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Lee R. Marks

John C. Grabow

THE PRESIDENT'S FOREIGN ECONOMIC POWERS AFTER *DAMES & MOORE v. REGAN:* LEGISLATION BY ACQUIESCENCE

Lee R. Marks† *& John C. Grabow*‡

On January 19, 1981, President Carter entered into three agreements with Iran to secure the release of fifty-two American hostages seized in Teheran, Iran, on November 4, 1979.[1] These agreements, entered into without the advice or consent of the Senate, provided for the termination of all legal proceedings against Iran pending in United States courts,[2] the nullification of all attachments and liens secured against Iranian property,[3] and the transfer to Iran by July 19, 1981, of Iranian property held in the United States.[4] The agreements also provided that, subject to certain exceptions,[5] claims of United States nationals against Iran would be settled by artibration before a newly created Iran-United States Claim Tribunal.[6]

In *Dames & Moore v. Regan,*[7] the Supreme Court upheld the President's authority to enter into and carry out the agreements with Iran. The case was argued on June 24, 1981, and decided on July 2, 1981, on a schedule expedited to enable the United States to meet its commit-

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† Member, District of Columbia Bar; B.A. University of Michigan, 1957; LL.B. Harvard University, 1960.

‡ Member, District of Columbia Bar; B.A. University of Michigan, 1978; J.D. University of Michigan, 1981.

1 The three agreements were: (1) Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 20 I.L.M. 224 [hereinafter cited as General Declaration]; (2) Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 20 I.L.M. 229; and (3) 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, Jan. 19, 1981, 20 I.L.M. 230 [hereinafter cited as Claims Declaration].

2 *See* General Declaration, *supra* note 1, ¶ 11, at 227.

3 *See id.* ¶ B, at 224.

4 The agreement called for the transfer within six months of the date of the Declarations of all Iranian deposits and securities held by American banks into an escrow account at the Algerian Central Bank. *Id.* ¶ 16, at 226.

5 The exceptions include all claims by hostages, claims arising under contracts specifying that Iranian courts would be the sole forum for resolving disputes, and claims for damage to United States nationals or property by "popular movements" in the course of the revolution. *See infra* note 38.

6 *See* Claims Declaration, *supra* note 1, arts. I-II, at 230-31.

7 453 U.S. 654 (1981).

ments to Iran.[8] Recognizing its "expeditious treatment"[9] of questions that "touch fundamentally upon the manner in which our Republic is to be governed,"[10] the Court repeatedly emphasized the narrowness of its holding.[11]

The Court upheld the President's extinction of attachments and liens on the ground that the "plain language" of the International Emergency Economic Powers Act[12] (IEEPA) permitted such executive action. The Court's holding, however, ignored both the legislative history of the IEEPA and its precursor statute, the Trading with the Enemy Act[13] (TWEA), and its own earlier admonitions against a literal reading of the language of the two statutes.[14] The Court also failed to provide a conceptually solid foundation in upholding the President's authority to suspend private claims pending in United States courts against foreign nations, relying upon a theory of implied congressional delegation through acquiescence that is without precedential support.[15]

To criticize the Court's conclusions is not to suggest that it should have held otherwise. Given the unique context of the case, it is difficult to fault the Court for upholding the President's authority to enter into the agreements with Iran. The agreements resolved a prolonged and debilitating foreigu affairs trauma. Once the hostages had been released, it was impossible to restore the status quo ante. The international consequences of dishonoring the President's undertaking were unpredictable. Limited to its unique facts, the Court's decision was tolerable as well as predictable. Unfortunately, the Court's analysis cannot be limited to the facts of *Dames & Moore.*[16] Despite its professed caution, to uphold the President's actions the Court was forced to rely on an unprecedented reading of the President's statutory and constitutional power to conduct foreigu affairs. The case establishes a precedent that

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8 President Carter had agreed to return bank deposits and other property subject to attachment by July 19, 1981. *See supra* note 4 and accompanying text. A "controlling precedent" from the Supreme Court upholding the President's authority to nullify attachments and require the transfer of the property to Iran was needed before that date. Petition for a Writ of Certiorari before Judgment, Memorandum for Respondents at 2, Dames & Moore v. Regan, 453 U.S. 654 (1981).

9 453 U.S. at 660.

10 *Id.* at 659.

11 *See id.* at 660-61, 688.

12 50 U.S.C. §§ 1701-1706 (Supp. IV 1980).

13 50 U.S.C. §§ 1-4 (1976).

14 *See infra* notes 58-61 and accompanying text.

15 *See infra* notes 100-17 and accompanying text.

16 Although the Court disclaimed any attempt to lay down "general 'guidelines' covering other situations not involved here," 453 U.S. at 661, Judge Bork of the Court of Appeals for the District of Columbia Circuit has properly noted in response that "an attempt to say nothing of general guidance must always be defeated in some measure as soon as reasons are given for the particular decision." Persinger v. Iran, 690 F.2d 1010, 1019 (D.C. Cir. Oct. 8, 1982); *see infra* notes 196-201 and accompanying text.

may cause serious mischief in the future and, therefore, cannot easily be dismissed.

I

BACKGROUND: UNITED STATES COMMERCIAL INTERESTS IN IRAN

The Imperial Shah of Iran had ambitious plans to modernize Iran. Under his guidance, Iran was to become "the fifth-largest industrial entity on the face of the earth by the year 2000."[17] The Iranian government and its agencies entered into hundreds of contracts with major American corporations to carry out this program of rapid industrialization. United States companies equipped the Imperial Iranian Air Force with sophisticated jet fighters, transport planes, and helicopters, conducted site studies for nuclear power plants, upgraded the country's telecommunications and highway systems, built irrigation projects, housing complexes, and hospitals, and provided consumer goods.[18]

The Shah's regime, however, was fragile.[19] Religious riots and anti-Shah demonstrations erupted in early 1978, with the exiled Ayatollah Khomeini calling for "rivers of blood" to bring down the Shah.[20] By the end of 1978, Iran was in economic and political chaos: oil production was virtually shut down; workers were on strike; and demonstrations were continuing. The Shah left Iran on January 17, 1979,[21] and soon after, Khomeini returned to Iran from his Paris exile.[22]

The fall of the Shah not only marked the end of the world's oldest monarchy, but also terminated the extensive commercial relationships between American companies and Iran, leaving hundreds of contracts in partial states of performance. Upon taking power, the anti-American Islamic regime of the Ayatolla Khomeini renounced all dealings with United States companies. American corporations suddenly found themselves with expropriation and breach of contract claims instead of contracts for goods and services. The claims represented a value estimated to be as much as eight billion dollars.[23]

To recover their losses, American corporations filed suits in United States district courts throughout the country against the Islamic Repub-

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17 W. SULLIVAN, MISSION TO IRAN 66 (1981).

18 *See generally* B. RUBIN, PAVED WITH GOOD INTENTIONS: THE AMERICAN EXPERIENCE AND IRAN (1980); K. MCLACHLAN, THE IRANIAN ECONOMY 1960-1976, in TWENTIETH-CENTURY IRAN 129-69 (H. Amirsadeghi ed. 1977).

19 *See generally* W. FORBIS, FALL OF THE PEACOCK THRONE (1980); B. RUBIN, *supra* note 18; W. SULLIVAN, *supra* note 17.

20 B. RUBIN, *supra* note 18, at 6.

21 N.Y. Times, Jan. 17, 1979, at A1, col. 6.

22 *Id.*, Feb. 1, 1979, at A1, col. 6.

23 *See, e.g.*, Marschalk Co. v. Iran Nat'l Airlines Corp., 518 F. Supp. 69, 74 (S.D.N.Y.), *rev'd on other grounds*, 657 F.2d 3 (2d Cir. 1981); *see also* IRANIAN ASSETS LITIGATION REP. (Andrews) 4238 (Feb. 19, 1982).

lic of Iran and the agencies and instrumentalities through which Iran had conducted business. They founded jurisdiction on the Foreign Sovereign Immunities Act of 1976[24] (FSIA), which gives the district court "original jurisdiction . . . of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement."[25] Section 1605 of the FSIA provides, *inter alia,* that a foreign state shall be subject to the jurisdiction of the United States courts whenever it has waived immunity or the claim is based on a "commercial activity" having a nexus with the United States.[26] The American claimants effected service on Iran and its agencies pursuant to the FSIA, which prescribes various modes of service including, when all else fails, service on the United States Secretary of State and subsequent transmittal to the foreign state through diplomatic channels.[27] Many plaintiffs obtained prejudgment attachments of Iranian property located in the United States,[28] including bank accounts, art, real estate, and Iran's remainder interest in its Foreign Military Sales Trust Fund.

II
THE PRESIDENT'S ACTIONS

On November 14, 1979, in response to Iran's seizure of the American hostages and its threat to remove its assets from the United States,

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24 28 U.S.C. §§ 1330, 1602-1611 (1976). *See generally infra* notes 163-65 and accompanying text.

25 28 U.S.C. § 1330 (1976).

26 28 U.S.C. § 1605(a) provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .

The FSIA provides a "minimum contacts" test of personal jurisdiction similar to that set forth in International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See, e.g.,* Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion, 614 F.2d 1247, 1254-55 (9th Cir. 1980).

27 *See* 28 U.S.C. § 1608 (1976). *See generally* New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 78 (S.D.N.Y. 1980) (when diplomatic channels are closed, FSIA and Federal Rules of Civil Procedure permit courts to order a substitute form of service).

28 The FSIA authorizes prejudgment attachment only when the foreign state "has explicitly waived its immunity" therefrom. 28 U.S.C. § 1610(d)(1) (1976). Because few commercial contracts with Iran contained explicit waivers, most claimants relied on the 1955 Treaty of Amity, Economic Relations, and Consular Rights, Article III, § 2, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, 902-03, T.I.A.S. No. 3853, at 4-5. The treaty provides generally for a waiver of immunity from legal process, but makes no specific reference to prejudgment attachment.

President Carter declared a national emergency[29] and ordered all property of the government of Iran within the jurisdiction of the United States, or within the possession or control of persons subject to the jurisdiction of the United States, to be blocked.[30] The order authorized the Secretary of the Treasury to exercise all powers granted to the President under IEEPA to carry out the blocking order.

The next day the Office of Foreign Assets Control of the Treasury Department issued the Iranian Assets Control Regulations. These regulations provided that "[u]nless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property" in which Iran held an interest.[31] The Treasury Department later issued a general license that authorized certain judicial proceedings against Iran, including prejudgment attachment,[32] but did not permit courts to enter final judgments or decrees.[33]

Iran released the hostages on January 20, 1981, pursuant to an agreement reached the previous day between the United States and Iran.[34] The terms of the agreement are embodied in three declarations of the Republic of Algeria, which had mediated between Iran and the United States.[35] In return for the release of the hostages, the United States agreed

> to terminate all legal proceedings in United States courts involving

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29 The President declared a national emergency pursuant to IEEPA upon his finding that the situation in Iran constituted an "unusual and extraordinary threat, which has its source . . . outside the United States, to the national security, foreign policy, or economy of the United States . . . ." 50 U.S.C. § 1701(a) (Supp. III 1979); *see also* STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97TH CONG., 1ST SESS., REPORT ON IRAN: THE FINANCIAL ASPECTS OF THE HOSTAGE SETTLEMENT AGREEMENT 12-14 (Comm. Print 1981) [hereinafter cited as REPORT ON IRAN].

30 *See* Exec. Order No. 12,170, 3 C.F.R. 457 (1980). The order applied to "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran." *Id.* For a detailed discussion of the decision to impose this freeze on Iranian assets, see generally Gordon & Lichtenstein, *The Decision to Block Iranian Assets—Reexamined,* 16 INT'L LAW. 161 (1982).

31 31 C.F.R. § 533.203(e) (1980).

32 *Id.* § 535.418.

33 *Id.* § 535.504(a).

34 For a discussion of the negotiations leading to the release of the hostages, see generally Cutler, *Negotiating the Iranian Settlement,* 67 A.B.A. J. 996 (1981); *The Iran Agreements: Hearings Before the Senate Comm. on Foreign Relations,* 97th Cong., 1st Sess. 9-24 (1981) [hereinafter cited as *Iran Hearings].*

35 *See* Claims Declaration, *supra* note 1. A discussion of the validity of the Algerian Declarations under international law is beyond the scope of this article. For a view that the Declarations may be voidable under Article 52 of the Vienna Convention on the Law of Treaties, U.N. Doc. T/Conf. 39/27, May 23, 1969, at 25, see generally Note, *The Iranian Hostage Agreement Under International and United States Law,* 81 COLUM. L. REV. 822, 826-42 (1981); Correspondence, *Void Ab Initio: The U.S.-Iran Hostage Hostage Accords,* 21 VA. J. INT'L L. 347 (1981). *But see generally* Lowenfeld, *International Law and the Hostage Agreement,* Wall St. J., Jan. 27, 1981, at 30, col. 3.

> claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.[36]

The United States further agreed to effect the transfer by July 19, 1981, of all Iranian assets blocked in the United States, including those restrained by writs of attachment and preliminary injunctions.[37] The agreement required that one billion dollars of those assets be deposited in a security account to satisfy any awards eventually rendered against Iran by the Claims Tribunal created by the agreement.[38]

On January 19, 1981, the last day of his Presidency, President Carter issued ten executive orders to implement the Algerian Declarations.[39] The orders revoked the license that had earlier permitted at-

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36 General Declaration, *supra* note 1, ¶ B, at 224.

37 *Id.* ¶ 6, at 226.

38 The Claims Declaration creates the Iran-United States Claims Tribunal "for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States." Claims Declaration, *supra* note 1, art. II, at 230. The tribunal is to arbitrate all claims not settled within six months. It is comprised of three members selected by the United States (George H. Aldrich, Howard M. Hotzmann, and Richard M. Mosk), three selected by Iran (Mahmoud Kashani, Jehugir Sani [replacement for Hassein Enayet] and Shefey Shafeiti), and three selected by agreement of the other six members (Justices Nils Mangard of Sweden, Pierre Bellett of France, and the President of the Tribunal, Justice Gunnar Lagargren of Sweden). *Id.* art. III, ¶ 1, at 231.

The Tribunal operates in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) as modified by the Tribunal, *id.* art. III, ¶ 2, at 231, and decides all claims "on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable." *Id.* art. V, at 232. Any award that the Tribunal renders "shall be enforceable . . . in the courts of any nation in accordance with its laws." *Id.* art. IV, ¶ 3, at 232. The Tribunal has exclusive jurisdiction over all claims against the Government of Iran except those claims relating to the seizure of the American Embassy, the detention of the hostages or the injury to the person or property of American Nationals by private individuals during the Islamic Revolution. General Declaration, *supra* note 1, ¶ 11, at 227. The Tribunal also will not adjudicate those claims arising under "a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts." Claims Declaration, *supra* note 1, art. II, ¶ 1, at 231. Many contracts of American claimants provided in one form or another for the resolution of legal disputes in Iran. The effect of such forum exclusion clauses was resolved on Nov. 9, 1982, when the Tribunal decided nine cases chosen as representative of the cases. *See* IRANIAN ASSETS LITIGATION REP. (Andrews) 5618-84 (Nov. 19, 1982).

American claimants have filed more than 1,000 claims with the Tribunal. An additional 2,795 claims of under $250,000 were filed by the United States government on behalf of American claimants. Iran has filed approximately 1,100 claims with the Tribunal. IRANIAN ASSETS LITIGATION REP. 4238 (Andrews) (Feb. 19, 1982). There has been considerable conflict among Tribunal members—one Iranian member has resigned and the Iranians have called for the resignation of Justice Mangard of Sweden for alleged anti-Iranian bias. *Id.* at 4234-35 (Feb. 19, 1982).

39 Exec. Order Nos. 12,276-12,285, 3 C.F.R. 104-118 (1982). These executive orders were not effective until the Algerian government certified that the hostages had safely departed from Iran. The hostages, however, were not released until 12:35 p.m. Eastern Stan-

tachment of the frozen assets, nullified non-Iranian rights in the assets acquired under the license, precluded persons subject to United States jurisdiction from acquiring further interests in the blocked assets, and required banks holding Iranian funds to transfer them to the Federal Reserve Bank of New York for disposition according to the Treasury Secretary's instructions.[40]

President Reagan ratified the agreement on February 24, 1981, and issued an executive order "suspending" all claims in other forums that were eligible for resolution by the Claims Tribunal.[41] The order provided that "[d]uring the period of this suspension, all such claims shall have no legal effect in any action now pending in any court of the United States . . . ."[42]

III

DAMES & MOORE V. REGAN

By January 20, 1979, when President Carter agreed to terminate legal proceedings against Iran and to nullify attachments obtained in such proceedings, at least 450 actions were pending in United States courts.[43] The case that ultimately provided the Supreme Court with the opportunity to review the President's actions was a typical claim—an American company's breach of contract action against the government of Iran, filed after the President's order blocking Iranian assets and before his agreement to terminate legal proceedings.

In December 1979, the petitioner, Dames & Moore, had filed suit in the United States District Court for the Central District of California against the government of Iran, the Atomic Energy Organization of Iran (AEOI), and a number of Iranian banks. The petitioner alleged that its wholly-owned subsidiary, Dames & Moore International, had contracted with the AEOI to conduct site studies for a proposed nuclear power plant in Iran, and that AEOI owed the corporation $3.4 million plus interest for services performed prior to termination of the contract.

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dard Time on Jan. 20, just minutes after Ronald Reagan assumed the presidency. These unusual events led one court to grant a preliminary injunction because "there is a substantial likelihood that the Executive Order was not validly promulgated during President Carter's term of office." Electronic Data Sys. Corp. Iran v. Social Sec. Org. of Iran, 508 F. Supp. 1350, 1359 (N.D. Tex.), *vacated in part,* 651 F.2d 1007 (5th Cir. 1981). This issue was subsequently mooted, however, by President Reagan's ratification of the orders. *See infra* notes 41-42 and accompanying text.

40 Exec. Order Nos. 12,276-12,285, 3 C.F.R. 104-18 (1982).

41 Exec. Order No. 12,294, 3 C.F.R. 139 (1982) [hereinafter cited as Suspension Order].

42 *Id.* The Suspension Order provides that the suspension of a claim terminates if the Tribunal determines it is without jurisdiction over the claim, in which case the claim may again be litigated in United States courts. If the Tribunal either rejects the claim on the merits or issues an award that is fully discharged, its action "shall operate as a final resolution and discharge of the claim for all purposes." *Id.*

43 Brief for Federal Respondents at 3 n.2, Dames & Moore v. Regan, 453 U.S. 654 (1981).

To secure any potential judgment, Dames & Moore attached Iranian bank accounts in the United States and obtained orders of attachment directed against the defendants' property.

One month after the United States signed the Algerian Declarations, the district court granted Dames & Moore's motion for summary judgment.[44] Dames & Moore then attempted to execute its judgment against Iranian property by obtaining writs of garnishment and execution in state courts. The district court, however, by an order dated May 28, 1981, stayed execution of its judgment pending appeal by the defendants. The district court also vacated all prejudgment attachments against the defendants and ordered that further proceedings be stayed pursuant to the executive orders.[45]

The petitioner then sued the United States and the Secretary of the Treasury for declaratory and injunctive relief. It sought to enjoin the enforcement of the executive orders and the Treasury regulations, alleging that the enactments were unauthorized by statute and were unconstitutional. The district court dismissed the petitioner's complaint for failure to state a claim upon which relief could be granted on May 28, 1981. The petitioner appealed to the Ninth Circuit Court of Appeals on June 3, 1981, while simultaneously petitioning the Supreme Court for a writ of certiorari before judgment. The Court granted certiorari on June 11, 1981.[46] Because of the July 19, 1981, deadline for transferring property to Iran,[47] the Court adopted an expedited briefing schedule and set oral argument for June 24, 1981.[48]

Less than one month after granting certiorari, and just eight days after oral argnment, the Supreme Court in *Dames & Moore v. Regan*[49] upheld the authority of the President by executive agreement alone to suspend legal proceedings instituted in United States courts by American plaintiffs, to nullify attachments obtained in such proceedings, and to cause the transfer back to Iran of Iranian assets in the United States, including assets previously subject to attachment.[50] The decision, writ-

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44 Dames & Moore v. Atomic Energy Org. of Iran, No. 79-04918 (C.D. Cal. 1980).

45 *Dames & Moore,* 453 U.S. at 666.

46 452 U.S. 932 (1981).

47 *See supra* note 8 and accompanying text.

48 452 U.S. at 933.

49 453 U.S. 654 (1981).

50 The lower courts had ruled inconsistently on the President's authority to enter into and implement the agreements. The two courts of appeals that had ruled on the issue, however, had upheld the President's actions. *Compare* American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430 (D.C. Cir. 1981) *and* Chas. T. Main Int'l Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800 (1st Cir. 1981) *with* Marschalk Co. v. Iran Nat'l Airlines Corp., 518 F. Supp. 69 (S.D.N.Y.), *rev'd,* 657 F.2d 3 (2d Cir. 1981) *and* Electronic Data Sys. Corp. Iran v. Social Sec. Org. of Iran, 508 F. Supp. 1350 (N.D. Tex.), *vacated in part,* 651 F.2d 1007 (5th Cir. 1981).

The Court also held that although the nullification of attachments did not constitute a "taking," the Court of Claims had jurisdiction to hear allegations that the President's suspen-

ten by Justice Rehnquist, was unanimous.

A. Nullification of Attachments and Transfer of Assets

The Court first addressed the President's authority to nullify attachments obtained by American litigants against Iranian property in the United States and to require the transfer of Iranian assets to Iran. Adopting the reasoning of the District of Columbia and First Circuit Courts of Appeals,[51] the Court found that the "plain language" of IEEPA specifically authorized the President's actions.[52] The relevant provision of IEEPA authorizes the President 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 foreigu country or a national thereof has any interest . . . by any person, or with respect to any property, subject to the jurisdiction of the United States.[53]

The Court rejected the argument that the legislative history of the IEEPA, and of its predecessor, section 5(b)(1) of the TWEA,[54] demonstrates that the IEEPA was not intended to give the President the extensive power over the assets of a foreign state that he had exercised:

> We do not agree and refuse to read out of § 1702 all meaning to the words "transfer", "compel", or "nullify". Nothing in the legislative history of either § 1702 or § 5(b) or the TWEA requires such a result . . . . Although Congress intended to limit the President's emergency power in peacetime, we do not think the changes brought about by the enactment of the IEEPA in any way affected the authority of the President to take the specific actions taken here.[55]

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sion of claims was a compensable "taking" under the fifth amendment. 453 U.S. at 689-90. Justice Stevens concurred in part, stating that the possibility of a taking was so remote that the Court need not have addressed this jurisdictional question. *Id.* at 690 (Stevens, J., concurring). Justice Powell dissented from the Court's determination that the President's nullification of attachments did not constitute a compensable taking of property and added that any losses caused by the President's suspension of claims should be compensable. *Id.* at 690-91 (Powell, J., concurring in part and dissenting in part). For a discussion of the Court's treatment of the fifth amendment taking issue, see generally Note, Dames & Moore v. Regan—*Rights in Conflict: The Fifth Amendment Held Hostage,* 31 AM. U.L. REV. 345 (1982).

51 *See, e.g.,* Ameriean Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 439-40 (D.C. Cir. 1981); Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 806 (1st Cir. 1981).

52 *See, e.g.,* 453 U.S. at 669-74.

53 50 U.S.C. § 1702(a)(1)(B) (Supp. IV 1980).

54 50 U.S.C. app. § 5(b)(1) (1976 & Supp. IV 1980). For a discussion of the relationship between the IEEPA and § 5(b)(1) of the TWEA, see generally *infra* notes 62-75 and accompanying text.

55 453 U.S. at 672-73.

1. *The Transfer of Assets*

The Court rejected in a footnote the contention that, by denying the President the power under the IEEPA to "vest" foreign-owned assets during a national emergency, Congress intended to permit him to "freeze" assets but not to dispose of them permanently. "[T]he plain language of the statute," the Court said, "defies such a holding."[56]

On their face, the words on which the Court relied—"transfer," "compel," "nullify"—appear to authorize the President to nullify attachments and order the transfer of foreign assets to their host country. As the Court itself has admonished, however, if statutory interpretation properly begins with "plain language," it does not end there. The Court has recognized that it "has some 'scope for adopting a restricted rather than a literal or usual meaning of [a statute's] words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute' . . . ."[57]

A literal reading of the IEEPA and the TWEA is particularly inappropriate, for the Supreme Court has characterized the TWEA as "hasty legislation which Congress did not stop to perfect as an integrated whole,"[58] and as "a makeshift patchwork."[59] Moreover, the Court has cautioned that the piecemeal nature of the TWEA "strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes."[60] As a result, the Court has recognized in another case interpreting the TWEA that "[t]he process of interpretation . . . misses its high function if a strict reading of a law results in the emasculation . . . of a provision which a less literal reading would preserve."[61]

Tracing the history of the IEEPA highlights the significance of the omission of a "vesting" power from its provisions. Section 1702 of the IEEPA grew out of the TWEA. Before Congress enacted the IEEPA in 1971, the TWEA granted expansive powers[62] to the President at war-

56 *Id.* at 672 n.5.

