




10-1980

Dames & Moore v. Regan

Lewis F. Powell Jr.

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CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 28, 1981

MEMORANDUM TO THE CONFERENCE

RE: Iranian Hostage Agreement

At lunch Byron, Bill, John and I discussed the Iranian Hostage Agreement. It was thought helpful to obtain a copy of the First Circuit opinion and the briefs in that case. I called Chief Judge Coffin who referred me to Judge McGowan of the D.C. Circuit where another of these cases is pending. Judge McGowan sent me the enclosed copies of the First Circuit opinions and also the copy enclosed of a judgment order entered in the D.C. case. The opinion of the D.C. Circuit is to follow in a few days. Judge Coffin is mailing the briefs in the First Circuit case today.

Bill

W.J.B. Jr.

To: Mr. Justice Powell
From: Peter Byrne
Re: No. 80-2078, Dames & Moore v. Regan (Sec'y), Iran Agreement Case
Date: 06/10/81

Summary: Petr requests the Court to grant cert in this case before judgment by the CA9. Petr argues that the President lacked authority to nullify judicial attachments and suspend claims against the government of Iran and its instrumentality.

Facts and Proceedings Below: Petr filed this action on April 28, 1981 in the DC to enjoin the United States from interfering in enforcing a judgment in an underlying suit by petr against Iran, and for a declaration that the Iranian Hostage Agreement, known as the Algerian Declarations, and implementing regulations were void insofar as they purported to authorize such interference because they were beyond the constitutional and statutory powers of the President. The DC granted the motion of the United States to dismiss for failure to state a claim under Rule 12(b)(6). It is this ruling that petrs seek to have reviewed here.

DC
dismissed
for failure
to state
a claim

It is helpful to recall the chronology of the relevant public events when describing the maturing of petr's claim. The Iranian revolutionaries seized American diplomats as hostages on November 4, 1979. On November 14, President Carter in response issued a Presidential Order: 1) declaring a "national emergency" within the meaning of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701; 2)

"blocking" all assets of Iran and its instrumentalities within the jurisdiction of the United States; and, 3) delegating his powers to the Sec'y of the Treasury to issue regulations implementing the blocking order. That same day, the Sec'y issued regulation prohibiting, absent a license or authorization, attachments, injunctions, or judgments against the Iranian property. Petrs commenced their underlying action against Iran, and gained a prejudgment attachment against Iranian assets, pursuant to a revocable license, on December 20, 1979.

Petrs won a pre-judg. attachment - pursuant to a revocable license

On January 19, 1981, Iran released the hostages pursuant to an agreement with the United States (the Declarations of Algeria). The agreement states as a purpose to settle and terminate all claims between the Government of each nation and the nationals of the other. To achieve this goal, the parties established an Iran-United States "Claims Tribunal," which will, with certain exceptions, arbitrate claims; its judgments shall be binding and enforceable in the courts of any nation. The United States undertook to "terminate" legal proceedings in domestic courts against Iran and its instrumentalities, to "nullify" all attachments, and to "prohibit" further litigation. The United States must also transfer by July 19, 1981 all Iranian assets held in U.S. banks. \$1 Billion will go directly into an account to be used to fund awards by the Tribunal; Iran agreed to maintain a balance of \$500 million in the account until all awards are

With power to make binding judgments

*U.S. agreed to "nullify" all attach-
attachments*

Wow

satisfied. The same day, President Carter issued executive orders implementing the agreement. These orders revoked all licenses permitting persons to exercise any "right, power or privilege" against Iranian assets, "nullified" all non-Iranian interests acquired in the assets after the blocking order went into effect, and ordered all those holding blocked assets to transfer them to the Federal Reserve Bank in New York [this is due on June 19]. On February 24, President Reagan "ratified" the January 19 orders, "suspended" all "claims which may be presented to the [Tribunal]," and provided that they "shall have no legal effect in any action now pending in any court of the United States." Notwithstanding all this, the DC granted petr summary judgment on its underlying claims against Iran in the amount of \$3.8 million on February 18.

Carter
nullified
all - non-
Iranian
interests

DC

In summary, petr initiated its underlying claims and gained pre-judgment attachment against Iran after the entry of the blocking order on November 14, 1979. The DC has now vacated petr's attachments and held, in essence, that the United States has the power to transfer the assets on July 19.

} DC's
action

State of Law: CAI, Chas. T Main Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (May 22, 1981) (Campbell, Coffin; Breyer, concurring), and CADC, American Int'l Group, Inc. v. Iran, (decided May 22, 1981; opinion issued June 5, 1981) (McGowan, Mikva, Jameson [DJ]), have both held in comprehensive opinions that 1) the President has statutory authority under IEEPA, 50 U.S.C. § 1702(a)(1), to "nullify"

CAI and
CADC

Takings claims

4. *are premature*

attachments on Iranian assets entered after the date of the blocking order; 2) the President has inherent authority to settle the claims of American nationals against foreign governments in reaching important agreements with those governments; 3) any takings claims by creditors are premature. Apparently no DC's have held otherwise. I will state in summary the grounds of the CAI and CADC holdings.

Reasons for holdings

The Act

1) The IEEPA enables the President, in times of national emergency, to prevent or prohibit the transfer of the assets of a foreign government, direct or compel the transfer or withdrawal of such assets, and nullify any rights acquired in them. 50 U.S.C. § 1702(a)(1). Here, the President did not wipe out existing judicial liens retroactively, but only attachments gained subject to the limitations of the blocking order. When the President acts pursuant to explicit statutory authorization, he exercises all the power of the United States regarding foreign affairs. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring). A similar blocking order was upheld under the President's power under the predecessor Trading With The Enemy Act in Orvis v. Brownell, 345 U.S. 183 (1953).

Precedent

2) The President has "inherent power" to suspend claims of nationals against foreign governments. In United States v. Pink, 315 U.S. 203 (1942), the Court upheld the settlement of such claims pursuant to an agreement recognizing the USSR. The President has made such settlements throughout the history of

the country without disapproval by Congress. If effective, the President's settlement is binding on a federal court. See United States v. Schooner Peggy, 1 Cranch 103 (1801). The passage of the Foreign Sovereign Immunities Act of 1976 (FSIA), which allows courts to entertain commercial suits against foreign sovereigns on commercial claims without interposition of the executive, does not abrogate the President's power to act in a national emergency.

3) Takings claims are premature because it is not clear that the Tribunal will give less value for the claims than petrs could obtain gaining unsecured judgments against Iran in the federal courts. No taking was acheived by the mere nullification of attachments gained after the blocking order was entered.

Contentions: Petr argues that the decisions below are incorrect. It claims that the President has bargained away their legal rights to gain release of the hostages. It argues that the President has neither statutory nor inherent power to achieve these "settlements." None of the cases relied on below involve a "giveaway" of claims held by American nationals. Pink involved only a marshalling of assets for American creditors. Schooner Peggy involved a formal treaty ratified by Congress. What the President has done is interfere with the exercise of jurisdiction by the federal courts, as conferred by the FSIA. The history of Presidential settlements of national's claims against foreign sovereigns is irrelevant to this case occuring

It will!

He did indeed.

after passage of FSIA in 1976. Prior to passage of that Act such claims could only be satisfied by international agreement; if the President did not act there would be no recovery, so his settlement had to bind the parties. The estimated American claims against Iran far exceed the \$1 Billion security account; they are estimated to total \$3 or \$4 Billion.

The United States has yet to file today, but will support the expedited petn and urge the following accelerated briefing schedule: briefs by June 19; reply briefs by June 23; oral argument on June 25. Iran has filed a motion to intervene; it supports the petn and the briefing schedule. Numerous major banks presently holding Iranian assets and fearful of being subjected to conflicting obligation, have filed an amicus brief urging the Court to hear this case on an expedited basis. These parties all state that there are numerous cases pending and a uniform and final decision is desireable. SG

Discussion: In looking into this case, I have been surprised to find that petr's arguments on the merits are quite weak. There seems little real argument to the point that the President ^{Lacked} ~~had~~ statutory authority under the IEEPA to transfer the assets and nullify post blocking order attachment orders. Petr offers only a strained attempt to narrow the sweeping grant of authority under IEEPA by reference to indirect legislative history. The more difficult question is whether the President may suspend the claims pending in federal courts. This is not a major loss to petr's because federal court

judgments will be worth little when the assets are gone. While the cases tend to support the President's power as part of an international agreement to settle claims by requiring they be submitted to arbitration this case does go somewhat beyond the precedents in the sweeping nature of the claim preclusion. It goes far beyond in the amount of money involved.

I would be tempted to merely affirm the judgement below with a brief per curiam. However, given the political importance of the issue plenary consideration may be desirable. This will allow the Court more carefully to weigh and state the President's inherent power to settle claims. At this time of year, a full hearing may be no less burdensome than the preparation of a per curiam.

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JUN 10 1981

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June 10, 1981

The Honorable Francis J. Lorson,
Chief Deputy Clerk,
Supreme Court of the United States,
1 First Street, N.E.,
Room 22B,
Washington, D.C. 20543.

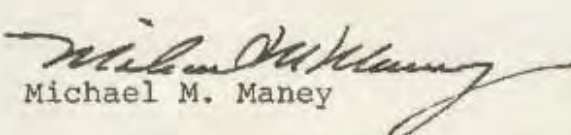
Re: Dames & Moore v. Donald T. Regan and the
United States of America, No. 80-2078

Dear Mr. Lorson:

Enclosed for filing are 40 copies of a motion for leave to file a brief and brief amici curiae. Although this is being filed as a motion, in accordance with your telephone conversation with Mr. Mark Zimmet, this letter confirms that we have obtained the consent of the respondents to the filing of the enclosed brief. Counsel for petitioner has consented to the filing of the brief insofar as it supports the petition for certiorari, but does not agree with our position supporting the respondents' motion for expedited consideration of the petition.

I enclose nine extra copies of this letter should it be appropriate to circulate to the Conference.

Very truly yours,


Michael M. Maney

(Enclosures)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1980

DAMES & MOORE, a partnership,

Petitioner,

v.

DONALD T. REGAN, THE SECRETARY
OF THE TREASURY OF THE UNITED STATES
OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit Before Judgment

MOTION TO INTERVENE AS RESPONDENT AND BRIEF IN
ACQUIESCENCE TO PETITION FOR CERTIORARI BEFORE JUDGMENT

Thomas G. Shack, Jr.
Raymond J. Kimball
Gregory de Sousa
Christine Cook Nettesheim

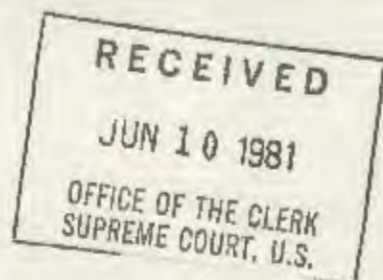
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MOTION TO INTERVENE AS RESPONDENT

The Islamic Republic of Iran (the "Government of Iran") and the Atomic Energy Organization of Iran the ("AEOI") hereby move this Court to intervene as respondents in this matter as a matter of right and to file the accompanying brief acquiescing in the petition for writ of certiorari before judgment.

The Government of Iran and AEOI fully satisfy the criteria of Fed. R. Civ. P. 24(a) for intervention as a matter of right. The Government of Iran has a direct interest in this case, because outstanding orders of attachment have been levied against its assets and those of other Iranian entities in the amount of some \$3.5 million and because a summary judgment in

In addition to its direct interest in the outcome of this case, the Government of Iran has a unique interest, not adequately represented by Secretary Regan or the United States, emanating from the Declaration of the Democratic and Popular Republic of Algeria, adhered to by the United States and Iran on January 19, 1981 (the "General Declaration"). While the United States is obligated by the General Declaration (General Principle B and ¶¶6-9) to return to Iran by July 19, 1981, the assets which are subject to petitioner's prejudgment attachments, that interest is not identical to that of the Government of Iran. The United States' interest can fairly be characterized as one of discharging its obligations under an international accord which is binding on domestic courts.

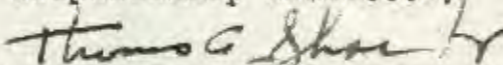
Should, however, the United States fail to effect the timely return of the Government of Iran's assets, a claim by Iran can be lodged with the Iran-United States Arbitral Tribunal, established by the Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims of the United States and the Islamic Republic of Iran, also adhered to on January 19, 1981 ("the Claims Declaration"). General Declaration, ¶17; Claims Declaration, Article II, ¶3. It is the Government of Iran's assets which are not freely mobile and which are not subject to the Government of Iran's access or use, pending vacation of these prejudgment attachments. Thus, the Government of Iran's interest can fairly be characterized as an immediate ownership interest, which is not represented by the existing parties and it is of vital concern to the Government of Iran that all prejudgment attachments, preliminary injunctions, or other provisional restraints on its financial assets be nullified, as required by the General Declaration, in advance of July 19, 1981, in order to permit their return to Iran in accordance with the General Declaration.

Finally, both the Government of Iran and AEOI have an interest distinct from that of Secretary Regan and the United States in this matter, because the summary judgment against the Government of Iran and AEOI was entered unlawfully after the Algerian Declarations were adhered to and ratified by President Reagan and after Executive orders and regulations were promulgated which prohibited all further judicial proceedings with respect to Iranian assets. The disposition of the summary judgment impacts directly on the Government of Iran and AEOI and only indirectly on the United States, which is obligated to nullify all judgments against the Government of Iran and Iranian entities pursuant to General Principle B of the General Declaration.

Counsel for the Government of Iran are authorized to state that the United States does not oppose this motion.

For the foregoing reasons, the Government of Iran and AEOI respectfully request that this motion be granted and that the accompanying brief be accepted for filing.

Respectfully submitted,



Thomas G. Shack, Jr.
Raymond J. Kimball
Gregory de Sousa
Christine Cook Nettesheim

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BRIEF IN ACQUIESCENCE TO PETITION
FOR CERTIORARI BEFORE JUDGMENT

QUESTION PRESENTED

Whether issues concerning the validity of implementation of the Algerian Declarations by Executive orders and federal regulations require immediate settlement in this Court.

STATEMENT

Intervenors the Islamic Republic of Iran (the "Government of Iran") and the Atomic Energy Organization of Iran (the "AEOI") hereby acquiesce in the petition for writ of certiorari and in the schedule for expedited briefing and argument proposed this date by Secretary Regan and the United States.

