Court also recognized that *Dames* involved an international crisis, "the nature of which Congress can hardly have been expected to anticipate in any detail."[244] The Court thus adopted a public policy rationale invalidating efforts by individual claimants to upset the results of time-consuming, delicate negotiations involving the safety of American citizens. The Court was plainly reluctant to allow any impairment of the value of the President's major bargaining chip in dealing with the unstable Iranian situation.[245] It resolved the tension between the President and the Constitution in favor of the Executive, at the expense of strict constitutional doctrine.

Other rationales besides the "bargaining chip" theory have been offered to legitimate executive agreements. Political considerations, including the relationship between this country and its negotiating counterpart,[246] are important. The volatile Iranian negotiations, which extended over a period of fourteen months and which were subject to alternating advances and reversals based on both executive and legislative whim in Iran and the United States, illustrate the need to be sensitive to the exigencies of international politics.

The need to act swiftly was another important political consideration.[247] It would have been unthinkable, after the numerous snags to a resolution of the Iranian crisis had been removed, to have risked further delays or collapse of the agreement by subjecting it to the time-consuming and often divisive process of treaty creation and ratification. The unpredictability of the Iranian situation further underscored the need to rely on the secrecy of the President,[248] rather than have sensitive negotiations over sharp antagonisms opened up to public debate.

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242. *Dames,* 453 U.S. at 688.

243. *Id.* at 662.

244. *Id.* at 669.

245. *Id.* at 673-74. "The frozen assets serve as a 'bargaining chip' to be used by the President when dealing with a hostile country." *Id.* at 673; *see* H.R. REP. No. 915, 96th Cong., 2d Sess. 3 (1980), which acknowledged the practice of the Government to block foreign assets to offset anticipated claims against the foreign country. There is no requirement that these claims be economic rather than political, and thus no reason why blocked assets cannot serve as bargaining chips for lives.

246. Rovine, *supra* note 83, at 419.

247. *Id.*

248. THE FEDERALIST No. 64, 329 (J. Jay) (London 1911). Berger, *supra* note 80, at 11, is unimpressed with the secrecy rationale.

Additionally, because other countries turn naturally to the President when this country has allegedly violated their rights,[249] they believe that a commitment by the President through executive agreement is the act of an "authorized agent" which will be honored by the other branches of the Government[250] and by the nation as a whole. This reliance may "estop" the Congress, unless it makes clear to the world that it is definitively entering the field, from negating executive agreements entered into in good faith by countries expecting the President's word to be respected. If Congress truly objects to an exercise of presidential power which it feels it should share, it must make its objection clear. Only Congress can prevent its losing its acknowledged power to legislate for emergencies.[251] Finally, the President must be able to respond flexibly to unforeseen circumstances, a category into which the Iranian crisis clearly fell.[252]

Other factors, unique to the Iranian hostage crisis, militate equally as strongly for approval of the Algerian Accords. Although most important agreements will be treaties rather than executive agreements,[253] the clear need for swift, unilateral executive action in the Iranian crisis made use of the latter particularly appropriate. Congress was kept informed, by both the outgoing Carter administration and the incoming Reagan administration, of all stages of the final negotiations. Nothing could have prevented Congress from acting had it so desired, and its silence at that particular time showed that in the hostage crisis Congress *intentionally* refrained from registering its characteristic objections to executive agreements.[254]

Entirely peculiar to the situation in *Dames* was the necessity to conclude an agreement before the end of the Carter administration. This necessity arose, not because of the now-rejected theory that executive agreements expire at the end of the administration concluding

249. HENKIN, *supra* note 27, at 49 (footnote omitted).

250. The Supreme Court, in Goldwater v. Carter, 444 U.S. 996 (1979), ordered dismissed a challenge by certain senators to deny effect to President Carter's unilateral abrogation of the Mutual Defense Treaty with Taiwan, since they had failed to show that they had been injured by the presidential action. Although lower courts had exhaustively argued about the power of the President to render inoperative a congressionally-approved treaty without Congress' consent, the high Court avoided deciding this issue by holding that the case was not ripe.

251. *Youngstown,* 343 U.S. at 654 (Jackson, J., concurring).

252. TRIBE, *supra* note 82, at 160.

253. Rovine, *supra* note 83, at 418.

254. *Dames,* 453 U.S. at 688 n.13.

them,[255] but because it was uncertain that the succeeding Republican administration would adopt an agreement with which it was dissatisfied.[256] Finally, the *Dames* Court was well aware of the volatility of the Iranian crisis and was sensitive to the fact that President Carter, although occasionally criticized, enjoyed widespread popular, national backing for his actions in resolving the hostage stalemate. It would have been impolitic for Congress or the Court to have ignored the national will by attempting to restrict the President's actions in this situation.

V. CONCLUSION

Although the text of the Constitution nowhere expressly grants the President the power to conclude executive agreements, nowhere does it preclude their use. If the President, or either of the other branches of government, is to be restricted to those powers enumerated in the Constitution, executive agreements are clearly impermissible. Both statute and case law, however, have acknowledged that certain powers inhere in each of the branches of government. The Supreme Court may extend *Dames* and hold that nothing prevents the President, even in non-emergency situations, from unilaterally negotiating and consummating international agreements pursuant to such inherent authority, subject, of course, to the proviso that they be within constitutional limits.[257] This is particularly so if the President, as Executive, is considered to have primary power to act in foreign relations. Moreover, in the absence of any unequivocal objection by Congress to these agreements, the courts will validate them as either a custom acquiesced in by Congress or a power impliedly delegated to the President.

Critics of executive agreements have argued that if these agreements are intended to be law, as they surely are, they can only be concluded by Congress. Furthermore, they argue that because executive agreements are not mentioned in the Constitution, they cannot be legit-

255. *See* HENKIN, *supra* note 27, at 181; E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 214 (4th ed. 1957).

256. President Reagan, of course, "ratified" the Algerian Accords in Executive Order No. 12,294, although he expressed his dissatisfaction with certain provisions of the agreement. *See* Exec. Order No. 12,294, 46 Fed. Reg. 14,111-12 (1981); President's Message to Congress on Suspension of Litigation Against Iran, 17 WEEKLY COMP. PRES. DOC. 189 (Feb. 24, 1981).

257. "[T]he very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . must be exercised in subordination to the applicable provisions of the Constitution." *Curtiss-Wright,* 299 U.S. at 320.

imate unless elevated to the level of the "Supreme Law of the Land" by a constitutional amendment.[258]

Nevertheless, the President should be given some flexibility to act without resort to the treaty process, particularly in emergency situations. In such circumstances, the legality of a specific executive agreement will depend upon whether a court is willing to read between the lines of the Constitution and any relevant statute, to ignore arguments concerning the expressed intent of the Founders designed to limit executive power, and to conclude that the two political branches have at least impliedly cooperated to bring about the court's desired result. It is thus that "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[259]

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258. *See, e.g.,* Berger, *supra* note 80, at 54: "If present exigencies demand a redistribution of powers in which Congress was originally fully to share . . . that decision ought candidly to be submitted to the people in the form of a proposed amendment . . . ."

259. *Youngstown,* 343 U.S. at 637 (Jackson, J., concurring); *see supra* text accompanying note 158.