57 *In re* Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978) (quoting Commissioner v. Brown, 380 U.S. 563, 571 (1965)); *see also* Phillbrook v. Glodgett, 421 U.S. 707, 714 (1975) ("[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.") (quoting Church of Holy Trinity v. United States, 143 U.S. 457, 459 (1892)); Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1 (1976) (recognizing relevance of statute's legislative history to construing meaning even of unambiguous words); Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts,* 75 COLUM. L. REV. 1299 (1975).

58 Clark v. Uebersee Finanz-Korp., 332 U.S. 480, 488 (1947).

59 Guessefeldt v. McGrath, 342 U.S. 308, 319 (1952).

60 *Id.* (citations omitted).

61 Markham v. Cabell, 326 U.S. 404, 409 (1945).

62 Section 5(b)(1) of the TWEA provided that:

During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he

time and "during any other period of national emergency declared by the President."[63] Among the enumerated powers, the Act specifically permitted the President to "vest [any property in which any foreign country or a national thereof has any interest] in such agency or person as may be designated . . . by the President."[64] The agency or person so vested could then dispose of the property "in the interest of and for the benefit of the United States."[65]

Congress enacted the IEEPA in 1977 specifically to limit the broad emergency powers previously exercisable by the President under the TWEA. Noting that the TWEA had "become essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without congressional review,"[66] Congress repealed all peacetime powers from TWEA section 5(b)(1).[67] The new act, the IEEPA, addressed national emergencies during peacetime and represented a "new set of international economic powers, more restricted than those available during time of war."[68]

In fact, section 1702(a)(1)(B) of the IEEPA, which grants the new set of powers, is in many respects identical to its predecessor, section 5(b)(1) of the TWEA;[69] indeed, the one notable change in the enumerated powers is that the IEEPA removed from presidential authority the

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may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise — . . . .

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes. . . .

First War Powers Act, Ch. 593, § 301(1), 55 Stat. 838, 839-40 (1941) (current version at 50 U.S.C. app. § 5(b)(1) (Supp. IV 1980)).

63 *Id.*

64 *Id.*

65 *Id.*

66 H.R. REP. NO. 459, 95th Cong., 1st Sess. 7 (1977) [hereinafter cited as IEEPA HOUSE REPORT].

67 Trading With the Enemy Act Amendments, Pub. L. No. 95-223, § 101(a), 91 Stat. 1625 (1977) (codified at 50 U.S.C. app. § 5(b)(1) (1976 & Supp. IV 1980)).

68 IEEPA HOUSE REPORT, *supra* note 66, at 10.

69 The "new set of international powers" does not so much change the powers given the President as it tightens the definition and limits the duration of a declared national emergency. *See* 50 U.S.C. §§ 1701(b), 1706(b) (Supp. III 1979).

power to "vest" foreign property.[70] Furthermore, Congress had earlier demonstrated that it recognized the distinction between the vesting power and other, less permanent powers of property disposition. The original 1917 version of the TWEA did not grant the President the power to vest foreign assets. Congress added the vesting provision in 1941, because the 1917 Act failed to give the President "the broad powers to take, administer, control, use, liquidate, etc. such foreign-owned property that would be given by [section 5(b)(1)]."[71] Prior to the addition of the power to vest, Congress noted that the TWEA was "a system which [could] prevent transactions in foreign property prejudicial to the best interests of the United States, but it [was] not a system which [could] affirmatively compel the use and application of foreign property in those interests."[72] Because section 1702(a)(1)(B) restores the pre-1941 langnage of section 5(b) in the national-emergency context, the scope of the early TWEA provides insight into the proper scope of section 1702(a)(1)(B). The legislative history of the original version of section 5(b) indicates that, notwithstanding its apparent breadth, the power granted by that language was the power to freeze temporarily foreign assets, and not, as was found in *Dames & Moore,* the power to dispose permanently of them.

As the Court read the IEEPA, the President may permanently dispose of foreign assets in which United States claimants have an interest in any way he chooses, as long as he does not formally vest them. Thus, under the Court's reasoning, the President may transfer such assets out of the United States and beyond the jurisdiction of its courts, even though the practical result is the extinction of the rights of domestic claimants. Such a "transfer" is in substance, if not in form, a "vesting" of assets. It is unlikely that Congress, having stripped the President of peacetime authority to vest in the belief that such power was excessive, intended nonetheless to leave him with the power to effect a de facto

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70 50 U.S.C. app. § 5(b)(1) (1976), *amended by* 50 U.S.C. app. § 5(b)(1) (1976 & Supp. IV 1980).

71 H.R. REP. NO. 1507, 77th Cong., 1st Sess. 2-3 (1941).

72 *Id.* As Representative Gwynne explained during the House debate on the 1941 amendment, "the principal difference between [the amended] law and the one we had during the last war [is that] the President may hold and use—that is the new part—or sell such property for the benefit of the United States." 87 CONG. REC. 9862 (1941), *quoted in* Tagle v. Regan, 643 F.2d 1058, 1066 (5th Cir. 1981); *accord* Markham v. Cabell, 325 U.S. 404, 411 (1945); Bishop, *Judicial Construction of the Truding with the Enemy Act,* 62 HARV. L. REV. 721, 721-23 (1949) (contrasting the essentially defensive freezing power, which "keep[s] an enemy from using for his own purposes any property which he owns or controls, located within the United States," with the power to vest, whieh makes that same property available for the purposes of the United States); Littaver, *The Unfreezing of Foreign Funds,* 45 COLUM. L.J. 132, 133 (1945) ("Freezing is employed where it is considered sufficient merely to prevent a use of the property by the owner in a manner detrimental to American interests. Vesting is applied where positive use or direct management of the property by the American government is considered desirable.") (footnote omitted).

vesting through the transfer of assets to a foreign sovereign.[73]

The Court's broad interpretation of the President's power under the IEEPA to transfer permanently assets also denies adequate protection to American claimants with interests in those assets. The TWEA complements the President's "vesting" power with a claims procedure to protect American creditors of foreign debtors whose assets are seized or vested.[74] In contrast, the Court's interpretation of the IEEPA allows the President to transfer assets without any statutory safeguards for American creditors. The Court, therefore, allowed the use of the transfer power in contravention of one of the primary objectives of the vesting power under the TWEA: the use of enemy property within the United States to satisfy the claims of United States citizens.[75] Moreover, the Court's interpretation of section 1702 leads to the anomalous result that if the President "vests" foreign property during wartime under the TWEA, he must distribute it to American claimants pursuant to a statutory claims procedure, but he may "transfer" that same property back to the foreign debtor free and clear under his supposedly more restrictive IEEPA peacetime powers.

2. *The Nullification of Attachments*

The Court also faced the question of the President's power to nullify attachment liens. The Court held that the attachments were properly nullified because they were subject to a revocable license[76] and, because the liens were subject to nullification, they created no property interest in their holders that could give rise to a compensable "taking" under the due process clause.[77] The Court furnished no support for these contentions. Instead, it cited a series of distinguishable "vesting" cases as support for this broad grant of presidential powers: *Orvis v. Brownell,*[78] *Zittman v. McGrath,*[79] and *Propper v. Clark.*[80]

The Court cited *Orvis* as support for the proposition that "an American claimant may not use an attachment that is subject to a revocable

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73 *See also* Security Pac. Nat'l Bank v. Iran, 513 F. Supp. 864 (C.D. Cal. 1981); McNulty, *Constitutionality of Alien Property Controls,* 11 LAW & CONTEMP. PROBS. 1, 139 (1945). *But see* Unidyne Corp. v. Iran, 512 F. Supp. 705 (E.D. Va. 1981).

74 Section 34(a) provides that "[a]ny property or interest vested in or transferred to the Alien Property Custodian . . . shall be equitably applied by the Custodian . . . to the payment of debts owned [sic] by the persons who owned such property or interest immediately prior to its vesting in or transfer . . . ." 50 U.S.C. app. § 34(a) (1976).

75 *See* H.R. REP. NO. 85, 65th Cong., 1st Sess. 1, 4 (1917). As stated in Zittman v. McGrath, 341 U.S. 471, 474 (1951), the power to vest "is not a confiscation measure, but a liquidation measure for the protection of American creditors."

76 453 U.S. at 672-73 nn. 5 & 6.

77 *Id.* at 673 n.6.

78 345 U.S. 183 (1953).

79 341 U.S. 446 (1951).

80 337 U.S. 472 (1949).

license and that has been obtained after the entry of a freeze order to limit in any way the actions the *President* may take under section 1702 respecting the frozen assets."[81] In *Orvis,* the President had issued a freeze order regarding Japanese assets. The petitioners, American claimants, subsequently brought suit against Japanese nationals and, without obtaining a license, attached a debt owed by an American company to the Japanese defendants. Shortly thereafter, the Custodian vested the assets in question under the authority of the TWEA.[82] The petitioners brought suit against the Custodian, challenging his power to annul the attachment. They claimed that he could not vest property in which they had acquired an interest and, therefore, they were entitled to a return of the assets rather than a smaller share of the assets by equitable distribution.[83] The Court held that the petitioner's attachment, although valid under New York law, was subordinate to the federal freezing order and the President's vesting of the assets.

The facts of *Orvis* bears little resemblance to *Dames & Moore.* First, *Orvis* presented a challenge to the use of the TWEA vesting power to override attachments; in *Dames & Moore,* the President had no power to vest the assets. Second, *Orvis* involved an attachment made without a license during an executive freeze on the transfer of foreign assets. In *Dames & Moore,* the Treasury Department had specifically licensed prejudgment attachments of Iranian assets.[84] Third, and most important, *Orvis* did not involve a dispute over a presidential order that tranferred the assets back to the foreign debtor; instead, the case held only that the interest of the domestic claimant was subordinate to that of the Alien Property Custodian, an interest that would ultimately be used to ensure equitable distribution of the assets under the TWEA claims procedure for the benefit of all United States claimants.[85] Thus, unlike *Dames & Moore,* the respective rights of a domestic claimant and the enemy debtor were not at issue in *Orvis.*

The Court summarily concluded that *Zittman v. McGrath*[86] did not require a contrary result.[87] *Zittman,* however, squarely rejected the very power that the Court approved in *Dames & Moore.* In *Zittman,* domestic claimants attached "frozen" German assets located in American banks. Pursuant to an executive order vesting the assets, the Alien Property Custodian sought a ruling that the attachments were void not only against the power to vest, but also against the German debtor.[88] The

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81 *Dames & Moore,* 453 U.S. at 672 n.5 (emphasis in original).

82 *Orvis,* 345 U.S. at 185.

83 *Id.* at 184-85; *see supra* note 76 and accompanying text.

84 *See supra* note 32 and accompanying text.

85 345 U.S. at 186-87; *see supra* note 75.

86 341 U.S. 446 (1951).

87 *See Dames & Moore,* 453 U.S. at 672 n.5.

88 "[The Custodian] takes the position that no valid rights against the German debtors

Court held that, although the attachments were subordinate to the Custodian's power to vest, they remained valid against property interests retained by the foreign debtors: "As against the German debtors, the attachments and the judgments they secure are valid under New York law, and cannot be cancelled or annulled under a Vesting Order by which the Custodian takes over only the right, title, and interest of those debtors in the accounts."[89]

As final support for the President's nullification of liens and attachments, the Court quoted an assertion in *Propper v. Clark* that the purpose of blocking orders is "to put control of foreign assets in the hands of the President."[90] *Propper* makes clear, however, that such assets are in the hands of the President to secure their benefit for United States claimants, not to allow their transfer to an enemy debtor beyond the reach of American creditors.[91] Again, a case cited by the Court for support arguably contradicts its upholding of the President's power to transfer assets directly to a foreign debtor and nullify prejudgment attachments.[92]

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were acquired by the attachments because prohibited by the freezing program." 341 U.S. at 463.

89 *Id.* at 463-64.

90 337 U.S. 472, 493 (1949).

91 "Through the Trading with the Enemy Act, in its various forms, the nation sought to deprive enemies, actual or potential, of the opportunity to secure advantages to themselves or to perpetrate wrongs against the United States or its citizens through the use of assets that happened to be in this country." *Id.* at 481. The assets are held "to compensate our citizens or ourselves for the damages done by the governments of the nationals affected." *Id.* at 484.