This case merits urgent consideration because it is representative of the hundreds of cases against the Government of Iran and Iranian entities involving prejudgment attachments

issued on or after November 14, 1979, restraining the mobility of Iranian assets that the United States is obligated to return to Iran by July 19, 1981. In addition, this case involves a summary judgment against intervenors entered in violation of executive orders and regulations.

Petitioner Dames & Moore obtained prejudgment attachments of some \$3.5 million in funds of the Government of Iran in the Central District of California on December 20, 1979; January 4, 1980; February 4, 1980; and May 12, 1980. Authorization for these prejudgment attachments was conferred by a revocable federal license. 31 C.F.R. §§535.418, 535.504, 535.805 (1980).

On January 19, 1981, the United States adhered to two Declarations of the Government of Algeria.*/ The General Declaration provides for the termination of the litigation in the United States courts and the nullification of judicial process, including attachments and judgments. The United States specifically agreed:

To terminate all legal proceedings in the United States courts involving claims of United States persons and institutions against Iran and its enterprises, to nullify all attachments and judgments obtained therein, [and] to prohibit further litigation based on such claims

General Declaration, General Principle B (emphasis added).

In addition to, and independently of, the above commitment, the General Declaration requires the return of all Iranian assets within United States jurisdiction. General Declaration, General Principle A. Paragraphs 4 through 9 of the General Declaration obligate the United States by July 19, 1981,

*/ These are the "Declaration of the Government of the Islamic Republic of Iran" (Dec. 14, 1979), the "General Declaration" and the "Declaration of the Government of the Islamic Republic of Iran" (Jan. 19, 1981) concerning the attachment of assets by the Government of the United States of America and the Government of the Islamic Republic of Iran." (Jan. 19, 1981).

to "bring about the transfer" of to "arrange for the transfer" of all Iranian assets.* / The General Declaration established a security account to be funded from the returned assets in the initial amount of \$1 billion and subsequently maintained by Iran so that the amount is not less than \$500 million. General Declaration, ¶7.

In furtherance of the United States' obligations under the Algerian Declarations, Executive orders were issued on January 19 and February 4, 1981, as implemented by Treasury regulations, which, inter alia, revoke the license for prejudgment attachments, direct the transfer of assets to the Federal Reserve Bank for retransfer as directed by the Secretary of the Treasury, and prohibit further judicial proceedings concerning Iranian assets. Exec. Order Nos. 12,277-12,280, 46 Fed. Reg. 7,915-7,922 (Jan. 23, 1981); Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 26, 1981); 46 Fed. Reg. 14,333-14,336 (1981) (to codified as 31 C.F.R. §§535.212, 535.213, 535.214, 535.218, 535.222, 535.504).

Although further judicial proceedings on its claim had been prohibited, on February 18, 1981, petitioner obtained a summary judgment against the Government of Iran and AEOI in the amount of \$3,788,930.79, plus interest.

Thereafter, on April 28, 1981, petitioner filed its injunctive action seeking to prevent respondents from enforcing the regulations requiring transfer of the attached assets. The district court on May 28, 1981, dismissed the complaint, vacated all the prejudgment attachments, stayed execution on the summary judgment, and stayed the vacation of the attachments until July 19, 1981. Petitioner noticed its appeal from the dismissal

1980, the Treasury issued regulations that revoked a policy of not seeking to impose criminal and civil sanctions on holders of Iranian property who failed to comply with its ordered transfer and directed that all Iranian funds, securities, or deposits be transferred to the Federal Reserve Bank by June 19, 1981, 46 Fed. Reg. 30,341 (1981) (to be codified as 31 C.F.R. §§535.213, 535.214, 535.221); 31 C.F.R. §535.701 (1980); compare 46 Fed. Reg. 14,335 (1981) (to be codified as 31 C.F.R. §535.221). Petitioner applied to the district court on June 5, 1981, for an order restraining enforcement of these regulations; on June 8, the district court enjoined the transfer of assets subject to petitioner's attachments pending the appeal in the Ninth Circuit and restricted its stay of execution on the summary judgment to only in stay pending appeal.

ARGUMENT

1. THE ISSUES OF THE EXECUTIVE'S AUTHORITY TO VACATE PREJUDGMENT ATTACHMENTS OF IRANIAN ASSETS AND THE EXECUTIVE'S OBLIGATION TO NULLIFY THE SUMMARY JUDGMENT REQUIRE IMMEDIATE SETTLEMENT IN THIS COURT.

Intervenors acquiesce in the petition insofar as it seeks immediate and expedited review of the Executive's authority to nullify prejudgment attachments of Iranian assets, pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§1701-1706 (Supp. III 1979), as a matter of imperative public importance that justifies a deviation from normal appellate practice and requires immediate settlement in this Court, within the contemplation of Sup. Ct. R. 18.* / The Algerian Declarations are international accords which are binding on the United States as a matter of both international

and domestic law. They mandate the return of Iran's assets held by United States banks and other persons by July 19, 1981, the termination of legal proceedings, and the nullification of summary judgments. To that end, the Executive has issued executive orders and regulations, the enforcement of which petitioners seek to frustrate and the legality and constitutionality of which petitioners ask this Court to address in advance of the July 19th deadline. Because this case involves the obligations to transfer assets and to terminate legal proceedings which must be finally discharged within 40 days, and because the prejudgment attachment is representative of over 200 cases with provisional restraints on Iranian assets, the petition demonstrates imperative public importance that justifies this Court's consideration of the issues on appeal before judgment by the court of appeals. Immediate settlement of these issues is necessary to provide uniform treatment by the courts throughout the country which must address and rule on these issues within the next month. The standards of Sup. Ct. R. 18 are unquestionably met.

II. THIS MATTER SHOULD BE HEARD ON THE EXPEDITED BRIEFING SCHEDULE PROPOSED BY RESPONDENTS.

Petitioner has invoked this Court's jurisdiction pursuant to 28 U.S.C. §1254(1) (1976); Rule 18 conditions the grant of certiorari before judgment on a showing that the issues on appeal require "immediate settlement in this Court." Thus, if petitioner asks this Court to hear its appeal before the Ninth Circuit has an opportunity to offer an intermediate ruling, petitioner must not only show the need for immediate review, which intervenors concede, but also facilitate immediate

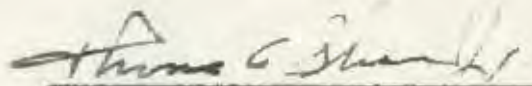
date in the near future. It is respondents who have proposed an expedited briefing schedule, and intervenors urge this Court to adopt that schedule as reasonably calculated to facilitate immediate resolution by this Court and - more critically - resolution by July 19, 1981.

Accordingly, intervenors join in respondents' request that the Court require simultaneous opening briefs by June 19, 1981; simultaneous reply briefs by June 23, 1981; and oral argument on June 25, 1981.

CONCLUSION

For the foregoing reasons, intervenors request that the petition be granted and that the Court adopt the briefing schedule proposed by respondents.

Respectfully submitted,

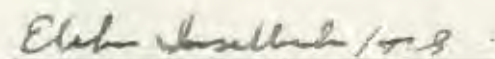


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CERTIFICATE OF SERVICE

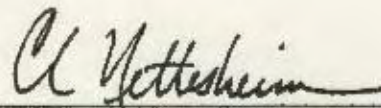
I, hereby certify, that the foregoing Motion To Intervene
as Respondent and Brief in Acquiescence to Petition for Certiorari
Before Judgment has been served this 10th day of June, 1981,
by Air Express to:

C. Stephen Howard, Esq.
TUTTLE & TAYLOR INCORPORATED
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Los Angeles, California 90017
(Counsel for Petitioner
Dames & Moore)

STANLEY C. FICKLE, Esq.
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(Of Counsel for Petitioner
Dames & Moore)

by hand delivery to:

Rex Lee
Solicitor General
Department of Justice
Washington, D. C. 20536



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June 10, 1981

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY
OF THE UNITED STATES OF AMERICA, and THE UNITED
STATES OF AMERICA,

Respondents.

MEMORANDUM IN RESPONSE TO MOTION OF
UNITED STATES TO EXPEDITE
BRIEFING SCHEDULE

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DAMES & MOORE, a partnership,

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STATES OF AMERICA,

Respondents.

MEMORANDUM IN RESPONSE TO MOTION OF
UNITED STATES TO EXPEDITE
BRIEFING SCHEDULE

Petitioner Dames & Moore files this memorandum in reply to the Government's motion for expedited consideration of the petition for writ of certiorari and expedited briefing and oral argument if the petition is granted.

Petitioner joins in the request for expedited consideration of its petition and does not oppose an expedited briefing schedule if the Court grants review. Petitioner, however, does oppose the Government's suggested

1981. This schedule is unreasonable in light of the significant constitutional issues presented that deserve the deliberate and detailed attention of both the litigants and the Court. For the same reason, we strongly oppose the Government's suggestion that this case be decided summarily.

If the Court grants certiorari, we suggest that the Court set as a schedule for simultaneous briefing and argument the following:

June 26, 1981 -- Opening Briefs by each party must be filed and served by hand on the opposing party.

June 30, 1981 -- Reply briefs for each party must be filed and served by hand on the opposing party.

July 2, 1981 -- Oral argument.

Respectfully submitted,

C. Stephen Howard /mm
C. STEPHEN HOWARD,
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Of Counsel:

Stanley C. Fickle

CERTIFICATE OF SERVICE

I, Eldon V. C. Greenberg, a member of the Bar of this Court, declare as follows:

On June 10, 1981, I served the foregoing Memorandum in Response to Motion of United States to Expedite Briefing Schedule on the parties in this action by causing three true copies thereof to be personally delivered to the offices of:

Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

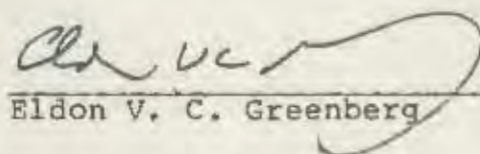
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 10, 1981, at Washington, D.C.


Eldon V. C. Greenberg

RECEIVED

JUN 10 1981

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-2078

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

DAMES & MOORE, A PARTNERSHIP, PETITIONER

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY
OF THE UNITED STATES OF AMERICA, AND THE
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-2078

DAMES & MOORE, A PARTNERSHIP, PETITIONER

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY
OF THE UNITED STATES OF AMERICA, AND THE
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

The Solicitor General, on behalf of the United States and the Secretary of the Treasury, urges the Court to grant the petition for a writ of certiorari before judgment to the United States Court of Appeals for the Ninth Circuit in this case.

The district court's decision upholds the authority of the President to revoke licenses for attachments of assets in which Iran has an interest, to order the transfer of these assets in compliance with the terms of the Agreement with Iran, and to suspend claims against Iran that may be presented to the Iran-

conflict among the circuits on the question presented in the petition, we request the court to review these questions under the extraordinary procedure of certiorari before judgment because of the absence of binding precedent in other circuits -- particularly the Second Circuit -- that similarly establishes the authority of the President to require the transfer of Iranian assets held by domestic banking institutions in those circuits by the July 19, 1981, deadline provided in the Agreement with Iran. A decision by this Court prior to July 19 will furnish controlling precedent for the orderly disposition of the more than 400 cases pending in the lower federal courts in the Second Circuit and elsewhere that involve claims against the Government of Iran and its instrumentalities and controlled entities.

1.a. On December 19, 1979, petitioner 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, and a number of Iranian banks that, petitioner asserts (Pet. 5), had been nationalized by the Government of Iran. Dames & Moore v. Atomic Energy Organization of Iran, et al., No. 79-04918 LEW (Px) (C.D. Cal.). Petitioner alleged that it was a party to a written contract with the Atomic Energy Organization of Iran (AEOI), under which it was to conduct certain site studies for a proposed nuclear power plant in Iran.

1. / The contract was terminated by AEOI on June 30, 1979, for

it was owed \$3,436,694.30 for services performed under the contract prior to the date of termination.

The contract with AEOI provided that if any dispute arising thereunder could not be resolved by agreement between the parties, the dispute would be submitted to conciliation 2 / and, if neither party was satisfied with the results of conciliation, "the matter shall be decided finally by resort to the courts of Iran" (Pet. 7 n.2). In its complaint in the action against the Iranian defendants, petitioner alleged that it had sought a meeting with AEOI for purposes of final settlement of all matters relating to the contract but that AEOI "has continually postponed said meeting and obviously does not intend that it take place" (Complaint, ¶27).

b. In its suit against the Iranian defendants, petitioner sought to recover the \$3,436,694.30 that was allegedly owing, plus interest, on breach of contract and related theories. The district court issued orders of attachments directed against property of the defendants, and property of certain bank defendants was thereby attached to secure any judgment that might be entered against them. 3 / On January 27, 1981, petitioner moved for summary judgment against AEOI and the Government of Iran (but not the Iranian banks). The motion was accompanied by affidavits attesting to the amount owing under the contract and with a request pursuant to Fed. R. Civ. P. 37(b)(2) to prohibit AEOI

and the Government of Iran from introducing any evidence in opposition to petitioner's motion for summary judgment as a sanction for AEOI's failure to comply with petitioner's discovery requests.

On February 18, 1981, the district court granted petitioner's motion for summary judgment against AEOI and the Government of Iran for the amount claimed under the contract, plus interest. AEOI and the Government of Iran filed a notice of appeal from this judgment on March 20, 1981. Petitioner attempted to execute on this judgment by obtaining writs of garnishment and execution in state court in the State of Washington, and a sheriff's sale of Iranian property was noticed in Washington to satisfy the judgment (Pet. 5-6; Pet. App. 15-18). 4 / However, by order of May 28, 1981, as amended by order of June 8, the district court stayed execution of the judgment pending the appeal of that judgment by AEOI and the Government of Iran (Pet. App. 106-107). On May 28, 1981, the district court also ordered that all pre-judgment attachments obtained in the suit against the Iranian defendants be vacated and that further proceedings against the bank defendants be stayed (*id.* at 107).

2. On April 28, 1981, petitioner filed the instant suit for declaratory and injunctive relief against the United States and the Secretary of the Treasury, seeking to prevent enforcement of

regulations generally revoke licenses for attachments of Iranian property, prevent the acquisition of any interest in such property and order the transfer of the property as required by the Agreement and Executive Orders, and suspend claims that may be presented to the Iran-United States Claims Tribunal (Executive Orders 12277-12281, 12294 (Pet. App. 36-54); 31 C.F.R. 535.201 (1980); 31 C.F.R. 535.213 et seq., as amended (Pet. App. 55-86). Petitioner contended that these Executive Orders and regulations are unconstitutional to the extent that they affect its final judgment against the Government of Iran and AEOL, petitioner's execution on that judgment in the State of Washington, petitioner's pre-judgment attachments of assets of the Iranian bank defendants, and petitioner's ability to continue to litigate against the bank defendants, against whom judgment had not been entered (Pet. App. 7-11).

By order dated May 28, 1981, the district court denied petitioner's motion for a preliminary injunction and dismissed petitioner's complaint for failure to state a claim upon which relief could be granted (Pet. App. 106-107). By order dated June 8, 1981, the district court stated that its orders denying a preliminary injunction and dismissing the complaint were based on the arguments presented by the government in its motion to dismiss and its memorandum in support of that motion (Pet. App. 161). The government's motion to dismiss and the memorandum in support thereof, relied upon by the district court, are reproduced at Pet. App. 88-105.

On June 3, 1981, petitioner filed a notice of appeal from the order denying a preliminary injunction and dismissing the complaint (Pet. App. 163-164), and the appeal has been docketed in the court of appeals (id. at 162). On June 8, 1981, the

district court entered an injunction pending appeal preventing the federal government from requiring the transfer of Iranian property that is subject to any writ of attachment, garnish-ment, judgment, levy or lien issued by any court in favor of petitioner (Pet. App. 167-168). Petitioner now seeks certiorari before judgment to review the decision of the district court.

3. The decision of the district court in this case, which is based on the government's arguments in support of its motion to dismiss, is plainly correct. It is also consistent with the decisions of the First and District of Columbia Circuits, 5 / the only courts of appeals that have addressed the President's authority to revoke licenses for post-blocking order attachments of Iranian assets, to order the transfer of Iranian assets, and to provide for suspension of claims that may be referred to the Iran-United States Claims Tribunal. See Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (1st Cir. May 22, 1981); American Int'l Group, Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir. May 22, 1981) (opinion filed June 5, 1981). 6 / Decisions of the district courts -- including two others in the Ninth Circuit -- also have unanimously sustained the authority of the President to revoke licenses for post-blocking order attachments and to order the transfer of property that had been subject to such attachments. See Security Pacific National Bank, et al. v. Government and State of Iran, No. CV 79-

4661-RJK (C.D. Cal. April 30, 1981). 7 / Blount Brothers Corp. v. Government of Iran, Civ. Action No. C79-14424 (W.D. Wash. May 7, 1981); Unidyne Corp. v. Islamic Republic of Iran, No. 80-1029-A (E.D. Va. Mar. 30, 1981). 8 / And, finally, the Ninth Circuit has denied a stay pending appeal in the Blount Brothers case of an order vacating an attachment, thereby allowing that attachment to lapse. 9 /

Ordinarily, in view of these consistent and plainly correct rulings of the lower courts sustaining the President's authority, 10 / we would not acquiesce in certiorari (particularly certiorari before judgment) in a case raising these same issues. The government sought to sustain the President's authority in the lower courts, as has been done thus far, and

7 / An appeal has been taken by the claimant in one of these four consolidated cases, and the government has moved to intervene in the court of appeals and for summary affirmance.

8 / Copies of these district court opinions were furnished to the Court by petitioner in Electronic Data Systems, Iran v. The Social Security Organization of Iran, No. 80-2035, cert. denied (June 8, 1981).

9 / The Ninth Circuit cited the "broad executive powers" conferred by the International Economic Emergency Powers Act, 50 U.S.C. (Supp. III) 1701 et seq. The district court order vacating the attachment in Blount Brothers became effective on June 6, 1981, when the claimant did not seek further review in this Court.

10 / In its opinion of June 7, 1981, the district court in Electronic Data Systems, Iran v. The Social Security Organization of Iran, et al., No. CA3-79-218-F (N.D. Tex.), concluded that the President does not have authority to suspend claims that may be referred to arbitration. The district court conceded that there was "ample precedent" for the Executive to settle such claims when United States courts recognized a broad doctrine of immunity of foreign sovereigns from suit (op. 13), but concluded essentially that this power had been implicitly divested by passage of the Foreign Sovereign Immunities Act (op. 13-14, 20-24). That conclusion is in error. See note 14, infra. Moreover, in EDS, the claim had been reduced to judgment before the United States entered into the Agreement with Iran, and the district court relied in part on the existence of that judgment (op. 24).

thereby, it was hoped, to eliminate the necessity for review by this Court except by way of denial of a petition for certiorari or denial of applications for stays of orders vacating attachments. However, at the present time, there has still been no decision on these questions by the Court of Appeals for the Second Circuit. The absence of controlling precedent in that circuit is particularly significant, because there are more than 150 cases involving claims against Iran pending in the Southern District of New York, and the largest portion of the financial assets held by domestic banking institutions that must be transferred by July 19 are in that circuit. On June 5, 1981, following promulgation of the latest Treasury regulations, the Department of Justice has requested all district courts -- including the Southern District of New York -- where Iranian asset cases are pending that these courts vacate orders of attachment prior to June 19, 1981. That date is the date on which the Department of the Treasury indicated that it would seek civil and criminal sanctions against banks that did not transfer financial assets to the Federal Reserve Bank of New York as required by the regulations.¹¹ / Similarly, on June 9, 1981, the government filed a motion in the Court of Appeals for the Second Circuit requesting that court to vacate attachments in the 96 consolidated cases pending there without waiting for further proceedings by the district court on remand. See New England Merchants National Bank v. Iran Power Generation & Transmission Co., Nos. 790, 1049-1144, 1145-1224, 1225-1227 (2d Cir. April 9,

¹¹ / See the government's Supplemental Memorandum, filed June 5, 1981, in Electronic Data Systems, Iran v. The Social Security Organization of Iran, supra.

1981), slip op. 2436 (retaining jurisdiction of these cases pending remand for further proceedings).12 /

Principles of sound judicial administration also weigh strongly in favor of certiorari before judgment here. There are more than 400 cases involving claims against Iran pending in district courts around the country. Review by this Court, which alone can furnish precedent that will control in all district courts, will allow for the orderly disposition of these cases and remove any remaining uncertainty about the validity of Executive orders and regulations implementing the Agreement with Iran.

For these reasons, the instant case plainly is one of "imperative public importance" requiring "immediate settlement in this Court" by means of certiorari before judgment. S. Ct. Rule 18. If the Court grants certiorari in this case, the Department of the Treasury will not seek to impose criminal and civil sanctions on persons who do not transfer assets to the Federal

12 / Despite these most recent efforts to obtain a prompt decision from the courts in the Southern District of New York and the Second Circuit, we cannot be confident that those courts will reach a decision within the time required for the timely transfer of bank-held assets to the Federal Reserve Bank for subsequent transfer pursuant to the Agreement with Iran. Moreover, although we believe that the decisions of the First and District of Columbia Circuits are compelling precedent, if the Second Circuit or Southern District should nevertheless conclude that the President was without authority in some respects to enter into and implement the Agreement with Iran, the government would intend to seek immediate review in this Court in order that bank-held assets would be transferred by July 19. Because the Southern District and the Second Circuit have not yet ruled

Reserve Bank by the June 19 deadline set forth in the June 4 revisions of the Treasury regulations (Pet. App. 152).

4. If the Court concludes that the petition for a writ of certiorari before judgment should be granted, the Court may wish to consider summary affirmance of the district court's order on the basis of the thorough opinions of the Courts of Appeals for the First and District of Columbia Circuits in Chas. T. Main International, Inc. v. Khuzestan Water & Power Authority, et al., and American International Group v. Islamic Republic of Iran, supra. For the Court's convenience, we are appending copies of those opinions to this Memorandum. We are also appending a copy of the government's brief in the latter case, which fully sets out the arguments in favor of the Presidential action challenged here.¹³ / Although the questions presented are indisputably of major public importance because of the number of claimants and cases affected, and plainly require immediate resolution, we believe that these questions are not particularly difficult and that the attached materials furnish a fully adequate basis on which to decide them. See S. Ct. Rule 23.1.

Petitioner obtained attachments of assets of the Iranian bank defendants after November 14, 1979, when President Carter issued Executive Order 12170 (44 Fed. Reg. 65729) freezing Iranian assets in this country. After issuance of that Executive Order, pre-judgment attachments of Iranian assets could only be obtained by means of a license obtained from the Treasury. 31

respect to Iranian property, including pre-judgment attachments (31 C.F.R. 535.418, 535.504(a) (1980)), but entry of a final judgment was expressly barred by the regulations (31 C.F.R. 535.504(b)(1) (1980)). However, such orders and licenses were explicitly made revocable at any time (31 C.F.R. 535.805 (1980)). Thus, petitioner was on notice when it obtained its pre-judgment attachments that the license for such attachments could be revoked at any time. See also Orvis v. Brownell, 345 U.S. 183, 187 (1953). Thus, no unfairness to petitioner resulted when the President revoked these licenses and the district court ordered the attachments vacated. As explained in the opinions of the First and District of Columbia Circuits, the President's actions revoking the license for attachments and rendering those attachments of no legal effect were plainly authorized by the International Emergency Economic Powers Act (IEEPA). No lower court decision has taken a contrary position.

The First and District of Columbia Circuit opinions also amply sustain the power of the President to settle claims against Iran by providing for arbitration of those claims, particularly in the context of the grave international crisis resulting from the seizure of American hostages. See also 22 U.S.C. 1732.14 / Under Executive Order 12294 (Pet. App. 52), petitioner's claim against Iran is only suspended pending its presentation to the Claims Tribunal; its claim need not be dismissed outright. If that Tribunal determines that it does not have jurisdiction of

petitioner's claim, the claim may be reactivated in district court (Executive Order 12294, Section 3). If the Tribunal determines that petitioner should recover on its claim, that determination operates as a discharge of Iran's obligation only upon full payment of the award (ibid., Section 4). Thus, petitioner's claim in district court would be preserved if the award were not paid.

Hence, the President has provided a reasonable and fully adequate means for resolving claims against Iran and, consistent with the purposes of IEEPA, has assured the presence of funds to pay arbitration awards out of the Iranian assets that were frozen on November 14, 1979.

It is therefore respectfully submitted that the petition for a writ of certiorari before judgment should be granted, and the judgment of the district court should be affirmed.

WADE H. McCREE, JR.
Solicitor General

JUNE 1981

DAMES & MOORE

vii.

REGAN

(Iranian/U.S. Agreement)

Ret. for Cent.
before judg. is
is granted.

[illegible]

80-2078 Moore v Regan (Special Conference) 6/11/81

CJ - Would expedite, grant Cert,
& set for argument Wed June ~~23~~ 24.
Allow Iran to intervene.

WJB - Agree with CJ. allow intervention

PS - Deny cert. We are being stampeded.
(No reason to expedite before judgment)

B.R.W. - ~~to~~ Two major issues:

1. Attachment (weakest of two)
2. Disposition of Claims

Agree with CJ & WJB

→ H.A.B. - Agree with CJ, WJB.

[T.M. - Agree

L.F.P. - Agree. We have institutional obligation
to settle these issues.

~~W.H.R.~~

W.H.R. - Disagree on every ~~one~~ Q.

J.P.S. - Agree - Also would allow ^{Iranian} Banks to
intervene.

Schedule: Same as SG's suggests, except
oral argument set for 24th at 10 A.M.

Announced, 19...

[illegible]

ORDER LIST

THURSDAY, JUNE 11, 1981

CERTIORARI GRANTED

80-2079 DAMES & MOORE v. DONALD T. REGAN, SECRETARY OF THE
TREASURY, ET AL.

The motion of Sperry Corporation, et al. for leave to file a brief as amici curiae is granted. The motion of Bank Markazi Iran for leave to intervene is granted. The motion of the Islamic Republic of Iran and the Atomic Energy Organization of the Government of Iran for leave to intervene as respondents is granted. The motion of the Solicitor General to expedite consideration of the petition for a writ of certiorari before judgment is granted. The petition for a writ of certiorari before judgment is granted. The request of the Solicitor General to expedite the schedule for briefing and oral argument is granted. The parties shall exchange and file opening briefs by 3:00 p.m. on June 19, 1981 and any reply briefs shall be exchanged and filed by 3:00 p.m. on June 23, 1981. Oral argument is set for June 24, 1981 at 10:00 a.m.

Justice Rehnquist dissents.

DismissSUPPLEMENTAL MEMORANDUM^{1/}

June 11, 1981 Conference
Supplemental List

No. 80-2078

DAMES & MOORE

v.

REGAN, Sec. of Treasury,
et al.

1. Motion by the Bank Markazi
Iran to Intervene

2. Motion by Sperry Corp., et al.
to file an amici brief

3. Petr's response to SG's motion
to Expedite

SUMMARY: The Bank Markazi, Iran seeks leave to intervene as a resp. Sperry Corp and Sperry World Trade, Inc. seek leave to file an amici brief. Petr concurs in the SG's request for expedition, but proposes a different schedule.

CONTENTIONS: (1) Bank Markazi Iran is the central bank of Iran and holds and regulates the monetary reserves and currency of Iran. At the time of the blocking order, Bank Markazi held over \$3 billion in its New York branch and various commercial banks throughout the United States. Bank Markazi argues that it is a real party in interest

1/A preliminary memorandum was prepared and circulated on June 10, 1981.

because most of the assets to be transferred on July 19 are its assets. Bank Markazi also claims standing to intervene because it was a party to a companion case in the DC. The DC considered the companion case at the same time as it considered the case that is now before the Court. Therefore, Bank Markazi's failure to formally move to intervene in this action before the DC should not be determinative.

(2) Sperry seeks leave to file an amici brief because it has also filed suit against Iran and obtained a prejudgment writ of attachment against Iranian assets in this country. Petr consents to the filing of the amici brief.