92 *Accord* Electronic Data Sys. Corp. Iran v. Social Sec. Org. of Iran, 508 F. Supp. 1350, 1361 (N.D. Tex.) ("In essence, [Ex. Order No. 11,279] directs that the funds in which Iran has an interest be transferred to the control of Executive Branch and attempts to vest custody and control of the assets in the Executive. This is a power which Congress declined to grant to the President with the enactment of IEEPA in 1977."), *rev'd in part,* 651 F.2d 1007 (5th Cir. 1981) (court cites *Dames & Moore* in allowing President to suspend claims); Note, Dames & Moore v. Regan: *The Iranian Settlement Agreements, Supreme Court Acquiescence to Broad Presidential Discretion,* 31 CATH. U.L. REV. 565, 585-86 (1982); Comment, *The Settlement Claims Case:* Dames & Moore v. Regan, 10 DEN. J. INT'L L. & POL'Y 577, 582 (1981) ("The President's 'transfer' order seeks to dispose of Iranian assets by permanently divesting American creditors of their statutory rights. Once such a transfer occurs, the freeze order no longer retains the character of a temporary measure, but rather becomes a permanent vesting order."). *But see* Note, *The Iranian Hostage Agreement Under International and United States Law,* 81 COLUM. L. REV. 822, 848 (1981) (arguing that IEEPA authorized the nullification of Dames & Moore's attachments).

The Court categorized Dames & Moore's interest in its attachments as "contingent" and "revocable," and held that "the attachments obtained by petitioner were specifically made subordinate to further actions which the President might take under the IEEPA." 453 U.S. at 673. The Court accurately stated that the "Treasury Regulations provided that 'unless licensed' any attachment is null and void, 31 C.F.R. § 535.203(e) (1980), and all licenses 'may be amended, modified, or revoked at any time.' § 535.805." 453 U.S. at 673. In contrast to its literal reading of the powers apparently conferred by the IEEPA, however, the Court selectively ignored the "plain language" of these regulations, which suggests that only the license, and not the attachments themselves, were revocable. *Id.* at 674 n.6. President Carter's statement to Congress, released concurrently with the initial Freeze Regulation, reinforces the "plain language" interpretation: The freeze "will enable the United States to assure that these resources will be available to satisfy lawful claims of citizens and entities of the United States against the Government of Iran." *President's Message to Congress* (Nov. 14, 1979), *reprinted*

The Court's willingness to uphold nullification of the attachments may have been due in part to an unvoiced skepticism that the attachments on Iranian property were valid in the first place. *Orvis* and *Zittman* involved attachments of private property, not property belonging to a foreign sovereign. Prejudgment attachment of property belonging to a foreign state is authorized only when the foreign state has explicitly waived its immunity therefrom.[93] Neither the Supreme Court nor any court of appeals has ruled on whether the Iran-U.S. Treaty of Amity[94] constitutes an "explicit waiver," but the only district courts to rule on the issue have held that it does not.[95] Under these circumstances, the Court may have felt that the prejudgment attachment of assets belonging to the Iranian sovereign would be nullified by the courts in any event. Nonetheless, attachments are presumptively valid until vacated, and nothing in the Court's reasoning serves analytically to distinguish prejudgment attachments of private property from those of property belonging to a foreign sovereign.

B. Suspension of Claims

1. *The Theory of Delegation by Acquiescence*

Under traditional notions of separation of powers, the President's exercise of power must find support either in the plenary powers granted by the Constitution or in a statutory delegation from Congress.[96] In

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in IRANIAN ASSETS LITIGATION REP. (Andrews) 140 (Feb. 8, 1980). Until the signing of the Algerian declarations, the question of license revocation had not come before the courts. In a somewhat analogous TWEA case, Brownell v. National City Bank, 131 F. Supp. 60 (S.D.N.Y. 1955), one district court held that a license permitting set-offs could not be revoked by the United States so as to require a set-off to be undone. *Brownell* is unreliable precedent, however, because the court suggested an intent to limit its holding to set-offs and the unique facts of that case. The set-off money in that case had been disbursed by the licensee, in part, to third parties. The Court analogized the case to an attempt to revoke a license permitting a building to be demolished after the building had been destroyed. *Id.* at 63.

93 *See supra* note 28.

94 Treaty of Amity, Aug. 15, 1955, United States-Iran, art. III, § 2, 8 U.S.T. 901, 902, T.I.A.S. No. 3853.

95 *See, e.g.,* New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120, 126 (S.D.N.Y. 1980); Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383, 393 (D.N.J. 1979).

96 "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." Youngstown Sheet & Tool Co. v. Sawyer, 343 U.S. 579, 585 (1952). The Court in *Dames & Moore* quoted this statement from the classic case in which the Court invalidated President Truman's seizure of the nation's steel mills. 453 U.S. at 668. The Court also recognized as analytically useful, if somewhat simplified, the framework that Justice Jackson set out in his *Youngstown* concurrence for assessing the power of the President to act in a given case. First, according to Justice Jackson, when the President acts pursuant to an express or implied authorization of Congress, he exercises his inherent powers plus those delegated to him from Congress, placing his authority "at its maximum." 343 U.S. at 635 (Jackson, J., concurring). Second, when the President acts in the absence of a congressional grant or denial of authority, he may rely only on his inherent constitutional powers. A "zone of twilight," however, may exist in this setting if he and Congress have concurrent

Dames & Moore, the Court rejected the government's contention that Congress had delegated to the President the power to suspend claims under the IEEPA[97] or the so-called "Hostage Act,"[98] and it refused to find that the President possesses plenary power to settle claims.[99] The

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authority, or if the distribution of power is uncertain. *Id.* at 637. In the "zone of twilight," congressional inertia may "enable, if not invite," the exercise of presidential power. *Id.* Finally, the President's power is at its "lowest ebb" when he acts contrary to the will of Congress; he then may rely only on his exclusive constitutional powers minus the constitutional powers granted to him and Congress concurrently. *Id.*

97 453 U.S. at 675. The Court determined that American claimants' *in personam* lawsuits against Iran were not "transactions involving . . . property" within the meaning of the IEEPA, and that the IEEPA, therefore, did not expressly confer the power to suspend such claims. *Id.; accord* American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 443 n.15 (D.C. Cir. 1981); Chas. T. Main, Int'l Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 809 n.13 (1st Cir. 1981); Marschalk Co. v. Iran Nat'l Airlines Corp., 518 F. Supp. 69, 79 (S.D.N.Y.), *vacated in part,* 657 F.2d 3 (2d Cir. 1981).

98 The Hostage Act, enacted in 1868, states:

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

22 U.S.C. § 1732 (1976). Despite the Act's broad language, the Court concluded that the Act's legislative history indicated its inapplicability to the Iranian situation. 453 U.S. at 676-77; *accord* Mikva & Neuman, *The Hostage Crisis and the "Hostage Act,"* 49 U. CHI. L. REV. 292 (1982).

99 "We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities." 453 U.S. at 688. The United States had argued strenuously that the President has broad inherent power to settle the claims of American nationals against foreign governments. *See* Brief for United States at 17, Dames & Moore v. Regan, 453 U.S. 654 (1981) [hereinafter cited as U.S. Brief] ("The President has authority under the Constitution to settle outstanding international claims of American nationals."); *see also* Statement of Interest of the United States, New England Merchants Nat'l Bank v. Iowa Power Generation & Transmission Co., 502 F. Supp. 120 (S.D.N.Y. 1980) [hereinafter cited as U.S. Statement of Interest] ("The President under Article II of the Constitution possesses plenary power to enter into agreements for settlement of claims with foreign nations."), *rev'd and vacated,* 657 F.2d 3 (2d Cir. 1981). During oral argnments before the Supreme Court, Solicitor General Rex Lee went a step further and stated that the Court's refusal to recognize such a power would "be in derogation of sovereignty itself." IRANIAN ASSETS LITIGATION REP. (Andrews) 3334 (July 3, 1981).

The Court's refusal to adopt the government's assertion of an inherent presidential power to settle claims, together with its reading of United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), may indicate an implied rejection, or at least a healthy skepticism, toward such a power. Underlying the Government's asserted inherent power to settle claims was the notion, first enunciated in Justice Sutherland's famous dictum in *Curtiss-Wright, id.* at 320, that the President is the "sole organ of federal government in the field of international relations." Justice Sutherland's discussion of the President's foreign affairs powers, *id.* at 319-20, was only dictum in that the sole issue in *Curtiss-Wright* was the legality of a congressional delegation of authority to the President. The case "involved, not the question of the President's power to act without congressional authority, but the question of his right

Court nevertheless upheld the President's suspension of American claims against Iran, relying on an alleged acquiescence of Congress in the President's actions. The Court cited three cases in support of its theory that congressional acquiescence constitutes delegation of power to the President.

First, the Court cited Justice Frankfurter's statement in his *Youngstown Sheet & Tube Co. v. Sawyer* concurrence that " 'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II.' "[100] Because Justice Frankfurter joined the full Court in rejecting President Truman's seizure of United States mills during peacetime, the quoted passage is dictum. Even if the passage was central to Justice Frankfurter's concurrence, no other member of the Court joined his opinion. In any case, the passage is inapposite given the express refusal in *Dames & Moore* to find any such inherent Article II power vested in the President.[101] The passage is thus irrelevant to any inquiry into the delegated, as opposed to plenary, sources of presidential power.[102]

Next, the Court cited the 1915 case of *United States v. Midwest Oil Co.*[103] and the recent decision in *Haig v. Agee*[104] to support the proposition that "[p]ast practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would

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to act under and in accord with an Act of Congress." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 n.2 (1952) (Jackson, J., concurring); *see also* Bickel, *Congress, the President and the Power to Wage War,* 48 CHI.-KENT L. REV. 131, 137 (1971) (discussion of better legislative delegation). More fundamentally, Sutherland's claim that the President possesses plenary and exclusive foreign affairs power has been sharply criticized as without historical foundation. *See, e.g.,* Berger, *The Presidential Monopoly of Foreign Relations,* 71 MICH. L. REV. 1, 45-48 (1972); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory,* 55 YALE L.J. 467, 488 (1946).

The Court in *Dames & Moore* contrasted Justice Sutherland's "sole organ" formulation in *Curtiss-Wright* with Justice Jackson's concurrence in *Youngstown.* The Court characterized Jackson's opinion as "bring[ing] together as much combination of analysis and common sense as there is in this area," and specifically noted that *Youngstown* focused not on the "plenary and exclusive power of the President" but rather responded to a claim of virtually unlimited powers for the Executive by noting:

> The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.

453 U.S. at 661-62 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring)).

100 453 U.S. at 686 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)).

101 *See* 453 U.S. at 688.

102 *See also* Comment, *Presidential Powers in Foreign Relations:* Dames & Moore v. Regan, 95 HARV. L. REV. 191, 195-96 (1981).

103 236 U.S. 459 (1913).

104 453 U.S. 280 (1981).

raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .' "[105] In *Midwest Oil,* the Court upheld the President's power to withdraw, in the public interest, public lands that Congress had previously opened to private acquisition. Legislative acquiescence to the President's action was manifest in *Midwest Oil*—American presidents had made "[s]cores and hundreds"[106] of these withdrawal orders throughout American history.[107]

Midwest Oil, however, does not support the proposition that congressional acquiescence alone constitutes delegation of power to the President. The full passage from *Midwest Oil* that *Dames & Moore* cites in part states "that the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent *or of a recognized administrative power of the Executive in the management of the public lands.* "[108] These excised words were critical to the holding in *Midwest Oil.* The presumption that the President has power to withdraw land within the public domain was deemed particularly appropriate in that case because "the land laws are not of a legislative character in the highest sense of the term (Art. 4, § 3), 'but savor somewhat of mere rules prescribed by an owner of property for its disposal.' "[109] "[I]t must be borne in mind," the *Midwest Oil* Court continued, "that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein."[110] The legislative acquiescence in *Midwest Oil* therefore validated an exercise of presidential power unique to land laws: the President's administrative power to execute "as agent" the proprietary powers of Congress over public lands.[111]

Moreover, congressional acquiescence in the President's actions in *Midwest Oil* cannot be questioned. Seven years before the order challenged in *Midwest Oil,* the Senate had requested and received a report from the Secretary of the Interior detailing the President's longstanding practice of land withdrawal.[112] Congress further demonstrated its ac-

105 453 U.S. at 686 (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)).

106 United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915).

107 236 U.S. at 469.