(3) Petr joins in the request for expedition. However, petr suggests that the briefing schedule proposed by the SG "is unreasonable in light of the significant constitutional issues presented." Petr suggests the following schedule:

June 26 - opening briefs filed and exchanged

June 30 - reply briefs filed and exchanged

July 2 - oral argument

DISCUSSION: (1) Intervention in this Court is an extraordinary remedy. Intervention will normally be granted "only for the most imperative of reasons and where one's interests may otherwise be lost." Stern & Gressman, Supreme Court Practice, 5th Ed. page 436.

Although Bank Markazi is clearly interested in this litigation, its interests are not directly at stake. If the Islamic Republic of Iran is allowed to intervene (see preliminary memorandum), Iran should adequately present and protect its bank's interests. Such

arguments that Bank Markazi wishes to raise that differ from the arguments advanced by Iran may be presented in an amicus brief.

(2) Sperry's motion to file an amici brief should be granted. The Court is usually liberal in accepting timely amici briefs.

(3) The only difference between the schedule proposed by the petr and the schedule proposed by the SG is that petr advances the due date for the initial briefs from June 19 to June 26. The time between opening briefs and reply briefs (4 days) is the same as is the time between reply briefs and argument (2 days).

Although the issues are important, petr should be sufficiently familiar with the issues to file a meaningful brief by June 19. The major advantage of the SG's schedule is that it will allow for argument and possibly resolution before the July 4 weekend.

6/11/81

Schickele

PJC

June 11, 1981 Conference
Supplemental List

No. 80-2078

DAMES & MOORE

v.

REGAN, Sec. of the Treasury,
et al.

1. Petition for Certiorari
2. Motion of the SG to Expedite
3. Motion of Islamic Republic
of Iran, et al. to Intervene

SUMMARY: Unlike the Electronic Data Systems Corp., Inc. petn (80-2035) considered last week, this petn squarely raises the issue of whether the President may vacate attachments on Iranian funds and transfer said funds to the Central Bank of Algeria on July 19. The SG, while defending the President's authority, does not oppose the petn and requests that the petn be expedited in order that an opinion may issue before the end of the Term. The SG has proposed an expedited schedule which the Court may wish to adopt.

In addition, Iran and the Atomic Energy Organization of the government of Iran seek leave to intervene as resps.

*Grant petn & motions to intervene. Adopt
SG's briefing schedule & PRS*

BACKGROUND:

On Nov. 4, 1979, the

American Embassy in Tehran was seized and its personnel were held as hostages. On Nov. 15, 1979, President Carter, acting under the International Economic Emergency Powers Act (IEEPA), 50 U.S.C. §§1701-1706, issued regulations that, inter alia, blocked the removal or transfer of Iranian assets in the United States except according to the terms of licenses accompanying the blocking order or later issued pursuant to it. See 31 C.F.R. Part 535 (1980) (this order is hereafter referred to as "the blocking order"). Of particular importance is 31 C.F.R. §535.203(e) (1980) which states:

Unless licensed or authorized pursuant to this part any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since the effective date there existed an interest in Iran.

In Dec. 1979, petr filed a suit in the DC (Central District of California) against Iranian government agencies to collect approximately \$3,500,000 in unpaid invoices. On Dec. 20, 1979, Jan. 4, 1980, Feb. 4, 1980 and May 12, 1980, the DC issued prejudgment writs of attachments against Iranian assets. On Feb. 18, 1981, the DC entered a final judgment for \$3,788,930.79 plus interest in favor of petr. In March two superior courts in the State of Washington issued writs of execution and garnishment in enforcement of the DC's judgment. Apparently a sheriff's execution sale of certain Iranian property in Washington has been noticed.

Meanwhile, on Jan. 21, 1981, President Carter issued a series of executive order implementing the Algerian Declarations.^{1/} These

^{1/}These declarations signed by Warren Christopher on Jan. 19, 1981, set forth the agreements between the United States, Algeria and Iran which led to the release of the hostages. The declarations are set forth as Exhibit D at pages 21 through 35 of the appendix to the petn.

Executive Orders (Nos. 12,279, 12,280, 12,281) nullified attachments on Iranian property in the United States. They also required persons holding such assets to transfer the assets to the Federal Reserve Bank of New York and provided that persons who transferred the assets would not be held liable for such actions.

On Feb. 24, 1981, President Reagan issued Executive Order 12,294. This Order ratified the Executive Orders issued by President Carter and "suspended" all claims against Iranian assets. The Order and the regulations promulgated by the Treasury Department implementing the order require that all claims be presented to the Iran-United States Claims Tribunal provided for in the Algerian Declarations. In furtherance of the Algerian Declarations, the United States apparently intends to transfer some \$4 billion of Iranian assets to the Central Bank of Algeria on or before July 19, 1981.

Petr felt that the United States' acts were interfering with its prosecution of petr's claims and therefore filed a second action in the DC. Petr requested: (1) a preliminary and permanent injunction enjoining the government from interfering with petr's actions against Iran; and (2) a declaratory judgment that the Algerian Declarations and the Executive Orders and regulations purporting to implement the Declarations, to the extent that they authorized interference with petr's actions, were beyond the constitutional and statutory powers of the President and therefore void.

Petr moved for a preliminary injunction and the government sought dismissal for failure to state a claim upon which relief could be granted. On May 28, the DC denied the motion for a pre-

liminary injunction and granted the government's motion to dismiss. Petr filed a notice of appeal to the CA 9 on June 3 and on June 8, the DC granted petr a stay prohibiting the government from transferring, pending appeal, any Iranian assets which are subject to a writ of attachment, garnishment, judgment or lien in favor of petr.

On June 10, petr filed the petn for prejudgment writ of cert at bar.

Both the CA 1 and the CADC have considered the President's authority to suspend claims against Iranian assets and to transfer those assets out of the country and both courts held that the President has such authority. Chas. T. Main International, Inc. v. Khuzestan Water and Power Authority, ___ F.2d ___, (CA 1, May 22, 1981) and American International Group, Inc. v. Islamic Republic of Iran, ___ F.2d ___ (CADC, June 5, 1981). Both courts issued lengthy opinions explaining their judgments. However, the claimants in those actions have yet to seek review in this Court.

In another case in the DC for the Central District of California, Security Pacific National Bank v. Government and State of Iran, No. Cv. 79-4661-RJK (CD Cal., Apr. 30, 1981), Judge Kelleher apparently held that the IEEPA authorized the vacation of attachments and the dismissal of pending claims.

Perhaps the most important action is pending in the CA 2. New England Merchants National Bank v. Iran Power Generation and Transmission Co., Nos. 1049, et al., consists of some 96 consolidated cases in which the government seeks to have attachments vacated. The CA 2 has yet to render its decision.

Finally, as the Court knows, the DC for the DC of Texas has enjoined the government from transferring Iranian assets that are subject to writs of attachments issued before the blocking order of Nov. 15, 1979. The case is presently before the CA 5 and the Supreme Court has denied a petn for prejudgment review. Electronic Data Systems Corp. v. Social Security Organization of Iran, No. 80-2035, cert denied June 8, 1981. In the case at bar the initial lawsuit was filed, and the writs of attachment issued, after the blocking order.

PETR'S CONTENTIONS: Petr recognizes that a prejudgment writ will only issue "upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Petr argues that the case presents novel and fundamental questions of law going to the core of the separation of powers set forth in the Constitution. Furthermore, time is truly of the essence because: (a) by June 19, all Iranian assets must be transferred to the Federal Reserve Bank; and (b) by July 19, the government will transfer these assets out of the country.

Basically, petr argues that the President does not have the authority either pursuant to statute or pursuant to his inherent power over foreign affairs to compromise the legal rights and property interests of private citizens, particularly where as here the citizens have pursued judicial proceedings authorized by Congress. This requires a determination of (a) what the Executive Orders and regulations really do; (b) the authority conferred on the President by IEEPA, the Foreign Sovereign Immunities Act, and possibly the

Hostage Act of 1868, 22 U.S.C. §1732 (1976); (c) the President's inherent power to control foreign affairs; and (d) the nature of petr's interest affected by the Executive Orders and regulations.

THE GOVERNMENT'S MOTION TO EXPEDITE: In order that the government can meet its obligation to transfer the assets by July 19, the SG requests that the Court expedite its consideration of the petn. The SG acquiesces in the grant of the writ and suggests that, if the Court does not summarily affirm, the Court adopt an emergency briefing schedule. The SG suggests the following schedule:

June 19 - 3:00 p.m. - Opening briefs by each party
filed and served by hand on
opposing parties

June 23 - 3:00 p.m. - Reply briefs by each party
filed and served by hand on
opposing parties

June 25 - Oral argument

To facilitate such a schedule, the SG recommends (a) that the Court immediately announce its decision on scheduling; and (b) that the requirement for printing the briefs and the joint appendix be temporarily lifted and the appendix and briefs be accepted in typewritten form.

The SG explains that in order to comply with the July 19 deadline, the government will need at least seven days after this Court's opinion (assuming it is favorable to the government) to settle the numerous pending cases and arrange for the transfer.

IRAN'S MOTION TO INTERVENE: The Islamic Republic of Iran and the Atomic Energy Organization of Iran (AEOI) seek leave to intervene as resps because: (1) the assets in issue belong to Iran; (2) petr's

underlying judgment is against AEOI; and (3) Iran's interests differ from the government's. Iran alleges that the judgment against AEOI was entered unlawfully after the Algerian Declarations were agreed to and after President Carter issued Executive Orders implementing the Declarations. Iran has an immediate ownership interest in the assets and will be the beneficiary of the transfer of the assets. The government, on the other hand, merely wishes to make a good faith effort to comply with the Declarations. Iran suggests that its presence as a resp is essential to insure that the Court is presented with a complete picture of the Iranian assets controversy.

Iran and AEOI have tendered their brief in acquiescence to the petn for cert. The government does not oppose the motion.

DISCUSSION: 1. Merits. This petn presents truly novel issues. The Executive Orders and the regulations in issue require that private citizens release their claims to certain Iranian assets in this country and forego judicial remedies at least temporarily in favor of their resolution by an international tribunal. Even assuming that the President clearly had the authority to promulgate these changes, their scope mandates an opinion from this Court. Furthermore, however clear the outcome, the issues are fairly complex (the CADC's opinion covers 46 pages and the CA 1's opinion covers 25 legal-size pages). This Court's interpretation of (a) the Executive Orders and the regulations; (b) two or three statutes authorizing the President to decide particular issues of foreign affairs; (c) the scope of the President's inherent power over foreign affairs; and (d) the nature of petr's interest in the Iranian assets will control not only the 400 Iranian assets cases but will also establish the guidelines

for numerous future cases. As the country becomes increasingly involved in international business and affairs, the federal courts can expect to be called upon to resolve conflicts between citizens, the government and foreign countries. Petr compares the importance of this case to Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1972). While this may be an overstatement, the case does appear to deserve plenary consideration.

2. Expedition. The July 19 deadline for the transfer of assets presents a very real emergency. The loss of the funds will irreparably harm petr and petr is powerless to avoid that harm. The government must either transfer the funds or face an international crisis. Theoretically the government and Iran could agree to extend the deadline but considering the relationship between the two countries, this is merely wishful thinking. Now that the controversy is squarely before the Court, the Court has a responsibility to resolve it before July 19.

As the novelty, importance and complexity of the issues presented appear to rule out summary affirmance or reversal, the adoption of the SG's proposed schedule appears reasonable. The complexity of the issues suggests that a further reduction in briefing time would not be productive. However, as all parties are familiar with the issues and have the benefit of the opinions by the CA 1 and the CADDC, they should be able to prepare meaningful briefs within the time allotted.

The Court may wish to tentatively schedule argument for July 25. This will allow preparation for argument and should the Court subsequently determine that argument is not warranted, the argument date can always be vacated.

3. Intervention. Although intervention in this Court is a remedy seldom invoked and rarely granted (see Stern & Gressman, Supreme Court Practice, 5th Ed., pages 433-438), the Court may wish to grant Iran and AEOI leave to intervene. The intervenors are parties to two parallel cases below. However, petr chose to seek cert on the action against the government. Iran and AEOI's interests in the action differ fundamentally from the government's. The government may wish to adhere to the Algerian Declarations but it has not real interest in the assets. Iran has an immediate ownership interest in the funds, regardless of the legality of the Declarations. Furthermore, if Iran and AEOI are allowed to intervene, as far as American law is concerned, they will be bound by the Court's decision.

Should the Court determine not to grant the motion to intervene, Iran and AEOI should be allowed to file an amici brief.

CONCLUSION: The novelty, importance and complexity of the issues presented recommend that the Court grant the writ and give the case plenary consideration. The July 19 transfer date recommends that the Court adopt the abbreviated briefing schedule proposed by the SG. Iran's and AEOI's unique interests in the litigation and the advantages inherent in binding them to the Court's decision suggest that they be granted leave to intervene as resps.

To facilitate consideration, this office in conjunction with the Clerk's office has presumed to prepare alternate proposed orders which are attached to the memorandum.

6/10/81

Schickele

PJC

PROPOSED ORDER IN:

Dames & Moore v. Regan, Secretary of the Treasury, et al.,
No. 80-1078

The Motion of Islamic Republic of Iran and the Atomic Energy Organization of Iran for leave to intervene as a party respondent is denied. (or granted) The petition for a writ of certiorari is granted. The motion of the Solicitor General for an expedited schedule is granted. The parties shall exchange and file opening briefs by 3:00 p.m. on June 19, 1981 and any reply briefs shall be exchanged and filed by 3:00 p.m. on June 23, 1981. Oral argument is set for June 25, 1981 at 10:00 a.m.

OR

The motion of Islamic Republic of Iran and the Atomic Energy Organization of Iran for leave to intervene as a party respondent is denied. (or granted) The petition for a writ of certiorari is granted. The motion of the Solicitor General for an expedited schedule is granted. The parties shall exchange and file opening briefs by 3:00 p.m. on June 19, 1981 and any reply briefs shall be exchanged and filed by 3:00 p.m. on June 23, 1981.