108 *Id.* at 474 (emphasis added).

109 *Id.* (citation omitted) (quoting Butte City Water Co. v. Baker, 196 U.S. 119, 126 (1905)); *see also* Kleppe v. New Mexico, 426 U.S. 529, 540 (1976) ("Congress exercises the powers both of a proprietor and of a legislature over the public domain." (citing United States v. Midwest Oil Co., 236 U.S. 459 (1915)).

110 236 U.S. at 474.

111 The Supreme Court had never before used *Midwest Oil* to support an exercise of presidential power independent of delegated authority; the Court had previously cited the case only in land cases and in discussion of the scope of presidential power under an express delegation from Congress. *See, e.g.,* Saxbe v. Bustos, 419 U.S. 65, 74 (1974); NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974); Zemel v. Rusk, 381 U.S. 1, 11 (1965); United States v. Jackson, 280 U.S. 183, 197 (1934); *see also* Comment, *supra* note 102, at 195.

112 236 U.S. 459, 480-81 (1915).

quiescence in the practice shortly after the withdrawal at issue in *Midwest Oil* by prospectively authorizing such withdrawals by the President.[113] According to the Court in *Midwest Oil,* Congress expressed not "the slightest intent to repudiate the withdrawals already made . . . ."[114]

The Court's reliance on *Haig v. Agee*[115] is equally misplaced. *Haig* upheld a regulation granting the Secretary of State broad discretion to revoke United States passports on national security and foreign policy grounds. At issue was the scope of executive power under an *express* congressional delegation of power to regulate the issuance of passports.[116] In contrast, the Court in *Dames & Moore* specifically held that Congress had made no such express delegation.[117]

2. *The Theory Applied*

The Court in *Dames & Moore* not only failed to find precedential support for its theory of delegation by congressional acquiescence, but also mischaracterized the "history of congressional acquiescence"[118] in the settlement by executive agreement of private claims against foreign governments. In justifying the delegation theory, the Court relied upon a "longstanding practice" of executive claims settlements dating as far back as 1799.[119] Although American presidents have made many settlements in the past,[120] the entire history recited by the Court up to 1952 is irrelevant to the propriety of settling enforceable commercial claims of American citizens pending in United States courts against foreign governments. Before 1952, the United States adhered to the doctrine of absolute sovereign immunity,[121] which denied state and federal courts

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113 Act of June 25, 1910, ch. 421, 36 Stat. 847 (codified at 43 U.S.C. § 141), *repealed by* Act of Oct. 21, 1976, Pub. L. No. 94-579, § 704, 90 Stat. 2743, 2792.

114 236 U.S. at 482.

115 453 U.S. 280 (1981).

116 The Passport Act of 1926, 22 U.S.C. § 211a (1976). The Court has long recognized that congressional acquiescence to an "interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute." Zemel v. Rusk, 381 U.S. at 11. The acquiescence in *Haig,* however, involved a long-standing executive *construction* of the Act. The dissent in *Haig* persuasively argned that *Zemel* requires that an administrative *practice* be shown. 453 U.S. at 314 (Brennan, J., dissenting).

Haig has been sharply criticized for its excessive deference to the executive branch, particularly in an area that implicates the constitutionally-protected right to travel. *See, e.g.,* Kamisar, *The Agee Decision,* N.Y. Times, July 28, 1981, at A15, col. 1; Comment, *The Right to Travel:* Haig v. Agee, 95 HARV. L. REV. 201 (1981); Comment, *Authority of Secretary of State to Revoke Passports for National Security or Foreign Policy Reasons:* Haig v. Agee, 66 MINN. L. REV. 667 (1982).

117 *See supra* notes 97-99 and accompanying text.

118 453 U.S. at 678-79.

119 *Id.* at 679.

120 *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 262-66 (1972).

121 Foreign nations traditionally enjoyed absolute immunity from suit in United States

jurisdiction over suits against foreign governments. A United States citizen with a grievance against a foreign government had no remedy unless the President chose to pursue the claim diplomatically—"espouse" it—and seek a settlement.[122] The President had wide discretion: he could not be compelled to espouse a claim, and he could settle for any amount.[123]

The Court conceded that this argument is "not wholly without merit,"[124] but rejected the argument nonetheless. In so doing, the Court failed to recognize that the pre-1952 history of claims settlement offered no support whatsoever to the exercise of presidential power in *Dames & Moore.* The issue raised in *Dames & Moore* was whether the President could force a plaintiff with a cognizable claim pending against a sovereign government to accept an alternative forum. That issue could not have arisen until 1952, when suits against foreign governments were first permitted in limited circumstances.[125] And it could not have been

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courts. *E.g.,* Schooner Exch. v. M'Faddon, 11 U.S. (7 Craneh) 116 (1812). Courts followed strictly State Department suggestions of immunity for foreign nation defendants. *See, e.g., Ex parte* Peru, 318 U.S. 578, 589 (1943).

122 The very authority that the Court cites for the longstanding practice of executive claim settlements, Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement,* 69 AM. J. INT'L L. 837 (1975), *cited with approval in Dames & Moore,* 453 U.S. at 679 n.8, illustrates the dissimilar positions of past claimants and the petitioners in *Dames & Moore:* "[T]he principal beneficiaries of the settlement agreements—U.S. claimants—unfortunately are looked upon more as charitable cases than as persons deprived of valuable rights and hence legally entitled to just compensation." *Id.* at 846; *accord* I. LILLICH & B. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 10 (1975) ("Absent a diplomatic initiative on the part of the private claimant's government, generally these claims have gone begging.").

123 *See, e.g.,* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 212 (1965) ("The government of the United States has discretion as to whether to espouse the claim of a United States national . . . . This discretion is vested in the President and exercised on his behalf by the Secretary of State."). Such discretion is grounded on the theory of espousal, which holds that the espousing sovereign has taken over the claim and is asserting derivatively an injury to itself. Thus cast, the dispute becomes one between nations. *See generally* E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 366-98 (1915); 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1216-33 (1967).

124 453 U.S. at 684.

125 Among other factors, the increasing involvement of foreign nations in commercial activities led the Department of State to adopt a restrictive theory of sovereign immunity in its "Tate Letter." Letter from Jack B. Tate, Acting Legal Adviser to the Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952). Under the restrictive theory, "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." 26 DEP'T ST. BULL. 984 (1952). *See generally* Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682 (1976); Victory Transport, Inc. v. Comisaria General, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965) (restrictive theory designed to "accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts").

posed fully until 1976, when the Foreign Sovereign Immunities Act[126] gave United States courts jurisdiction over claims against foreign governments.[127]

The Court also concluded that the executive settlement of analogous claims since 1952 justified its finding of congressional acquiescence in the presidential action challenged in *Dames & Moore.*[128] The Court listed ten such settlements of suits against foreign governments after such suits first became cognizable in United States courts.[129] None of the settlements, however, supports the Court's finding of congressional acquiescence in the President's actions.[130] The agreements with Japan,[131] Rumania,[132] Bulgaria,[133] and Hungary[134] were executed pursuant to peace treaties.[135] The agreements with Egypt,[136] Yugoslavia,[137] Poland,[138] China,[139] and the two with Peru[140] settled expropriation claims, which presumably could not have been prosecuted in American courts because of the foreign nation's sovereign immunity under the FSIA[141] and the "act of state" doctrine.[142] The Court was unable to point to a single instance in which the President has, as in *Dames & Moore,* settled

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126 28 U.S.C. §§ 1330, 1602-1611 (1976).

127 *See infra* notes 163-65 and accompanying text.

128 453 U.S. at 686.

129 *See supra* note 125 and accompanying text.

130 *Accord* Comment, *supra* note 102, at 196-97.

131 Agreement on Claims: Trust Territory of the Pacific Islands, Apr. 18, 1969, United States-Japan, 20 U.S.T. 2654, T.I.A.S. No. 6724.

132 Agreement on Settlement of Claims of United States Nationals, Mar. 30, 1960, United States-Rumania, 11 U.S.T. 317, T.I.A.S. No. 4451.

133 Agreement on Claims, July 2, 1963, United States-Bulgaria, 14 U.S.T. 969, T.I.A.S. No. 5387.

134 Agreement on Settlement of Claims, Mar. 6, 1973, United States-Hungary, 24 U.S.T. 522, T.I.A.S. No. 7569.

135 Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. No. 2490; Treaty of Peace with Rumania, Feb. 10, 1947, 61 Stat. 1757, T.I.A.S. No. 1649; Treaty of Peace with Bulgaria, Feb. 10, 1947, 61 Stat. 1915, T.I.A.S. No. 1650; Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2065, T.I.A.S. No. 1651.

136 Agreement on Claims of United States Nationals, May 1, 1976, United States-Egypt, 27 U.S.T. 4214, T.I.A.S. No. 8446.

137 Agreement on Claims of United States Nationals, Nov. 5, 1964, United States-Yugoslavia, 16 U.S.T. 1, T.I.A.S. No. 5750.

138 Agreement on Settlement of Claims of United States Nationals, July 16, 1960, United States-Poland, 11 U.S.T. 1953, T.I.A.S. 4545.

139 Agreement on Settlement of Claims, May 11, 1979, United States-China, 30 U.S.T. 1957, T.I.A.S. No. 9306.

140 Agreement on Claims: Marcona Mining Company, Sept. 22, 1976, United States-Peru, 27 U.S.T. 3993, T.I.A.S. No. 8417; Agreement on Settlement of Certain Claims, Feb. 19, 1974, United States-Peru, 25 U.S.T. 227, T.I.A.S. No. 7792.

141 The FSIA limits strictly the relief available to claimants on expropriation and nationalization grounds. *See* 28 U.S.C. § 1605(a)(3) (1976).

142 The "act of state" doctrine prohibits United States courts from examining the validity of the public acts of a foreign nation committed within its own country. *See generally* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

the commercial claims of American citizens enforceable in United States courts.

The Court purportcd to find a congressional "stamp of approval"[143] on executive claim settlements in the enactment of the International Claims Settlement Act of 1949 (ICSA),[144] which established the Foreign Claims Settlement Commission.[145] This Act, however, gives no such discretion or authority to the President. Congress enacted the ICSA to provide for the adjudication of claims arising primarily out of the nationalization of American property, and to allow for payment from a lump sum paid by foreign nations to the United States.[146] To protect the rights of American claimants, Congress created the Foreign Claims Settlement Commission,[147] a tribunal independent of the executive branch.[148] Although Congress created the Commission to adjudi-

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143 453 U.S. at 680.

144 22 U.S.C. §§ 1621-1644 (1976 & Supp. IV 1980) [hereinafter cited as ICSA].

145 The Reorganization Plan No. 1 of 1954, 68 Stat. 1279 (1954), abolished the International Claims Commission (which administered claims under the ICSA), and the War Claims Commission (which administered claims under the War Claims Act of 1948), 50 U.S.C. §§ 2001-2016 (1976 & Supp. IV 1980), and transferred the functions of both to the Foreign Claims Settlement Commission.

146 The ICSA provides a mechanism to adjudicate claims of the United States and its nationals "arising out of the nationalization or other taking of property." 22 U.S.C. § 1623(a) (1976). *See generally* Note, *Iranian Assets and Claims Settlement Agreements: A Study of Presidential Foreign Relations Power,* 56 TUL. L. REV. 1364 (1982). The frequent amendments of the ICSA noted by the Court, 453 U.S. at 681, fail to broaden the scope of the Act. For instance, the China Claims Act of 1966 granted the Commission the limited authority to determine "losses resulting from the nationalization, expropriation, intervention or other taking . . . of property. . . ." 22 U.S.C. § 1643b (1976).

The limited nature of the prior executive claim settlements approved by Congress explains the statement in the legislative history of the IEEPA, quoted in *Dames & Moore,* that "[n]othing in this act is intended . . . to impede the settlement of claims of U.S. citizens against foreign countries." 453 U.S. at 681-82 (quoting S. REP. NO. 466, 95th Cong., 1st Sess. 6 (1977)). Prior to the Algerian Declarations, the President had never before attempted to settle by executive agreement claims enforceable in United States courts. *See supra* notes 120-27 and accompanying text. Congress's acceptance through the framework of the ICSA of the President's past settlement of the claims of otherwise remediless claimants, therefore, provides no support for the President's settlement of claims against Iran.

147 The President appoints the members of the Commission with the advice and consent of the Senate. *See* Re, *The Foreign Claims Settlement Commission: Its Functions and Jurisdiction,* 60 MICH. L. REV. 1079, 1087 (1962). The Commission is directed to apply the provisions of the applieable claims agreement and "the applicable principles of international law, justice, and equity." 22 U.S.C. § 1623(a) (1976). Although proceedings before the Commission are nonadversarial, they are judicial. Re, *supra,* at 1089.