JUN 18 PAGE 7

IN THE SUPREME COURT
FOR THE UNITED STATES

Office - Supreme Court, U.S.
FILED
JUN 11 1981
ALEXANDER L. STEVENS, CLERK

JAMES E. PATTERSON,	:	
	:	
Appellant-Petitioner,	:	
	:	
v.	:	NO. 80-6657
HANS J. SCHACHT, OTIS J.	:	
ABERNATHY, JAMES LEWIS,	:	
RALPH JOHNSON, NEIL	:	
GUNTER, WESLEY BOYD HINCHEY,	:	
KENNETH GORDON, THEODORE	:	
FRANKEL, and THE UNITED STATES	:	
DISTRICT COURT FOR THE	:	
NORTHERN DISTRICT OF GEORGIA,	:	
	:	
Appellees-Respondents,	:	

MOTION TO DISMISS APPEAL

William E. Hoffmann, Jr.
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Attorney for Appellee-Respondent
Theodore G. Frankel

IN THE SUPREME COURT
FOR THE UNITED STATES

JAMES E. PATTERSON,	:	
	:	
Appellant-Petitioner,	:	
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KENNETH GORDON, THEODORE	:	
FRANKEL, and THE UNITED STATES	:	
DISTRICT COURT FOR THE	:	
NORTHERN DISTRICT OF GEORGIA,	:	
	:	
Appellees-Respondents,	:	

MOTION TO DISMISS APPEAL

Appellee-Respondent THEODORE G. FRANKEL (hereinafter "Frankel") respectfully moves this Court to Dismiss the Appeal of Appellant-Respondent JAMES E. PATTERSON (hereinafter "Patterson"), on the ground that the Appeal is not made in conformity with the Rules of this Court and on the further ground that the Appeal is frivolous and incomprehensible.

Rule 12 requires an Appeal to be docketed not more than 90 days after the entry of the judgment appealed from. The judgment appealed from in this case was entered on December 29, 1980 and the case was not docketed in this Court until April 9, 1981, a total of 101 days after the entry of judgment. The Appeal, therefore, should be dismissed as not timely filed.

If this Appeal is treated as a Writ of Certiorari, it is untimely under Rule 20. Rule 20 requires that the Writ be

applied for within 60 days of the judgment sought to be reviewed and this time limit may not be extended for more than 30 days.

Rule 15 has to do with the form of the Jurisdictional Statement filed with the Court. Section .1(a) requires that all questions be presented in a short and concise manner without unnecessary detail. Patterson's jurisdictional statement is long, rambling and at times unintelligible. Section .1(b) requires a list of parties within the Jurisdictional Statement if the parties are not listed in the caption. Patterson is inconsistent with the list of parties in his various captions; it is not clear who the parties are. At least one "party" Jeffrey Smith was not a party below. Section .1(e) requires a concise statement of the grounds alleged for jurisdiction. Patterson's alleged grounds for jurisdiction are rambling, unclear and unintelligible.

Since the United States District Court for the Northern District of Georgia is a party, Patterson failed to comply with Rule 28 by failing to serve the Solicitor General, Department of Justice.

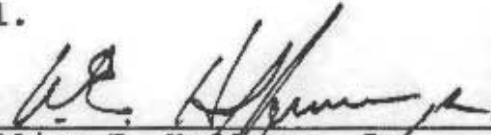
There are numerous, less serious violations of the Rules of this Court.

Aside from violations of the Rules of the Court, Patterson's Appeal is frivolous, incoherent, unintelligible, and not subject to a rational response.

For the foregoing reasons, Frankel respectfully requests this Court to dismiss Patterson's Appeal, and if the

Court should deem Patterson's filing to be a Petition for
Certiorari, that this Court deny the Petition.

This 10th day of June, 1981.



William E. Hoffmann, Jr.
Attorney for Appellee-Respondent
Theodore G. Frankel

OF COUNSEL:

TROTTER, BONDURANT, MILLER
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2200 First National Bank Tower
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CERTIFICATE OF SERVICE

I, William E. Hoffmann, Jr., do hereby certify that I have this day served the within and foregoing pleadings by mailing a copy thereof to counsel of record in an envelope properly stamped and addressed as follows:

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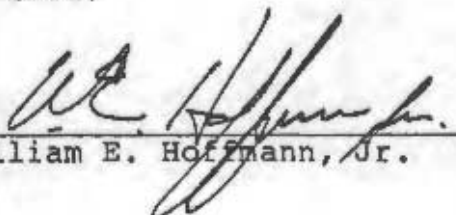
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Solicitor General
Department of Justice
Washington, D. C. 20530

This 10th day of June, 1981.



William E. Hoffmann, Jr.

1/ Bank Melli Iran, Industrial Credit Bank, Industrial and Mining Development Bank of Iran, International Bank of Iran, Agricultural Development Bank of Iran, Bank of Tehran, Agricultural Cooperative Bank of Iran, Bank Bazargani Iran, Bank Bimeh Iran, Bank Iranshahr,

to intervene in the present case, scheduled for argument before this Court on June 24.

Statement

The 26 moving bank defendants were among the 30 Iranian defendants named by petitioner in Dames & Moore v. Atomic Energy Organization of Iran, No. CV-79-04198 LEW (Px), brought in the United States District Court for the Central District of California in 1979. Among the other named defendants in this underlying action was Bank Markazi Iran, whose motion to intervene in the present case has already been granted by this Court. Like Bank Markazi Iran, the moving bank defendants were among the parties whose assets were attached pursuant to writs issued by Judge Waters.

In the underlying Dames & Moore action, the moving bank defendants challenged subject matter and personal jurisdiction, as well as the propriety of the writs of attachment issued against their assets. And, following the Algerian Declarations, they argued to Judge Waters the validity and applicability of the Declarations and ensuing executive orders. The present action against Secretary Regan and the United States was commenced by Dames & Moore on April 28, 1981. While the moving bank defendants, like Bank Markazi Iran, were not technically parties in the present action, because of its clear implications for their interests and position, fourteen of the moving bank defendants -- those who had been served with process in the underlying action -- were granted leave by Judge Waters to partici-

Argument

THE MOTION TO INTERVENE SHOULD BE GRANTED

The 26 moving bank defendants were all named as parties defendant in the underlying Dames & Moore litigation and have participated at every stage in the proceedings. Judge Waters ruled that the moving bank defendants were subject to the jurisdiction of the District Court and made their assets subject to attachment. Later, in the related action brought by Dames & Moore against Secretary Regan and the United States, the court vacated the attachments against property of the moving bank defendants and stayed proceedings in the underlying action. The moving bank defendants will be directly affected by this Court's determination of the present action.

Moreover, although the present action is the only Iranian assets litigation now before this Court, the Court's decision will control proceedings in over 100 other suits in which the moving banks or similarly situated Iranian commercial banks were named as defendants and had their assets attached. These include several in which the issues now before the Court have been ruled upon. The moving bank defendants briefed and argued the appeals in the Courts of Appeals for the District of Columbia and Second Circuits, and were heard earlier this month in the Iranian assets proceeding before United States District Judge Kevin T. Duffy in New York.

Markazi Iran in the underlying action and would be equally affected by this Court's determination. Moreover, unlike Bank Markazi Iran and other intervenors, the moving bank defendants actually participated in Dames & Moore's suit against Secretary Regan and the United States, through the filing of their own brief.

Conclusion

We urge the Court to grant this motion to intervene. We are prepared to meet the briefing schedule set by the Court and to present oral argument on June 24.

Respectfully submitted,

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JUN 16 1981

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June 16, 1981

BY HAND

MEMBER DISTRICT OF COLUMBIA BAR

Mr. Alexander L. Stevas
Clerk of the United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: Dames & Moore v. Donald T. Regan, et al.,
No. 80-2078

Dear Mr. Stevas:

In connection with the above-referenced matter, we respectfully lodge copies of the following two opinions: (1) the Opinion filed June 11, 1981 by Judge Duffy of the United States District Court for the Southern District of New York in The Marschalk Company, Inc. v. Iran National Airlines Corp., et al. [79 Civ. 7035 (CBM)]; and (2) the Memorandum Opinion and Order and Judgment filed June 7, 1981 by Judge Porter of the United States District Court for the Northern District of Texas in Electronic Data Systems Corporation, Iran v. The Social Security Organization of the Government of Iran, et al. (No. CA3-79-218-F).

We are providing copies of this letter to counsel of record for the United States and for intervenors the Islamic Republic of Iran and Bank Markazi.

Very truly yours,

TUTTLE & TAYLOR

C. Stephen Howard

By

C. Stephen Howard
Attorneys for Petitioner
Dames & Moore

CSH:cb

Enclosures

lfp/ss 6/16/81

80-2078 Dames & Moore v. Regan and the United States

This brief memo for the file is dictated to record my initial impressions of CADC's opinion in the American International Group and Pfizer cases.

CADC's judgment order, entered May 22, and followed on June 5 with its opinion, (i) vacated all outstanding attachments and prejudgment restrains (the attachments having been obtained pursuant to revocable licenses); (ii) remanded the cases with instructions to stay further proceedings; and (iii) denied the government's request to vacate the award of partial summary judgments.

Following seizure of the hostages, and on November 15, 1979, the President - acting under the International Economic Emergency Powers Act (IEEPA), issued regulations blocking the removal or transfer of Iranian assets except according to the term of licenses. Apparently a general license was issued authorizing judicial proceedings against Iran, with some exceptions.

CADC's opinion (p. 9) contains an excerpt from an affidavit by Secretary Haig that warned, should the courts refuse to free the Iranian assets "the whole structure of the agreements may begin to crumble, and there could be set in motion a series of actions and reactions that would have serious consequences have both for the claimants and for the

foreign policy of the United States". I would like to see Haig's entire statement. I wonder what serious consequences could result, since we now both the hostages and the assets. We made the agreement under the most lawless sort of coercion and blackmail. In the private world, it would be a nullity.

Part II of CADC's opinion involved a request that the cases be remanded to the District Court. It is presently irrelevant.

Part III addresses, and rejects, the argument that the agreement with Iran - not having been approved by the Congress - violated the separation of powers doctrine. If indeed IEEPA can fairly be read as authorizing the President to do what he has done, there would be no violation. The question I would like to have examined carefully by my clerks is whether IEEPA does so authorize the President.

Suppose, to take a hypothetical, that Libya had seized Billy Carter (his beer formula and all), and that in order to free his brother, the President declared an emergency, and agreed to the release of all Libyan assets in the United States - with American claims to be resolved by a three party tribunal composed of a KGB agent, a North Vietnamese commissar and Jane Fonda? If the Act gives a President power as broad as he exercised where 53 hostages were involved, and where an argument can be made that the agreement was not wholly irrational if Congress had

authorized such action, where does this power end? Who has authority to determine whether an emergency did in fact exist? Who has authority to decide whether the ransom - in this case release of \$4 billion of Iranian assets - was fair and reasonable in the circumstances? Putting it differently does the President have an absolute, unreviewable right to do what Carter did?*

Part IV holds that the President had authority to revoke licenses issued that permitted prejudgment restraints (attachments) upon Iranian assets. The President vacated the attachments and - pursuant to §1702(a)(1) of IEEPA - nullified the judgments in those cases. I suppose if IEEPA is valid, revocation of the licenses would be valid also. It is said that the licenses were revocable. I suppose we should check that.

*My hypothetical may not be too good an example. From what one reads in the press, President Carter would have been glad to leave Billy in Libya - indefinitely.

Part V holds that the President also had authority "to suspend the claims of appellees (all American claimants against Iran). The opinion, at this point, is talking primarily about President Reagan's Executive Order 12294 of February 24, 1981. That order stated that "all claims which may be presented to the Claims Tribunal [are] suspended ..."

CADC emphasized that the President did not order litigation suspended or that the power of the courts to consider claims be suspended. Rather, "he acted with respect to the claims only". Therefore, no action was taken to modify or affect the jurisdiction of the courts, only the "substantive rule of law" was modified by the order. p. 24. Putting it differently, CADC said:

"We are persuaded that the difference between modifying federal court jurisdiction and directing the courts to apply a different rule of law on appeal is a meaningful one."
p. 25

The opinion repeatedly emphasized that the order "modified the law" - I suppose by suspending the claims so that the assets could be freed. See pp. 26-27.

In sustaining the President's power to do this, CADC noted that there was "only suspension, not cancellation", and that the President "has provided an alternative forum capable of providing meaningful relief". CADC accordingly "concluded that the President did possess

such inherent power". p. 27. It should be noted here that the court's decision was based on inherent power, and not on IEEPA. In reaching this conclusion, CADC expressed agreement with CA1. See fn. 15, p. 27,28.

Without reading the cases, I have no basis for agreeing or disagreeing with CADC - except a high level of skepticism. This does seem to me to be a rather extraordinary view of presidential power: that a President, after declaring some emergency - not necessarily an IEEPA emergency - may by executive fiat change substantive law. Suppose there were a federal statute that expressly forbade a President from doing what has been done in this case. I would hardly think any President, by virtue of inherent power, could suspend the operation. A first reading of CADC's opinion on this issue leaves me less than enthusiastic. I would like enlightenment from my clerk.

Part VI considers the "taking issue", concludes that it is not ripe, that there has been no taking up to this point, and that there may well be a right to sue in the Court of Claims - probably under the Tucker Act.

I would like for a clerk to develop a memorandum on this issue. Pages 37-42 of CADC's opinion are relevant. The memorandum should state exactly what CA1 and CADC have said with respect to compensation, and should recommend what we should say or hold on this issue. One can predict with a

fair degree of certainty that once the Ayatollah gets the assets out of the United States, there will be substantial shortfalls in the settlement of just debts.

CADC may well be right in concluding that the taking issue is not before the court if we should hold that the President had the power to free the attached assets, return them to Iran, and commit American creditors to present their claims to a stacked tribunal - with no provision in the agreement or any present order (as I understand it) for recovery from the United States of unpaid just claims.

* * *

I add one further question: Is it not true that Congress enacted all of the relevant statutes to protect and preserve the rights of U.S. citizens against foreign governments where assets were subject to the jurisdiction of our courts? If so, do these statutes also authorize a President to use the power granted to endanger - if not nullify - such rights? What does the legislative history reveal?

L.F.P., Jr.

lfp/ss 6/16/81

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p. 25

The opinion repeatedly emphasized that the order "modified the law" - I suppose by suspending the claims so that the assets could be freed. See pp. 26-27.

In sustaining the President's power to do this, CADC noted that there was "only suspension, not cancellation", and that the President "has provided an alternative forum capable of providing meaningful relief". CADC accordingly "concluded that the President did possess

such inherent power". p. 27. It should be noted here that the court's decision was based on inherent power, and not on IEEPA. In reaching this conclusion, CADC expressed agreement with CAL. See fn. 15, p. 27,28.

Without reading the cases, I have no basis for agreeing or disagreeing with CADC - except a high level of skepticism. This does seem to me to be a rather extraordinary view of presidential power: that a President, after declaring some emergency - not necessarily an IEEPA emergency - may by executive fiat change substantive law. Suppose there were a federal statute that expressly forbade a President from doing what has been done in this case. I would hardly think any President, by virtue of inherent power, could suspend the operation. A first reading of CADC's opinion on this issue leaves me less than enthusiastic. I would like enlightenment from my clerk.

Part VI considers the "taking issue", concludes that it is not ripe, that there has been no taking up to this point, and that there may well be a right to sue in the Court of Claims - probably under the Tucker Act.

I would like for a clerk to develop a memorandum on this issue. Pages 37-42 of CADC's opinion are relevant. The memorandum should state exactly what CAL and CADC have said with respect to compensation, and should recommend what we should say or hold on this issue. One can predict with a

fair degree of certainty that once the Ayatollah gets the assets out of the United States, there will be substantial shortfalls in the settlement of just debts.

CADC may well be right in concluding that the taking issue is not before the court if we should hold that the President had the power to free the attached assets, return them to Iran, and commit American creditors to present their claims to a stacked tribunal - with no provision in the agreement or any present order (as I understand it) for recovery from the United States of unpaid just claims.

* * *

I add one further question: Is it not true that Congress enacted all of the relevant statutes to protect and preserve the rights of U.S. citizens against foreign governments where assets were subject to the jurisdiction of our courts? If so, do these statutes also authorize a President to use the power granted to endanger - if not nullify - such rights? What does the legislative history reveal?

L.F.P., Jr.

ss

lfp/ss 6/17/81

80-2078 Iranian Case

At the Conference scheduled for June 18 we have a request from the Second Circuit to receive certification of questions in the above case. This is styled No. 80-2126 Iran National Air Lines v. Marschalk. The papers include a very long list of lawyers and the names of parties whom they represent.

Both Peter Byrne, Sally and I have reviewed this list with some care. We find no company in which there is any stock ownership problem. But United Virginia Bank is listed among the clients of Coubert Bros. as party to a case against Industrial Credit Bank of Iran - I suppose this is one of the cases pending in CA2.

In a talk this afternoon with Bob Buford, general counsel for UVB, I find that there is no problem. UVB, to the extent of \$4,000,000 was in a consortium of bank that lent several hundred million dollars to Iran or some government agency there. UVB was not one of the lead banks, but merely took a relatively small participation in the loan. But UVB has been paid in full, and Bob thinks that only the lead banks retain a pecuniary interest in the case. We discussed the possibility of a claim being made in the event Iran wins, to reinstate the loan - i.e. to return the \$4,000,000 that in fact is owned by UVB. Bob says no such

claim has been made, none is expected and he thinks it is wholly improbable that any such claim can or would be asserted.

In short he saw no reason to notify me of any interest of UVB, and sees no reason why I should not participate.

L.F.P., Jr.

ss

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

DAMES & MOORE, a Partnership, Petitioner,

v.

DONALD T. REGAN, ET AL., Respondents.

On Petition for Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

MOTION TO PARTICIPATE AS AMICUS CURIAE
AT ORAL ARGUMENT AND FOR AN ENLARGEMENT
OF TIME FOR ORAL ARGUMENT

Electronic Data Systems Corporation Iran ("EDS") respectfully moves this Court for leave to present oral argument as amicus curiae^{*} in this case pursuant to Rule 38, subdivisions 3, 4 and 7 of the Rules of this Court, and, for this purpose, for an enlargement by ten minutes of the time set for oral argument.

This Court granted certiorari in the instant case which presents three expansive questions of extraordinary national importance involving some of the most serious

^{*}/ EDS will file a motion for leave to file a brief amicus curiae together with the accompanying brief in this case, pursuant to Rule 36 of this Court, by 3:00 p.m. on June 19, the time established by this Court for the simultaneous filing and exchange of briefs.

EDS is a subsidiary of E.D.S. World Corporation, whose parent is Electronic Data Systems Corporation.

questions as to the allocation of powers among the co-equal branches of our tripartite form of government ever to be submitted to this Court.*

EDS seeks this leave solely to present argument on a position, different from that of any of the parties, on the principles that should be applied to the broad questions now before the Court in this case. Those questions comprehend two specific issues which neither Dames & Moore nor any other litigant, other than EDS, has any direct interest in placing before this Court -- but which have critical constitutional ramifications:

1. The power of the Executive to nullify or negate a pre-freeze attachment of funds held in custodia legis; and

2. The power of the Executive to nullify or "suspend" an effective and enforceable judgment, secured after full trial on the merits and prior to the Algerian Declarations.

These specific questions constitute critical aspects of the grave constitutional issues already before the Court and thus Petitioner submits that this Court's task

*/ 1. Whether the President has statutory or Inherent constitutional authority to settle legally enforceable claims of American citizens against foreign states, agencies, and controlled entities pending in United States courts and nullify judgments of United States courts adjudicating such claims?

would be facilitated by argument directed to these specific issues.

The facts of EDS' case which both Iran and the Government have recognized as "unique" in their successful opposition to EDS' June 3, 1981 certiorari petition (No. 80-2035), are that EDS "was one of the very few claimants that instituted suit and obtained attachments prior to the November 14, 1979 blocking order, and was one of the few claimants that obtained a judgment against Iran, albeit after the blocking order."^{*}/ The Government pointed out that the "vast bulk of the over 400 Iranian cases involve suits filed, and attachments obtained, after November 14, 1979, and have not gone to judgment" (id.) -- a concession that aptly and clearly demonstrates that only EDS has an adequate stake to address the complete ramifications of the position asserted by the Government.

As a result of these "unique" facts, EDS has an interest in addressing the consequences of the sweeping issues now before the Court. More importantly, this "unique" position is not represented by the record of the case now before the Court.

Both as a matter of fundamental fairness to EDS and to assure that the Court is fully apprised of the constitutional effects of adjudicating the potentially sweeping questions presented in Dames & Moore, EDS respectfully requests an opportunity to be heard.^{**}/

^{*}/ Memorandum of Federal Respondents in Opposition, June, 1981, at 7 n.8, in Electronic Data Systems Corp. Iran v. Social Security Organization of Iran, No. 80-2035, cert. denied (June 8, 1981); see Iran Brief in Opposition, June 3, 1981, pp. 7, 13-14.

^{**}/ It is respectfully submitted that adequate presentation of this position would necessitate 10 additional minutes to be allocated to EDS for oral argument.

Dated: June 17, 1981

Thomas W. Luce UT
SOS

Thomas W. Luce, III
Counsel of Record
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Eugene Zemp DuBose

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

DAMES & MOORE, a Partnership, Petitioner,
v.
DONALD T. REGAN, ET AL., Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion of Electronic Data Systems Corporation Iran To Participate As Amicus Curiae At Oral Argument And For An Enlargement Of Time For Oral Argument has been served this 17th day of June, 1981, in the manner indicated: by air express:

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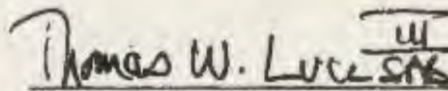
by hand delivery to:

Wade H. McCree, Jr.
Solicitor General, Room 5614
Department of Justice
Washington, D. C. 20530

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Corporation, et al.)


Thomas W. Luce, III
Counsel of Record

NO. 80-2078

Office-Supreme Court, U.S.
FILED

JUN 17 1981

ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY
OF THE UNITED STATES OF AMERICA, and THE UNITED
STATES OF AMERICA,

Respondents.

MEMORANDUM IN RESPONSE TO MOTIONS
OF INTERVENORS FOR TIME FOR ORAL ARGUMENT
AND DIVIDED ORAL ARGUMENT

C. Stephen Howard
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Merlin W. Call
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Washington, D.C. 20540
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

DAMES & MOORE, a partnership,
Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY
OF THE UNITED STATES OF AMERICA, and THE UNITED
STATES OF AMERICA,

Respondents.

MEMORANDUM IN RESPONSE TO MOTIONS
OF INTERVENORS FOR TIME FOR ORAL ARGUMENT
AND DIVIDED ORAL ARGUMENT

Petitioner Dames & Moore does not oppose (1) the Motion of Intervenor-Respondent The Islamic Republic of Iran for Leave to Argue or, Alternatively, for Divided Argument or (2) the Motion of Intervenor Bank Markazi Iran for Enlargement of Time for Oral Argument and for Divided Oral Argument, provided that Petitioner is allowed equal additional time in order to respond to the oral argument of the Interveners, both of whom will argue against Petitioner.

The overall allocation of time suggested by Bank Markazi^{*/} is acceptable to Petitioner.

Dated: June 17, 1981

Respectfully submitted,

C. Stephen Howard / ms
C. STEPHEN HOWARD,
Counsel of Record,
MERLIN W. CALL,
RAYMOND C. FISHER,
MILES N. RUTHBERG,
WILLIAM C. SCHWEINFURTH,
JEFFREY M. HAMERLING,

TUTTLE & TAYLOR Incorporated
Attorneys for Petitioner
Dames & Moore.

Of Counsel:

Stanley C. Fickle

<u>*/</u> Petitioner Dames & Moore	-	50 minutes
Intevenor Bank Markazi	-	10 minutes
Intervenor Islamic Republic of Iran	-	10 minutes
Respondent United States	-	30 minutes

CERTIFICATE OF SERVICE

I, Eldon V.C. Greenberg, a member of the Bar of this Court, declare as follows:

On June 17, 1981, I served the foregoing Memorandum in Response to Motions of Intervenor for Time for Oral Argument and Divided Oral Argument on the parties in this action by causing true copies thereof to be personally delivered to the office of:

Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

William Black, Esq.
Department of Justice-Civil Division
Room 3338
10th & Pennsylvania Ave., N.W.
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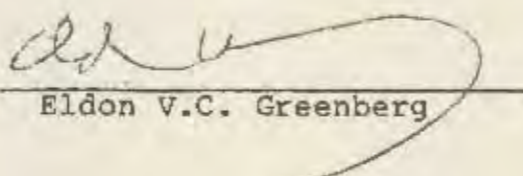
and by overnight courier to:

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30 East 42nd Street
New York, New York 10017

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 17, 1981, at Washington, D.C.


Eldon V.C. Greenberg

NO. 80-2078

Office - Supreme Court, U.S.
FILED

JUN 17 1981

ALEXANDER L. STEVANS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY
OF THE UNITED STATES OF AMERICA, and THE UNITED
STATES OF AMERICA,

Respondents.

MOTION TO DISPENSE WITH THE
REQUIREMENT OF A JOINT APPENDIX

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY
OF THE UNITED STATES OF AMERICA, and THE UNITED
STATES OF AMERICA,

Respondents.

MOTION TO DISPENSE WITH THE
REQUIREMENT OF A JOINT APPENDIX

Pursuant to Rule 30.7, Petitioner Dames & Moore hereby moves to dispense with the requirement of a joint appendix and to permit this case to be heard on the original record and the Appendix filed with the Petition for a Writ of Certiorari before Judgment.

Petitioner and the Government have concluded that the Appendix to the Petition for a Writ of Certiorari before Judgment, filed June 10, 1981, already includes all materials

produced in the original Appendix, need not be reproduced in a Joint Appendix. Accordingly, Petitioner moves to dispense with the Joint Appendix.

Petitioner has been authorized to state that the Government and Intervenor Bank Markazi Iran support this motion and that Intervenor Islamic Republic of Iran does not oppose it.

For the above reasons, Petitioner respectfully requests the Court to grant this motion to dispense with the requirement of a Joint Appendix.

Dated: June 17, 1981

Respectfully submitted,

C. Stephen Howard/mm

C. STEPHEN HOWARD,
Counsel of Record,
MERLIN W. CALL,
RAYMOND C. FISHER,
MILES N. RUTHBERG,
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THOMAS D. SILVERSTEIN
CHRISTINE C. NETTESHEIM
JOHN B. BEATY
G. DANIEL MCCARTHY
JAMES A. STENGER

June 18, 1981

RECEIVED

JUN 18 1981

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Mr. Alexander L. Stevas
Clerk of the
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: Dames & Moore v. Donald T.
Regan, et al., No. 80-2078

Dear Mr. Stevas:

In connection with the above-referenced case, we respectfully lodge 20 copies of the Memorandum Opinion and Order issued by Judge Gesell in Kamran Mashayekhi and Claudia Mashayekhi v. Iran, and Iran National Radio and Television, Civ. Act. No. 79-2039 (D.D.C. June 10, 1981).

We are providing copies of this letter and the Memorandum Opinion and Order to counsel of record for the petitioner, the United States, and intervenors, the Atomic Energy Organization of Iran and Bank Markazi.

Very truly yours,

ABOUREZK, SHACK & MENDENHALL, P.C.

Thomas D. Silverstein
Thomas D. Silverstein

Counsel for the Islamic
Republic of Iran

TDS/psl *

Enclosures

FOR THE DISTRICT OF COLUMBIA

KAMRAN MASHAYEKHI
and CLAUDIA MASHAYEKHI,

Plaintiffs,

v.

IRAN, and
IRAN NATIONAL RADIO AND
TELEVISION,

Defendants.

Civil Action No. 79-2039,

FILED

JUN 10 1981

JAMES F. DAVEY, Clerk

MEMORANDUM

This is a civil action for damages brought pursuant to the Foreign Sovereign Immunities Act ("FSIA").

The issue now presented on defendants' motion to dismiss is whether an Iranian citizen can invoke that Act to recover money allegedly due him under his former employment contract with an instrumentality of the Iranian Government for work done in the United States. The motion to dismiss attacks the jurisdiction of the Court and asserts, in the alternative, that defendants are immune from suit.