148 In describing the War Claims Commission, one of the precedessors of the FCSC, the Supreme Court stated:

> The final form of the legislation, as we have seen, left the widened range of claims to be determined by adjudication. Congress could, of course, have given jurisdiction over these claims to the District Courts or to the Court of Claims. The fact that it chose to establish a Commission to "adjudicate according to law" the classes of claims defined in the statute did not alter the intrinsic judicial charaeter of the task with which the Commission was charged. The claims were to be "adjudicated according to the law," that is, on the merits of each claim, supported by evidence and governing legal con-

cate these types of claims generally, by passing legislation it has nonetheless specifically authorized each new program that the Commission undertakes.[149]

The Court's reliance on the ICSA is also misplaced because the Algerian Declarations contravene one of the primary goals of the ICSA: providing equal treatment to all United States claimants.[150] Although the Algerian Declarations disposed of all United States claims against Iran, they provide for disparate treatment of various categories of claimants. The Declarations satisfied immediately claims of American banks from assets on deposit in the United States;[151] in contrast, the agreements nullified the claims of the United States hostages.[152] Claims based upon breaches of contract, such as that of Dames & Moore, received intermediate treatment, with the possibility of future remuneration upon adjudication by the Claims Tribunal.[153] Some claims may be barred because the Tribunal lacks jurisdiction over contracts with "binding" provisions requiring disputes to be settled in the Iranian courts.[154]

The Court held that "Congress, though legislating in the area, has left 'untouched' the authority of the President to enter into settlement agreements."[155] The contrary conclusion seems more appropriate. By its enactment and subsequent amendments of the ICSA, Congress has "covered the field"[156] of permissible claim settlements by executive agreement. The President's powers were thus at their "lowest ebb"[157]

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siderations, by a body that was "entirely free from the control or coercive influence, direct or indirect," of either the Executive or the Congress.

Wiener v. United States, 357 U.S. 349, 355-56 (1958) (citation omitted).

149 Re, *supra* note 147, at 1088. For instance, the most recent program, "Claims against Vietnam," 22 U.S.C. § 1645 (Supp. III 1979), provides that "[i]t is the purpose of this subchapter to provide for the determination of the validity and amounts of outstanding claims against Vietnam . . . ."

150 *See* 22 U.S.C. § 1627(e); S. REP. NO. 836, 90th Cong. 2d Sess. 11-12, *reprinted* in 1968 U.S. CODE CONG. & AD. NEWS 2710, 2720-21.

151 *See* REPORT ON IRAN, *supra* note 29, at 37-38.

152 General Declaration, *supra* note 1, ¶ 11.

153 Claims Declaration, *supra* note 1, art. II, ¶ 1.

154 *Id.* The provision of the Declarations requiring that these contracts be settled in Iranian courts appears to be an arbitrary and largely senseless jurisdictional restriction upon which Iran insisted.

155 453 U.S. at 682 n.10.

156 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 639 (1952) (Jackson, J., concurring). What Justice Frankfurter found dispositive in *Youngstown* is equally true here. In denying President Truman the power to seize domestic steel mills, Frankfurter noted that Congress had frequently provided for certain seizures by the executive in the past, but in every case had "qualified this grant of power with limitations and safeguards." *Id.* at 598 (Frankfurter, J., concurring). Frankfurter concluded that this prior legislation demonstrated that Congress deemed this power "so drastic . . . as to require that it be carefully circumscribed whenever the President was vested with this extraordinary authority." *Id.*

157 *Id.* at 637 (Jackson, J., concurring); *see supra* note 96. The Court also suggested that prior cases indieate that the President "does have some measure of power to enter into execu-

when he entered into the Algerian Declarations.

3. *The FSIA, Article III, and the "Tenor" of Legislation*

The Court in *Dames & Moore* also indicated that the "general tenor" of congressional legislation in the area of international emergencies buttressed its conclusion that the Congress accepted the President's actions.[158] Although the Court held that neither the IEEPA nor the

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tive agreements without obtaining the advice and consent of the Senate." 453 U.S. at 682. This statement, in and of itself, is accurate. Although the Constitution does not expressly provide for the making of international agreements other than by treaty, the vast majority of international agreements made by the United States are executive agreements and not treaties. *See, e.g.,* Rovine, *Separation of Powers and International Executive Agreements,* 52 IND. L.J. 397, 406-07 (1977). The President derives the authority to make such agreements from several provisions of the Constitution. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* § 2 ("The President shall be Commander in Chief of the Army and Navy . . . ."); *id.* § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . .").

Executive agreements may take two forms: "congressional executive" agreements made pursuant to the joint authority of the President and Congress, and "sole" executive agreements made by the President pursuant to his plenary foreign affairs powers. *See generally* W. BISHOP, JR., INTERNATIONAL LAW 95 (2d ed. 1962); Rovine, *supra,* at 412. The latter agreements, totaling no more than two or three percent of all executive agreements, *see id.,* have generated the greatest controversy, and their scope remains unsettled. *Compare* Berger, *supra* note 99 *with* McDougal & Lans, *Treaties, Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy,* 54 YALE L.J. 181 (1945). *See generally* L. HENKIN, *supra* note 120, at 179.

The significance of the Court's statement that the President has "some measure of power" to enter into executive agreements is dubious, especially after the Court declined to find that the President's plenary powers extend to the making of an agreement settling American claims against a foreign nation. *See supra* note 99 and accompanying text. The two cases that the Court cited, United States v. Pink, 315 U.S. 203 (1942) and Ozanic v. United States, 188 F.2d 228 (2d Cir. 1951), do not suggest otherwise. Neither case supports the power that the President exercised in *Dames & Moore,* for both predate the adoption of the restrictive theory of sovereign immunity in the United States in 1952, which first conferred enforceable rights against foreign nations independent of executive intervention. *See supra* note 125 and accompanying text.

Pink involved the Litvinov Assignment, an executive agreement entered into with the Soviet Union. The Court carefully noted that no United States creditors were adversely affected by the Agreement: "The contest here is between the United States and creditors of the Russian corporation who, we assume, are not citizens of this country . . . ." 315 U.S. at 227. Moreover, *Pink* involved the President's power to enter into executive agreements with foreign governments incidental to his Article II, § 3 recognition powers. In *Pink* "[i]t was the judgment of the political department that full recognition of the Soviet government required the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent." *Id.* at 230. Finally, Congress had "tacitly" approved the Litvinov Assignment by authorizing, in anticipation of the Agreement, claims of American nationals against the Soviet government. *See* Joint Resolution of Aug. 4, 1939, 53 Stat. 1199; *see also* 315 U.S. at 227-28. The langnage quoted from *Ozanic* was dictum because the settlement was made under an express congressional delegation of power, the "Lend-Lease Act," 22 U.S.C. §§ 411-419; *see also* 188 F.2d at 231-32.

158 453 U.S. at 678. The Court stated 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." *Id.* (quoting Haig v. Agee, 453 U.S. 280, 291 (1981)). The Court's reliance on *Haig* is unfounded. *Haig* stands for

Hostage Act directly authorized the President's suspension of American claims,[159] it found that both acts indirectly supported a "broad scope for executive action."[160] The Court viewed the IEEPA as delegating broad authority to the President to act in times of national emergency with respect to the property of foreign nations.[161] Similarly, the Court read the Hostage Act as a delegation to the President of broad discretion in responding to the hostile acts of foreign sovereigns.[162]

Although the Court's argument may have some force with respect to claims against foreign governments that are not cognizable in United States courts, the "general tenor" of legislation is irrelevant to the executive settlement of claims covered by the Foreign Sovereign Immunities Act of 1976.[163] Congress enacted the FSIA to achieve two primary objectives: first, Congress intended the FSIA to codify the "restrictive" principle of sovereign immunity and enable American citizens with commercial claims to sue foreign sovereigns in United States courts;[164]

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no more than the established proposition that in the area of foreign affairs, congressional silence in the face of "a consistent administrative construction of [a] statute" will not be equated with congressional disapproval. *Id.* The issue in *Dames & Moore,* however, was not the proper scope of presidential power under an express delegation from Congress, but the authority of the President in the absence of such a delegation. *See supra* notes 115-17 and accompanying text.

159 453 U.S. at 677.

160 *Id.*

161 *Id.*

162 *Id.*

163 28 U.S.C. §§ 1330, 1602-1611 (1976).

164 Although the State Department had adopted the restrictive theory of sovereign immunity, *see supra* note 125, the Department often found it politically infeasible to resist the pressures from foreign governments to recognize their immunity from suit:

> From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.

H.R. REP. NO. 1487, 94th Cong., 2d Sess. 9, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604 [hereinafter cited as FSIA HOUSE REPORT]. This uncertainty engendered problems for United States foreign policy as well as for private litigants. During the committee hearings on the FSIA, the Legal Adviser to the State Department noted:

> I can't think of any [advantages] and may I say that I think there are some disadvantages attaching to the power of being able to enter a political judgment in the court because it means that the State Department becomes involved in a great many cases where we would rather not do anything at all, but where there is enormous pressure from the foreign government that we do something . . . . [I]n practice I would have to say to you in candor that the State Department, being a political institution, has not always been able to resist these pressures. And to my way of thinking, this consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see established.

Jurisdiction of U.S. Courts in Suits Against Foreign States, 1976: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 34-35 (testimony of Mr. Leigh) [hereinafter cited as *FISA House Hearings* (1976)].

second, Congress wanted to depoliticize these commercial lawsuits by placing the determination of claims of sovereign immunity exclusively in the hands of the judiciary, free of executive-branch interference.[165]

Under the FSIA, foreign governments still enjoy immunity from suit in many cases.[166] In such instances, the President presumably may still invoke espousal powers.[167] The "general tenor" of international emergency legislation may assist in defining the scope of the traditional executive power to settle these claims. When the FSIA enables claimants to sue a foreign state in American courts, however, executive interference with jurisdiction, not executive powers of espousal, are at issue. The "general tenor" of such legislation as the IEEPA and the Hostage Act is irrelevant to an inquiry into the President's power to divest United States courts of jurisdiction specifically conferred by Congress.

The Court rejected the argument that the President's suspension of lawsuits against Iran violated Article III of the Constitution by circumscribing the jurisdiction of the courts that the FSIA conferred.[168] The

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165 FSIA HOUSE REPORT, *supra* note 164, at 7; *accord* von Mehren, *The Foreign Sovereign Immunities Act of 1976,* 17 COLUM. J. TRANSNAT'L L. 33, 45, 65 (1978). Congress considered and rejected proposals to allow presidential intervention in suits during times of international emergency. The State and Justice Departments originally drafted the FSIA to be "subject to existing *and future international agreements.*" H.R. 11315, 94th Cong., 2d Sess. § 1604 (1976) (emphasis added). Although prior to the enactment of the FSIA, the executive branch could, for political reasons, suggest immunity from suit for foreign nations otherwise susceptible to claims, Congress rejected that power in enacting the FSIA. Congress heard testimony that the continuation of the practice of executive recommendations of immunity was important. *FSIA House Hearings, supra* note 164, at 65-66 (testimony of Mr. Michael Cardozo). The Chairman of the House Subcommittee, Rep. Flowers, disagreed and instead agreed with a later witness "that the so-called flexibility the State Department has under any present practice [of suggesting immunity to achieve a political goal] . . . is achieved at a price that is paid by some individual citizen or corporation. That is not the way this Government does business and it is not the way we ought to do business." *Id.* at 90. Congress deleted from the FSIA the reference to "future international agreements" to ensure that the jurisdiction of the courts to make determinations of sovereign immunity would be untouched by the President. *See* FSIA HOUSE REPORT, *supra* note 164, at 10 ("[I]t was thought best to eliminate any possible question that this language might be construed to authorize a future international agreement."); S. REP. NO. 1310, 94th Cong., 2d Sess. 6 (1976) ("Mention of future agreements was found to be unnecessary and misleading.").

Congress clearly intended to divest the President of the power to use jurisdiction as a bargaining chip in international political negotiations. Professor Carl, in a prescient article published after the passage of the FSIA but before the Iranian Hostage Crisis, wrote:

> Assume American hostages are being held by a foreigu government. While negotiating for their release, the United States government wishes to offer as a quid pro quo the termination of pending litigation against that nation within this country. Under the FSIA, *the executive would have no such authority* . . . .

Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice,* 33 SW. L.J. 1009, 1063 (1979) (emphasis added).