Plaintiff Kamran Mashayekhi^{1/} formerly worked as Bureau Chief of the Washington, D. C., office of Iran National Radio and Television, now known as Voice and Vision of the Islamic Republic of Iran. National Radio and Television operated as part of the Iranian Bureau of Information under a budget established by the government. It performed informational and propaganda services from the United States. As an arm of the Iranian government it developed radio and television coverage of activities in the United States and transmitted the material for use in Iran on the nationally controlled radio and television network. Dissemination in Iran was effected in accordance with official policy. On

^{1/} The claim of co-plaintiff Claudia Mashayekhi, an American citizen and wife of Kamran Mashayekhi, was severed on her unopposed motion by Order of the Court on April 22, 1981. The severance was without prejudice to prosecution of her claim through arbitration pursuant to the Algerian Accords agreed to by the United States and Iran. No provision of the Accords relates directly to Kamran Mashayekhi's claim.

occasion, the agency made available to American media materials from Iran. With the fall of the Shah, plaintiff's employment ceased and he went into hiding in this country. His claim is for salary, benefits, and advances not reimbursed. To protect his position, he allegedly appropriated from Voice and Vision two violins and other valuable musical instruments, at least some of which he now admittedly holds as security. Voice and Vision has counterclaimed for these items.

This case arises in the context of the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, signed by the two nations in 1955. This Treaty has never been abrogated and has remained in effect.^{2/} Under the FSIA, passed by Congress in 1976, what were then "existing international agreements" remained valid and superior to the FSIA wherever the terms concerning immunity contained in the previous agreement conflict with the FSIA. See 28 U.S.C. § 1604 (1976); H.R. Rep. No. 94-1487 at 17-18, reprinted in [1976] U.S. Code Cong. & Admin. News 6604, 6616.

Defendants contest federal jurisdiction, asserting that this Court has no jurisdiction because the plaintiff is a citizen of a foreign state suing defendants who both are foreign entities, and the common law contract claim finds no basis in any particularized grant of federal jurisdiction. Relying on the reasoning of the United States Court of Appeals for the Second Circuit in its recent decision in Verlinden B.V. v. Central Bank of Nigeria, C.A. No. 80-7413 (2d Cir., filed April 16, 1981), defendants contend that the limited jurisdiction of the federal courts, as set forth in Article III, Section 2 of the Constitution, does not extend to claims such as the one presented here. Although the

^{2/} The treaty is printed at 8 U.S.T. 899, T.I.A.S. 3853. The continuing validity of the treaty has been recognized by numerous courts reviewing suits between citizens of the two nations.

FSIA appears to grant jurisdiction to the federal courts to hear claims like those of plaintiff, see 28 U.S.C. § 1330(a) (1976), it is clear under the reasoning of Verlinden that the Act cannot grant jurisdiction beyond those circumstances for which there is some underlying constitutional basis on which that grant can rest. Diversity, of course, is not available as a constitutional basis for the jurisdiction, because all of the parties are foreign. The issue, then, as the Verlinden decision recognized, is whether this case in some way "arises under" the laws of the United States. The Court finds that it does. As the Second Circuit noted in Verlinden, slip op. at 9, there are occasions on which the national interest is sufficiently strong to compel use of a federal rule of decision rather than state law, and in such a situation there is federal jurisdiction. Cf. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). That is the situation here, where the heightened tensions between the two nations involved and the existence of hundreds of suits have created an exceedingly strong federal interest in consistent interpretation of the Treaty of Amity and its immunity provisions as they are read in the light of the FSIA. Although this case is for breach of contract, the meaning of the Treaty is at the core of any decision and the strong federal interest in the interpretation of the Treaty and the resolution of these numerous disputes is sufficient to ground federal court jurisdiction.

Turning to the merits, defendants argue that the limited waiver of immunity in Article XI of the Treaty of Amity does not apply in this case and that plaintiff's claim is thus barred. In particular, defendants contend that the "enterprises" for which immunity is waived under the Treaty are only those which are privately owned and controlled and engaged in commercial activity for economic gain within the United States. In support of this interpretation, defendants

have engaged in a careful analysis of the language of the Treaty itself, and also have submitted a wide variety of documentary evidence, including material drawn from negotiating documents, governmental statements made in connection with this and similar treaties, analyses by commentators, and, perhaps most important, recent statements by the United States that reflect the government's present interpretation of immunity under the Treaty.

Upon reviewing the material presented and the arguments of counsel, the Court agrees with defendants that the governmental, not-for-profit nature of the activities of Iran and of Voice and Vision fall within the scope of activities for which Iran and its instrumentalities have retained immunity. Neither Iran nor Voice and Vision has waived its immunity by virtue of its activities under the terms of the Treaty of Amity and that immunity will be recognized, thus making it necessary to grant defendants' motion to dismiss.

At oral argument, counsel for Voice and Vision made it clear that its protective counterclaim for the return of the musical instruments will not be pursued if plaintiff's claim is dismissed on the grounds of immunity.

Accordingly, defendants' motion to dismiss the complaint is granted. The complaint is dismissed, without prejudice to all parties pursuing relief in other forums if they so choose. The counterclaim is withdrawn.

SO ORDERED.


UNITED STATES DISTRICT JUDGE

June 16, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KAMRAN MASHAYEKHI
and CLAUDIA MASHAYEKHI,

Plaintiffs,

v.

IRAN, and
IRAN NATIONAL RADIO AND
TELEVISION,

Defendants.

Civil Action No. 79-2039.

FILED

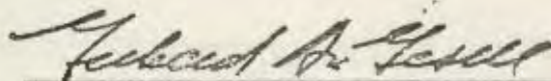
JUN 10 1981

ORDER

JAMES F. DAVEY, Clerk

For the reasons set forth in the Court's Memorandum filed this day, defendants' motion to dismiss the complaint is granted. The complaint is dismissed, without prejudice to all parties pursuing relief in other forums if they so choose. The counterclaim is withdrawn.

SO ORDERED.



UNITED STATES DISTRICT JUDGE

June 10, 1981.

ORDER LIST

THURSDAY, JUNE 18, 1981

ORDER IN PENDING CASE

A-1046
(80-2078)

DAMES & MOORE V. REGAN, SECRETARY OF TREASURY, ET AL.

The joint application for a waiver of the page limitation of the parties' briefs on the merits addressed to the Chief Justice and referred to the Court is granted.

The motion of petitioner to dispense with printing the joint appendix is denied.

OK

Iranian Case

Opening 3 P.M. 6/19
Briefs

Reply B 3 P.M. 6/23

Argument 6/24 - 10 AM

X X X X

Den Schickel

Deny

June 18, 1981 Conference
List 3, Sheet 4

No. 80-2078

Motion to Intervene

DAMES & MOORE

v.

REGAN, Sec. of Treasury

SUMMARY: Twenty-six Iranian commercial banks, named party defendants in the companion action brought by Dames & Moore (petr) in the DC, request leave to intervene as resps.

BACKGROUND: The 26 banks were among the 30 Iranian defendants named by petr in Dames & Moore v. Atomic Energy Organization of Iran, No. CV-79-04198 LEW (Px), DC for Central Ca. In this action the banks challenged subject matter and personal jurisdiction as well as the propriety of the writs of attachment. Following the Algerian Declaration and the ensuing executive orders, the banks argued their validity.

Deny J.P.B.

Petr commenced a separate action in Apr. 1981 against the Sec. of the Treasury and the government only. The DC considered the new case in conjunction with petr's other cases. Petr sought a prejudgment writ only on its action against the government.

INTERVENORS' POSITION: The 26 banks argue that they, like the Bank Markazi Iran which was granted leave to intervene, have a substantial interest in the underlying assets. Not only were their assets attached by petr but this case will decide the validity of the attachments in over a hundred other cases. The banks should be allowed to intervene to protect their interests.

The banks also argue that their participation in petr's actions before the DC gives them a particular familiarity with this action which may be helpful to the Court.

DISCUSSION: Stern & Gressman's Supreme Court Practice, 5th Ed., page 436 suggests that "only for the most imperative of reasons and where one's interest may otherwise be lost will the Court entertain a motion to intervene in pending proceedings before the Court."

In this case, the banks' interests in particular assets are not in issue. The issue is the President's authority to vacate writs of attachment lodged against the assets. The President's authority will be ably defended by the government and by Iran and its central bank, the Bank Markazi Iran, which have been granted leave to intervene.

Thus, there does not appear to be a critical need to allow the 26 banks to intervene. However, should the Court be inclined to bring as many interested parties into the litigation as possible, the inclusion of the 26 banks will not broaden the issues presented in the case.

In light of the abbreviated schedule adopted in this case, the Court may wish to announce its decision on the motion as soon as a decision is reached.

There is no response.

6/16/81

Schickele

PJC

Grant leave to file amicus brief
Schickels

Discuss

June 18, 1981 Conference
Supplemental List

No. 80-2078

DAMES & MOORE

v.

REGAN, Sec. of Treas., et al.

1. Motion to Dispense with the Requirement of a Joint Appendix
2. Motion to Participate as Amicus at Oral Argument
3. Motion for Leave to File Amicus Brief

SUMMARY: (1) Petr requests leave to dispense with a joint appendix; (2) Electronic Data Systems Corporation Iran requests leave to present oral argument as amicus curiae; and (3) Daniel, Mann, Johnson and Mendenhall request leave to file an amicus brief. All three requests were received on June 17.

CONTENTIONS: (1) Petr requests leave to dispense with the requirement of a joint appendix because the Court has the original record and the appendix to the petn for writ contains all the material that both parties believe should be included in the joint appendix.

I agree. JPB

The government joins in the request and the intervenors either support or do not oppose the motion.

(2) Electronic Data Systems Corporation Iran (EDS) requests leave to present oral argument as an amicus. EDS would like 10 minutes in which to argue the legality of the President's action from the perspective of a claimant that has a pre-blocking order writ of attachment.

(3) Daniel, Mann, Johnson and Mendenhall (DMJM) seek leave to file an amicus brief. DMJM had several contracts with Iranian entities and has filed lawsuits against them. DMJM suggests that its amicus brief may be helpful to the Court because DMJM's contracts had different forum selection clauses and DMJM has an actual final judgment in its favor against an Iranian entity. DMJM believes that all parties would agree to the filing of an amicus brief but time did not permit the gathering of their approvals.

DISCUSSION: (1) Rule 30.1 provides that if the items that compose the joint appendix "have already been reproduced in a jurisdictional statement or the petition for certiorari complying with Rule 33.1 [they] need not be reproduced again in the joint appendix." Here the appendix to the petn contains all the materials and the Court also has the original record. Requiring a separate joint appendix would not provide the Court with more information and may make it difficult for the parties to comply with the abbreviated briefing schedule adopted in this case.

(2) EDS, an amicus, argues that its position is unique because, unlike most claimants, it obtained a writ of attachment before the President froze Iranian assets in the United States. EDS seeks leave

to present its position in oral argument. The Court may wish to deny the request for several reasons. First, there is the need to limit the number of counsel that will argue this case. Second, EDS's concern is not subject to the extreme time limitation that this case presents. EDS attempted to obtain a prejudgment petn for writ. This was denied in part because the Iranian assets subject to EDS's writ of attachment will not be transferred out of the country in July. (EDS v. Soc. Sec. Org. of Iran, No. 80-2035, denied June 8, 1981).

(3) DMJM's amicus brief is timely, relatively short and may be helpful to the Court. No party will be prejudiced by the acceptance of the amicus brief.

There is no response.

6/18/81

Schickele

PJC

June 18, 1981 Conference
Supplemental List

No. 80-2078

DAMES & MOORE

v.

REGAN, Sec. of Treas., et al.

Joint Application for Waiver of
Page Limitation Presented to the
Chief Justice and Referred to the
Court. (Heretofore Denied by
Justice Rehnquist)

CONTENTIONS: The parties request waiver of the page limitation for briefs (Rule 33). Because the briefs were in preparation and were not submitted to the printer until the evening of June 17, the parties could not represent with certainty the exact length of the briefs. However, the parties feel that there is a substantial likelihood that the briefs will exceed the limit (65 pages) and request that this be allowed "because of the importance and complexity of the issues in the case, and because of the extraordinary time constraints in preparing and printing the briefs." The intervenors do not oppose the application.

DISCUSSION: After Justice Rehnquist denied the application, petr merely tendered a cover letter requesting that the application be resubmitted to the Chief Justice. The two-page application simply states that the brief may be oversized and suggests that the importance of the case and the time deadlines makes the extended brief reasonable.

Neither the importance of a case nor an abbreviated briefing schedule nor a combination of these factors should result in a per se allowance of an oversized brief. Particularly in a case such as this where the Court is also subject to time pressures, the Court should not be required to wade through an oversized brief unless it is clear that the issues could not be presented in less pages. As the application fails to articulate which issues require an expanded discussion, the Court might deny the motion.

A denial of the motion might result in some slippage of the briefing dates or the acceptance of Xeroxed briefs pending the printing of the briefs.

There is no response.

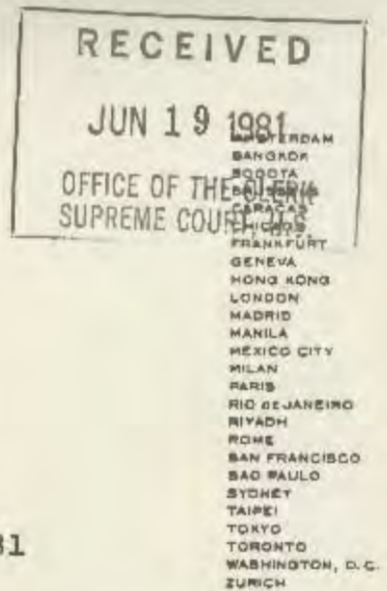
6/18/81

Schickele

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June 19, 1981

BY HAND
Mr. Francis J. Lorson
Deputy Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Ré: Dames & Moore v. Donald T. Regan, et al.,
Supreme Court of the United States,
Docket No. 80-2078

Dear Mr. Lorson:

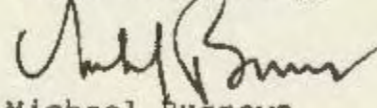
As you know, on June 16, 1981, Baker & McKenzie, on behalf of plaintiffs in 25 of the approximately 150 actions in the Southern District of New York, moved pursuant to Rule 38.7 of the Rules of this Court for leave to permit Lawrence W. Newman, a partner in our firm, to present oral argument before this Court on June 24, 1981 in respect of claimants' right to compensation for the taking of their claims and attachments against Iran.

Pursuant to your request, enclosed as Attachment 1 is a statement listing all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each plaintiff in the 25 actions, as described in Rule 28.1 of the Rules of this Court.