166 For instance, the FSIA does not confer jurisdiction on United States courts to hear most expropriation and tort claims. *See* 28 U.S.C. §§ 1605(a)(3), (5) (1976) (detailing the limited tort and expropriation claims that can be brought against foreign sovereigus).

167 *See supra* notes 122-23 and accompanying text.

168 Article III provides: "The judicial Power of the United States, shall be vested in one

Court held that the President had not terminated lawsuits against Iran, but only suspended them, pending their final determination by the Claims Tribunal.[169] The Court reasoned that the Suspension Order had not divested the courts of jurisdiction, but had only "direct[ed] the courts to apply a different rule of law."[170] The Court concluded, therefore, that the President in exercising his power to settle claims had "simply effected a change in the substantive law governing the lawsuit."[171]

It is plain why the Court strove to avoid characterizing the President's action as "jurisdictional." When dealing with presidential action arguably within "a zone of twilight,"[172] the distribution of power is uncertain and the Court has some leeway. The President's power to settle claims[173] is at least arguably within the "zone of twilight." Jurisdiction, however, is not in that zone. The President possesses no constitutional authority to affect the jurisdiction of the federal courts. Only Congress, under Article III of the Constitution, possesses that power.[174] To avoid the dictates of Article III, the Court needed to characterize the President's Suspension Order[175] as a change in substantive law rather than a

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supreme Court, and in such inferior Courts *as the Congress* may from time to time ordain and establish." U.S. CONST. art. III, § 1 (emphasis added).

169 Although the Suspension Order "suspended" all claims that "may be presented" to the Claims Tribunal, Exec. Order No. 12294, § 1, 3 C.F.R. 139 (1982), the Algerian Declarations obligate the United States "to nullify all attachments and judgements," "to terminate all legal proceedings in United States Courts," and "to prohibit all further litigation based on such claims." General Declaration, *supra* note 1, ¶ B, at 224.

170 453 U.S. at 685.

171 *Id.*

172 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see supra* note 96.

173 *See supra* notes 118-57 and accompanying text.

174 The scope of Congress's power to affect the jurisdiction of the courts remains uncertain. *See, e.g.,* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). *See generally* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362 (1953); Sager, *Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts,* 95 HARV. L. REV. 17 (1981). It is indisputable, however, that no matter how great the crisis, the President has no such power. *See, e.g., Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121 (1866) (striking down President Lincoln's attempt during the Civil War to transfer jurisdiction over civilians from the courts to a military tribunal). Not only is the President without inherent authority to limit federal court jurisdiction, but Congress may not delegate such authority to him:

> Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.

United States v. Nixon, 418 U.S. 683, 704 (1974); *see also* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

175 Exec. Order No. 12,294, 3 C.F.R. 129 (1982).

divestiture of jurisdiction.

However understandable the Court's characterization effort may be, it does more justice to Lewis Carroll than to legal scholarship. *Dames & Moore,* like most of the cases affected by the Suspension Order, was a breach of contract suit. The Suspension Order had no effect on the substantive contract and remedies law that governed the lawsuit. To the contrary, the Order did nothing more than transfer the litigation from one forum to another. It is legal hocus-pocus to categorize this as anything but jurisdictional.[176]

The order that the Court upheld is arguably a "suspension" of claims in form, but it is in effect a termination of most claims. Although claims not cognizable by the Claims Tribunal possibly may revive and become judicially enforceable in United States courts,[177] the determination of the Claims Tribunal under the Suspension Order is final for claims that the Tribunal recognizes. Whether the Tribunal issues an award or rejects a cognizable claim, the adjudication "operate[s] as a final resolution and discharge of the claim for all purposes."[178] Therefore, legal proceedings in the United States courts on claims cognizable by the Tribunal are in effect terminated.[179]

Even for claims not cognizable before the Claims Tribunal, the Court nowhere explains why "suspension" of the statutorily-conferred right to proceed in the United States district courts, subject to a possible

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176 The Court has defined jurisdiction as the "power to entertain the suit, consider the merits and render a binding decision thereon . . . ." General Inv. Co. v. New York Cent. R.R., 271 U.S. 228, 230 (1926). In the succinct words of Justice Holmes: "Jurisdiction is authority to decide the case either way." The Fair v. Kohler Die & Speciality Co., 228 U.S. 22, 25 (1913).

177 453 U.S. at 687. The Supreme Court assumed that claimants excluded from the Claims Tribunal had a right to seek redress in United States courts, but the right is not settled. Indeed, the United States specifically agreed in the Algerian Declarations to "terminate" all legal proceedings in the United States courts. *See supra* note 169. In October 1982, Iran filed a number of claims against the United States in the Claims Tribunal based upon alleged violations of the Algerian Declarations. Prominent among the alleged violations is the United States' suspension, rather than termination, of lawsuits against Iran. *See* Statement of Claims of the Islamic Republic of Iran Based Upon Violations by the United States of the Algiers Declarations at 68-76, *reprinted in* IRANIAN ASSETS LITIGATION REP. (Andrews) 5423-25 (Oct. 22, 1982).

178 Exec. Order No. 12,294, § 4, 3 C.F.R. 139-40 (1982).

179 One lower court held:

> Whether the executive is attempting to foreclose United States citizens from access to United States courts to vindicate rights obtained by contract wholly performed within the United States, such as in the case at bar, by "termination" or "suspension," the intent is the same. While it may be that "suspending" the claims without limit is more acceptable in a public relations sense than "terminating" or "nullifying" the claims, the result in either case is to prevent claimants from asserting their right in federal court. I must deal with the reality rather than niceties of language. "A rose by any other name . . . ." Shakespeare, *Romeo and Juliet,* Act. II, Scene 2, Lines 41-42.

Marschalk Co. v. Iran Nat'l Airlines Corp., 518 F. Supp. 69, 83 (S.D.N.Y.), *rev'd,* 657 F.2d 3 (2d Cir. 1981).

right of "revival" if the alternative forum fails to act on the merits,[180] is not jurisdictional. The change of forum mandated by the "suspension" appears as much a jurisdictional change as a transfer pursuant to Title 28 of the United States Code, section 1404 (change of venue),[181] section 1407 (multidistrict litigation),[182] or removal pursuant to sections 1441-1451.[183] A change in forum is no less jurisdictional merely because it may not be permanent.

Additionally, the President's Suspension Order itself defies the Supreme Court's assertion that his actions affected substantive law rather than jurisdiction. The order defines with some particularity the permitted jurisdiction of United States courts. The Order permits claimants to commence an action to toll a statute of limitations[184] and to assert a counterclaim or set-off in any legal action that Iran brings.[185] The Order further provides that the courts need not dismiss any action for want of prosecution.[186]

Finally, the Court nowhere explained how the President's international agreement can change the substantive law governing litigation in United States courts. Clearly a treaty, as the law of the land, can change substantive law. Executive agreements, however, although they can commit the United States internationally, cannot change substantive domestic law.[187]

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180 *See supra* note 177.

181 28 U.S.C. § 1404 (1976).

182 *Id.* § 1407 (1976).

183 *Id.* §§ 1441-1451 (1976).

184 Exec. Order No. 12,294, § 1, 3 C.F.R. 139 (1982).

185 *Id.* § 6, 3 C.F.R. 140.

186 *Id.* § 2, 3 C.F.R. 139.

187 A treaty and an executive agreement have the same legal effect under international law. *See, e.g.,* Moore, *Contemporary Issues in an Ongoing Debate: The Roles of Congress and the President in Foreign Affairs,* 7 INT'L LAW. 733, 739 (1973) ("At the outset, we should be clear about what the issue is. It is not the *international* authority of treaties as opposed to executive agreements . . . . The issue is rather the *constitutional* authority of the President, the President and the Senate, or the President and the Congress to enter into international agreements."). The *domestic* effect of an executive agreement, however, differs from that of a treaty. An executive agreement, unlike a treaty, cannot override a prior act of Congress. *Cf.* United States v. Guy W. Capps, Inc., 204 F.2d 655, 658, 660 (4th Cir. 1953) (voiding executive agreement with Canada regarding the importation of potatoes beeause it conflicted with a prior law enacted by Congress under its power to regulate foreign commerce), *aff'd on other grounds,* 348 U.S. 296 (1955); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 144 (1963) ("An executive agreement, made by the United States without reference to a treaty or an act of Congress, . . . does not supersede inconsistent provisions of earlier acts of Congress.").

The drafters of the *Restatement* appear to favor a different rule. Tentative Draft No. 1 of the RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 135 (rev. draft 1981) provides that: "A rule of international law or a provision of an agreement that becomes effective as law in the United States supersedes any inconsistent law of the several states of the United States, as well as any inconsistent preexisting provision in the law of the United States." Reporters' Note 6 to that section recognizes that "[i]t has been commonly assumed that . . . a sole executive agreement . . . cannot supersede an earlier treaty or act of

The Court relied on the holding in *United States v. Schooner Peggy*[188] to support the argument that the Suspension Order merely effected a change in substantive law.[189] The case involved a French ship, the Schooner Peggy, which the United States captured in the year 1800. The Circuit Court for the District of Connecticut found that the Schooner Peggy was an armed French vessel captured on the high seas and was therefore a lawful prize. Consequently, one-half of the ship and its cargo became the property of the United States, and the other half became the property of the officers and crew of the capturing ship, the Trumbull, a ship "duly commissioned by the President of the United States" to capture armed French vessels found on the high seas.[190] While the case was pending on appeal to the Supreme Court, the President ratified a peace treaty with France which provided that property captured "and not yet *definitively* condemned . . . shall be mutually restored."[191] The Court held that the treaty controlled the case and denied recovery.

The Court has cited the *Schooner Peggy* for the broad proposition that courts of appeal should retroactively apply new substantive law unless "manifest injustice" would result.[192] The case, however, provides no precedential support for the Court's conclusion in *Dames & Moore* that the President's actions changed only the substantive law governing the claims. First, in *Schooner Peggy,* the President's actions did in fact change the substantive law. When Trumbull's crew captured the Schooner Peggy, the law of war prevailed, while the Peace Treaty governed the case when it came before the Supreme Court. Thus the treaty changed the substantive law, not the Court's jurisdiction over the case. In *Dames & Moore,* on the other hand, the Algerian Declarations in reality only affected jurisdiction.[193]

Congress," but states that "a valid sole executive agreement is federal law and American jurisprudence has not known federal law of different status under the Constitution." No court has adopted this rule, and the drafters themselves recognize that "even if a sole executive agreement were held to supersede a statute, Congress could proceed to reenact the statute and thereby supersede the intervening executive agreement as domestic law." *Id.* Reporter's Note 6.

The Supreme Court addressed, but did not resolve, the issue in Weinberger v. Rossi, 102 S. Ct. 1510 (1982). Holding that an executive agreement constituted a "treaty" for the purposes of a specific federal statute, the Court stated: "Even though [executive] agreements are not treaties under the Treaty Clause of the Constitution, they may *in appropriate circumstances* have an effect similar to treaties *in some areas* of domestic law." *Id.* at 1514 n.6 (emphasis added).

188 5 U.S. (1 Cranch) 103 (1801).

189 453 U.S. at 685.

190 5 U.S. (1 Cranch) at 106-07.

191 *Id.* at 107.

192 *See supra* notes 168-83 and accompanying text.

193 Courts will refuse to apply intervening substantive law within the meaning of *Schooner Peggy* if "manifest injustice" would result. Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974) (dictum); Thorpe v. Housing Auth., 393 U.S. 268, 282 (1969) (dictum). The dan-

Second, the President in *Schooner Peggy* ratified a treaty, while the President in *Dames & Moore* entered into an executive agreement. The distinction becomes significant in light of the *Schooner Peggy* Court's emphasis on the constitutional force of a treaty on the substantive law of the land:

> The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and, in the general, superintended by the exccutive of each nation, and therefore, whatever the decision of this court may be relative to the rights of parties litigating before it, the claim upon the nation if unsatisfied, may still be asserted. But yet where a treaty is the law of the land, and as such affccts the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress. . . .[194]

In contrast, an executive agreement, such as that in *Dames & Moore,* has no such constitutional force.[195]

In *Persinger v. Iran,*[196] the United States Court of Appeals for the District of Columbia also rejected the argument that the executive orders implementing the Algerian Declarations unlawfully circumscribed the jurisdiction of the federal courts. The District of Columbia Circuit

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ger of such injustice is particularly great when the rights of private litigants are at stake. *See, e.g.,* Bradley v. Richmond School Bd., 417 U.S. at 717 (dictum); *cf. Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110 (1801) ("[I]n mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties . . . ."). The reluctance of courts to apply a law retroactively when private litigants are involved is also arguably warranted in actions by a private litigant against a foreign nation under the FSIA, because the FSIA renders a foreign state liable to suit "to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606 (1976).

194 5 U.S. (1 Cranch) 103, 109-10 (1801).

195 *See supra* note 187 and accompanying text. The Court also noted, as an argument *reductio ad absurdum,* that if sovereign immunity were jurisdictional, "the President's determination of a foreign state's sovereign immunity" prior to enactment of the FSIA would have been an encroachment on the jurisdiction of the courts. 453 U.S. at 685. Although prior to the enactment of the FISA, courts routinely accepted the President's sovereign immunity "suggestions" as "conclusive determinations," *Ex parte* Peru, 318 U.S. 578, 588 (1943), this did not affect the power of the courts. As one district court noted: "This course entails no abrogation of judicial power; it is a self-imposed restraint to avoid embarrassment of the executive in the conduct of foreign affairs." New York & Cuba Mail S.S. v. Koria, 132 F. Supp. 684, 688 (S.D.N.Y. 1955); *see also* Mexico v. Hoffman, 324 U.S. 30, 35 (1945); *Ex parte* Peru, 318 U.S. at 588.

Regardless of how one characterizes State Department suggestions of immunity and judicial acceptance of such suggestions in the past, the FSIA is an exercise of Congress's constitutional power to regulate the jurisdiction of the federal courts. Under the FSIA, Congress codified the restrictive principle of sovereign immunity, permitting commercial suits against foreign sovereigus in the United States courts, and delegated the exclusive responsibility for interpreting the Act and making determinations of immunity to the courts. The Suspension Order clearly encroaches upon this jurisdictional grant.

196 690 F.2d 101 (D.C. Cir. 1982).

based its decision on grounds different from, but no more satisfactory than, those of the Court in *Dames & Moore.* In *Persinger,* a former hostage and his parent sued the government of Iran for damages inflicted by the seizure and detention of the hostages in Tehran. The plaintiffs challenged the President's power to divest the United States courts of jurisdiction by extinguishing hostage claims against Iran.[197]

The court of appeals could not rely on *Dames & Moore* because it had rejected the jurisdictional argument on the grounds that Executive Order No. 12,284 suspended, rather than terminated, claims. In contrast, Executive Order No. 12,283 extinguished hostage claims with no provision for resolution before an alternative forum. Noting that "a very serious problem would be presented for decision" if the President had attempted to deprive the courts of jurisdiction,[198] Judge Bork concluded that the President had made no such attempt, because Executive Order No. 12,283 and the implementing regulations "are addressed to persons, not to courts—one index of a legal change rather than a jurisdiction divestiture."[199] Because it is not apparent on its face that Executive Order No. 12,283 and implementing regulations address persons and not courts, the court of appeals devoted several paragraphs to supporting this conclusion. The court explained that this interpretation was "a more natural reading"; that under the circumstances, any ambiguities in language should be resolved in favor of the President, and that even if the contrary interpretation was "more probably the correct one, courts have more than once allowed the pressure of a constitutional issue to influence their interpretation of language."[200]

The effort to characterize Executive Order No. 12,283 as addressed to persons, and not to courts, is labored at best. But even if one grants this premise, it is not clear why the conclusion follows that the change is not jurisdictional. To Judge Bork and his fellow judges, it is axiomatic that language addressed to persons effects a change in substantive law rather than in subject matter jurisdiction. But they advance no reasons to support this assumption, and it is hardly self-evident. Unless semantics are to govern, a rule regulating access to courts is jurisdictional, whether that result is achieved by directing the courts not to hear certain classes of cases or by directing persons not to institute certain types of proceedings.[201]

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197 Exec. Order No. 12,283 and the implementing regulations prohibit, *inter alia,* "any person subject to U.S. jurisdiction" from prosecuting any claim against the Government of Iran arising out of the seizure of the hostages or their subsequent detention. Exec. Order No. 12,283, 3 C.F.R. 114 (1981).

198 690 F.2d at 1016. Judge Bork characterized any alleged presidential power to alter subject matter jurisdiction as "an awesome power" of "dubious constitutionality." *Id.*

199 *Id.*

200 *Id.*

201 The court of appeals could have avoided the jurisdictional issue altogether by finding,

CONCLUSION: THE PRESIDENT'S POWERS AFTER *DAMES & MOORE*

The Court in *Dames & Moore* intended "to lay down no general 'guidelines' "[202] and attempted to confine its decision "to the very questions necessary to decision of the case."[203] If the decision could be limited to the exigencies of the hostage crisis, perhaps no harm would be done. The decision's effects, however, cannot be so easily confined.[204] To uphold the President's nullification of attachments obtained by American litigants against Iranian property in the United States, the Court had to interpret the IEEPA broadly. Although Congress enacted the IEEPA to restrict the President's national emergency powers, as construed in *Dames & Moore* the IEEPA grants the President powers perhaps even greater than those that the TWEA previously conferred.[205] The Court's interpretation provides no effective limits on the President's power to dispose of foreign assets as he sees fit during a national emergency.

The Court, for the first time, also upheld the power of the President to remove from the jurisdiction of United States courts the commercial claims of American citizens against foreign nations and to dispose of them upon whatever terms he chooses. The Court's attempt to limit its holding by characterizing the case as the resolution of a "major" foreign policy dispute does not provide a workable limiting guideline.[206] Al-

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as did the district court, that the FSIA barred jurisdiction. Instead, the court of appeals specifically found that jurisdiction was not barred, holding that the phrase, damages "occurring in the United States" as used in the FSIA, *see* 28 U.S.C. § 1605(a)(5) (1976), included the American Embassy in Iran. *See Persinger,* 690 F.2d at 1017. Having found jurisdiction under the FSIA, the court of appeals held that the President's authority to settle international claims permitted him to extinguish hostage claims. For this holding, the court of appeals relied on the dubious legislation-by-acquiescence theory advanced in *Dames & Moore.* The court of appeals, however, went even beyond the holding in *Dames & Moore,* which had held only that Congress had acquiesced in the practice of disposing of the claims of Americans against foreign sovereigns when a sum of money or an alternative forum was provided. The *Persinger* court, in contrast, found a broader acquiescence: "Congress has acquiesced in presidential authority to dispose of claims when important foreign policy considerations were at stake." *Id.* at 1022.

202 453 U.S. at 661.

203 *Id.*

204 *See also* Howard, *Implications of the Iranian Assets Case for American Business,* 16 INT'L LAW. 128, 134 (1982); Comment, *The Iranian Hostage Agreement Cases: The Evolving Presidential Claims Settlement Power,* 35 SW. L.J. 1055, 1077 (1982). That courts may not limit *Dames & Moore* to its facts is already evident. One subsequent case, for example, has characterized *Dames & Moore* as "sustaining the exclusive power of the President in the sphere of international relations." United States v. Fernandez-Pertierra, 523 F. Supp. 1135, 1141 (S.D. Fla. 1981). *But see* Worthington v. Fauver, 180 N.J. Super. 368, 375, 434 A.2d 1134, 1138 (1981) (*Dames & Moore* supports the proposition that "[a] case which seeks to declare an executive action unconstitutional as usurpation of or intrusion into the constitutional power of another coequal branch of government stirs any court to a sense of caution in its approach and to a realization of the requirement that its decision be based upon the narrowest possible ground capable of deciding the case.").

205 *See supra* notes 66-75 and accompanying text.

206 453 U.S. at 688 ("[W]here, as here, the settlement of claims has been determined to be

though the taking of the hostages was a "major" crisis, nowhere in *Dames & Moore* does the Court provide criteria for distinguishing major from less-than-major disputes; nor would such a standard be appropriate. The foreign affairs powers of the President do not expand or contract with the relative severity of the dispute in issue. As Justice Douglas stated in *Youngstown:* "[T]he emergency did not create power; it merely marked an occasion when power should be exercised."[207]

Finally, the Court held in *Dames & Moore* that Congress had acquiesced in the President's settlement[208] of the claims of United States citizens against foreigu nations, and that the acquiescence was tantamount to an express congressional delegation.[209] The Court reasoned that because Congress had not enacted legislation or passed a resolution indicating its displeasure with the Algerian Declarations, and because it had not "resisted the exercise of Presidential authority," Congress had acquiesced in the President's agreement.[210] The Court thus implicitly created

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a necessary incident to the resolution of a major foreign policy dispute between our country and another . . . we are not prepared to say that the President lacks the power to settle such claims.").

207 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629 (1952) (Douglas, J., concurring).

208 The use of the term "settlement" throughout *Dames & Moore* appears to be a misnomer. Dames & Moore and other American claimants have received no compensation in settlement of their claims. To the contrary, they have lost their judgments and the security of an American forum for adjudication of their claims. In the words of Judge Duffy in *Marschalk Co. v. Iran Nat'l Airlines Corp.:*

> Even assuming for the moment that the President has the constitutional authority to settle claims, I seriously question that the President actually "settled" the claims of Marschalk and the other plaintiffs under the Agreement with Iran. The term "settlement" implies that the plaintiffs receive something of value in exchange for the termination of adjudicative proceedings in United States courts of their claims. In the instant cases, nothing has been received in exchange for the suspension of litigation in the United States. Instead, Marschalk and the other plaintiffs must still seek satisfaction of their claims. They, however, have lost their rights to litigate in the United States courts and are forced to pursue their claims before an arbitral tribunal located in a foreign country. They also lose the guarantees of due process afforded by the United States courts as well as the right of appeal. Furthermore, if successful on the merits of the Tribunal, the plaintiffs may only receive as little as 20 cents on a dollar since the identified claims of United States citizens against Iran and its instrumentalities exceed by over five times the amount Iran has put in the settlement fund.

518 F. Supp. 69, 88 (S.D.N.Y.), *rev'd,* 657 F.2d 3 (2d Cir. 1981).

209 *See supra* notes 96-157 and accompanying text.

210 453 U.S. at 688. One must question whether the Court in *Dames & Moore* accorded undue significance to Congress's failure to object to the Algerian Declarations. First, congressional reaction was mixed. *Compare Iran Hearings, supra* note 34, at 2 ("In my judgment, these matters have been handled with extraordinary skill.") (statement of Sen. Percy) *with id.* at 135 (fulfillment of the agreements "involves our utter humiliation in the eyes of the entire world") (statement of Sen. Hayakawa). Congress's generally muted response demonstrates less of an acceptance of the President's authority than a realization that it had been presented with a *fait accompli,* and that America's international stature might be damaged if it were to repudiate the President's undertaking. *Id.* at 67-68. The remarks of Senator Percy support this conclusion. Repudiation of the Agreements, he noted,

a presumption of legislative acquiescence in executive agreements, absent specific congressional disapproval. The absence of congressional disapproval surely cannot be the determinative factor in a finding of acquiescence, for it would give the President powers unchecked by judicial review and subject only to the ultimate veto of Congress. Such a rule would contravene the basic principles of our constitutional scheme of government.[211]

After *Dames & Moore,* absent congressional action, a President may, by executive agreement, suspend and effectively terminate the enforceable claims of American citizens in United States courts. Adherence to this rule effectively obliterates the rights of American claimants against Iran and creates an unwieldy standard of congressional delegation by acquiescence. Because the Court held that the President possesses no plenary power to make such a settlement, and because congressional powers are "not lost by being allowed to lie dormant,"[212] Congress retains the power to reverse this holding with an unambiguous expression of a contrary intent. Congress would do well to heed the words of warning Justice Jackson directed to it three decades ago:

> If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.[213]

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would increase tremendously the Soviet influence in that vital part of the world. It would cause a wave of reaction against us, I think all over the world, certainly by some of our best friends, but also certainly within Iran . . . . I think [repudiation] would be looked upon as a dishonorable act. I think it would show a lack of continuity between administrations . . . . Those who would have egged us and goaded us into renouncing this agreement in the end I think would have harmed American interests really irreparably . . . . I don't know of any international support for repudiation.

Id. at 67-68.

211 A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safegnards which these restrictions afford.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 613 (Frankfurter, J., concurring).

212 United States v. Morton Salt Co., 338 U.S. 632, 647 (1950).

213 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 654 (Jackson, J., concurring); *cf.* Kurland, *The Impotence of Reticence,* 1968 DUKE L.J. 619, 633-34 ("Congress might well choose to put on the facade of the literally crumbling capitol the words: 'The fault, dear Brutus, lies not in the stars, but in ourselves, that we are underlings.' ").