Mr. Francis J. Lorson
Deputy Clerk
June 19, 1981
Page 2

The Court should be aware that plaintiffs in 17 other actions in New York have joined in our motion and amici brief. Accordingly, we also are enclosing, as Attachment 2, a Rule 28.1 statement for those other plaintiffs.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Michael Burrows", written in a cursive style.

Michael Burrows

MB:hpl
enclosures
cc: All Counsel of Record

CASE CAPTION	PLAINTIFF	PLAINTIFF'S PARENT	SUBSIDIARIES (EXCLUSIVE OF WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES
Reading & Bates Corporation and Reading & Bates Exploration Co. v. National Iranian Oil Company ("NIOC"), Civ. 4421 (KTD)	Reading & Bates Corporation	Reading & Bates Corporation	- Associated Pipeline Contractors, Ltd. - Irano-Reading & Bates, S.S.K. - Leonard Pipe Contractors, Ltd. - Reading & Bates-Defuracous Ltd.
	Reading & Bates Exploration Co.	Reading & Bates Corporation	- Frontier Oil Company, Inc. - Frontier Togo Oil Company, Inc. - P.T. Indonesia Frontier Lumber Co. - Indonesia Frontier Petroleum Co. - Irano-Reading & Bates, S.S.K.
Reading & Bates Drilling Co. v. NIOC, Civ. 6034 (CSH)	Reading & Bates Drilling Co.	Reading & Bates Corporation	- Reading & Bates Defuracous
Reading & Bates Corporation and Reading & Bates Exploration Co. v. NIOC, Civ. 6035 (GLG)	Reading & Bates Corporation	Reading & Bates Corporation	- Same as in 79 Civ. 4421 (KTD)
	Reading & Bates Exploration Co.	Reading & Bates Corporation	- Same as in 79 Civ. 4421 (KTD)
Sedco International, S.A. v. NIOC, Civ. 6115 (WCC)	Sedco International, S.A.	Sedco, Inc.	NONE
Sediran Drilling Company v. NIOC, Civ. 6116 (RJW)	Sediran Drilling Company	Sedco, Inc.	NONE
Sediran Drilling Company v. NIOC, Civ. 6117 (TPG)	Sediran Drilling Company	Sedco, Inc.	NONE

CASE CAPTION	PLAINTIFF	PLAINTIFF'S PARENT	SUBSIDIARIES (EXCLUSIVE OF WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES
Williams Brothers International Corp. v. NIOC, 79 Civ. 6195 (LPG)	Williams Brothers International Corp.	The Williams Companies	NONE
Williams Brothers International Corp. v. NIOC, 79 Civ. 6196 (LPG)	Williams Brothers International Corp.	The Williams Companies	NONE
Sedco, Inc., as Assignee of Iran Marine Industrial Company v. NIOC, 79 Civ. 6279 (LPG)	Sedco, Inc., as Assignee of Iran Marine Industrial Company	Sedco, Inc.	<ul style="list-style-type: none"> - CJB - Earl and Wright - CAT Houston Joint Venture - Houston-Green - Iran Marine Industrial Co. - Marine Drilling, S.A. - Sea Drilling Netherlands - Sedco Dubai Limited - Sedco Espana, S.A. - Madrico, N.V. - Southeastern Drilling Co. of Nigeria, Ltd. - Sedco/Green Joint Venture - Sedco Malaysia Sendirian Berhad - Sedco Perfuracoes Maritimas Limitada - Sedran Drilling Company - Societe Algerienne De Forage - Marine Drilling, B.V. - Sedco Hamilton Production Services - Overseas Drilling Limited - Sedco/Phillips 712 Partnership - 714 Drilling Corporation - Sedpex Inc.
Otis Engineering Corporation v. NIOC, 79 Civ. 6484 (RWS)	Otis Engineering Corporation	Halliburton Company	<ul style="list-style-type: none"> - Otis of Nigeria, Ltd. - Otis Saudi, Ltd. - Amsito Oil Well Services - Productos Industriales De Vera Cruz, S.A. - Otis and Partner Abu Dhabi - Otisbras-Equipamentos E Servicos De Poços De Petroleo Limitada - Otis Egypt, Ltd. - Tharin, Longson & Associates, Ltd.

CASE CAPTION	PLAINTIFF	PLAINTIFF'S PARENT	SUBSIDIARIES (EXCLUSIVE OF WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES
Halliburton Limited v. NIOC, 3 Civ. 6485 (RWS)	Halliburton Limited	Halliburton Company	NONE
Houston Contracting Company v. NIOC, 9 Civ. 6488 (GLG)	Houston Contracting Company	Sedco, Inc.	NONE
Houston Contracting Company v. NIOC, 9 Civ. 6489 (MEL)	Houston Contracting Company	Sedco, Inc.	NONE
IMCO Services (U.K.) Ltd. v. NIOC, 9 Civ. 6525 (LPG)	IMCO Services (U.K.) Ltd.	Halliburton Company	NONE
Ingersoll-Rand Co. v. NIOC and National Iranian Gas Co. ("NIGC"), 9 Civ. 6867 (RWS)	Ingersoll-Rand Co.	Ingersoll-Rand Company	<ul style="list-style-type: none"> - Proto Max S.A. - Industrias Ingersoll-Rand - NIJECT Services (joint venture with Union Carbide) - NSK-Torrington (joint venture with Nippon Seiko K.K.) - CMP-L Morro (joint venture with Ralston Purina)
Irano-Reading & Bates, S.S.K. v. NIOC, 79 Civ. 6831 (VLB)	Irano-Reading & Bates, S.S.K.	Reading & Bates Corporation	NONE
Enserch Service Company of Iran v. NIGC and NIOC, 80 Civ. 560 (WCC)	Enserch Service Company of Iran	Enserch Corporation	NONE
Williams Brothers International Corp. v. NIOC, 80 Civ. 1099 (LPG)	Williams Brothers International Corp.	The Williams Companies	NONE

CASE CAPTION	PLAINTIFF	PLAINTIFF'S PARENT	SUBSIDIARIES (EXCLUSIVE OF WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES
Compagnie Francaise de Prospection Sismique v. NIOC, 80 Civ. 1980 (ADS)	Compagnie Francaise de Prospection Sismique	Raytheon Co.	NONE
Houston Contracting Company v. Chase Manhattan Bank, N.A. and Bank Tejerat, 30 Civ. 3441 (LPG)	Houston Contracting Company	Sedeo, Inc.	NONE
Shirazi v. Bank Markazi Iran, 30 Civ. 6117 (RO)	Shirazi	NONE	NONE
Brown & Williamson Tobacco Corp. v. Ministry of Mines and Light Industry of the Gov't of Iran, World Express Co., Ministry of Tourism of the Gov't of Iran and the Islamic Republic of Iran, 31 Civ. 0283 (CLB)	Brown & Williamson Tobacco Corp.	B.A.T. Industries Limited	NONE
Enserch Corp., Tair Inc. and Intairdril v. NIOC, Islamic Republic of Iran and Irano-Intairdril, S.S.K., 31 Civ. 292 (LWP)	Enserch Corporation	Enserch Corporation	<ul style="list-style-type: none"> - Nipak Energy Corporation - Pool Arabia, Ltd. - Pool-Wood Production Services (U.K.) Limited - Pool-Santana, Limited - Ebaseo Arabia Limited - Ebanel, S.A. de C.V. - Allied Oilfield Services (Nigeria) Limited - Oiltools de Espana, S.A. - Antah Oiltools Sdn. Bhd. - Fisher-Oiltools (Philippines), Inc. - Solus (Malaysia) Sdn. Bhd. - Solus Schall (Nigeria) Ltd. - Ocean Systems Espanola, S.A. - Ebaseo- CTCL Corporation
	Tair Inc.	Tair Ltd.	- Enpro, Inc.
	Intairdril Ltd.	Enserch Corporation	NONE

CASE CAPTION	PLAINTIFF	PLAINTIFF'S PARENT	SUBSIDIARIES (EXCLUSIVE OF WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES
Brown & Root, Inc., Brown & Root, S.A. and Brown & Root International Limited v. Government of Iran, Civil Action No. 80-2961 (U.S. D. Ct. Maryland)	Brown & Root Inc.	Halliburton Company	<ul style="list-style-type: none"> - Pearl River Sand & Gravel Company - Prestressed Concrete Products Company, Inc. - Wimpey-Brown & Root (Nigeria) Limited - NUS Corporation - Brown & Root - Malta Limited - Corporacion de Construcciones de Campeche, S.A. de C.V. - Brownaker Offshore A/S - P.T. Brown & Root Indonesia - Brown & Root - Wimpey Highlands Fabricators Limited - Arctic Constructors Ltd. - Brown & Root Engenharia e Construção, Ltda. - Quimica Retzlaff Interamericana, S.A. - Marine Bases (Stevedores) Limited - Brown & Root - Wimpey Limited - Highlands Fabricators Pension Trustees Limited - Brown & Root Nigeria Limited - Diego Garcia Construction Joint Venture
	Brown & Root, S.A.	Halliburton Company	<ul style="list-style-type: none"> - Highland Special Shipping Company, S.A. - NKK - Brown & Root Overseas, S.A. - Brown & Root - Kokan Offshore Constructors, S.A. - Brown & Root Orient, S.A. - Brown & Root Engenharia e Construção, Ltda. - Concretos Industriales, C.A. - Brown & Root - Wimpey Middle East, S.A.
	Brown & Root International Limited	Halliburton Company	<ul style="list-style-type: none"> - Brown & Root - Alireza W.L.L. - Brown & Root - Saudi Limited - Brown & Root (Bahrain) L.L. - Moroccan Engineers & Constructors

CASE CAPTION	PLAINTIFF	PLAINTIFF'S PARENT	SUBSIDIARIES (EXCLUSIVE OF WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES
Brown & Root, Inc., Brown & Root, S.A. and Brown & Root International Limited v. Government of Iran, Civil Action No. R80-0360 (U.S.D. Ct. Western District Virginia)	Brown & Root, Inc.	Halliburton Company	- Same as in Civil Action No. R80-2961 (U.S.D. Ct. Maryland)
	Brown & Root, S.A.	Halliburton Company	- Same as in Civil Action No. R80-2961 (U.S.D. Ct. Maryland)
	Brown & Root International Company	Halliburton Company	- Same as in Civil Action No. R80-2961 (U.S.D. Ct. Maryland)

CASE CAPTION	PLAINTIFF	PLAINTIFF'S PARENT	SUBSIDIARIES (EXCLUSIVE OF WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES
Philip Morris Incorporated v. Government of Iran (Government of the Islamic Republic of Iran) and Iranian Tobacco Company, 81 Civ. 0238 (VLB) and 81 Civ. 0315 (LPG)	Philip Morris Incorporated	Philip Morris Incorporated	<ul style="list-style-type: none"> - Abal Hermanos S.A. - Aliso Viejo Company - Benson & Hedges (Canada) Inc. - B&H Retail Limited - International Cigarette Company Limited - Jack G. Raub Company - Massalin Particulares S.A. - Excel, S.A. - Mendiola y Compania S.A. - Miller Brewing Company - Crescent Distributing Company - Miller Brands, Inc. - Star Distributing Company - Waterloo Malting Company, Inc. - Mission Viejo Company - MCV Financial Corporation - Park Avenue Export Corporation - Phillip Morris Asia Incorporated - Phillip Morris (Australia) Limited - G.P.M. Cigarette Distributors (Australia) Limited - Lindeman (Holdings) Limited - Leo Baring Pty. Limited - Lindemans Wines Pty. Limited - M. Moss & Co. Pty. Limited - Crawford & Co. (Australasia) Pty. Limited - Phillip Morris Limited - Stateside Tobacco Services Limited - Phillip Morris Brasileira S.A. - Phillip Morris Export Corporation - Phillip Morris GmbH - Phillip Morris France S.A. - Phillip Morris Industrial Incorporated - Plainwell Paper Co., Inc. - Phillip Morris International Capital N.V. - Phillip Morris International Finance Corporation - Fabriques de Tabac Reunies S.A. - INBIFO, GmbH - Intertaba, S.P.A. - Phillip Morris Holland B.V. - Phillip Morris Europe S.A. - Phillip Morris Limited - Mission Viejo Realty

CASE CAPTION	PLAINTIFF	PLAINTIFF'S PARENT	SUBSIDIARIES (EXCLUSIVE OF WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES
Phillip Morris Incorporated (continued)			<ul style="list-style-type: none"> - Anniversary House Limited - Charles Stewart & Company (Kirkcaldy) Limited - The United Kingdom Tobacco Company Limited - Phillip Morris Marketing S.A. - Phillip Morris Overseas, Inc. - Tabacalera Centroamericana S.A. - Tabacalera Costarricense S.A. - Tabacalera Internacional S.A. - Tabacalera Nacional S.A. - The Seven-Up Company - B.W.O. Company - Connecticut Seven-Up Bottling Company, Inc. - Oregon Freeze Dry Foods, Inc. - Seven-Up Bottling Company of Albuquerque, Inc. - Seven-Up Bottling Company of Norfolk, Incorporated - Seven-Up Bottling of Phoenix, Inc. - Seven-Up Canada Inc. - Seven-Up Montreal Ltee. - Seven-Up International, Inc. - Seven-Up Argentina, S.A.I.C. - Seven-Up Flavor Mfg. Co. - Seven-Up Ireland Limited - Seven-Up Andino S.A. - Hoparves A.G. - Seven-Up Nederland B.V. - Seven-Up S.A. - SPI Extract Corporation - Seven-Up U.S.A., Inc. - Taylor Group, Inc. - Five Five Five Brown Road Realty - Ventura Coastal Corporation - Warner-Jenkinson Company of California - Warner-Jenkinson, S.A. de C.V. - Warner-Jenkinson East, Inc. - Weitab S.A. - Distalux Anciens Etablissements - Feller S.A. - Wikolin-Polymer Chemie GmbH - Wisconsin Tissue Mills Inc.

CASE CAPTION	PLAINTIFF	PLAINTIFF'S PARENT	SUBSIDIARIES (EXCLUSIVE OF WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES
Esphahanian v. Iranian's Bank, 79 Civ. 6188 (VLB)	Esphahanian	NONE	NONE
Advanced Computer Techniques Corp. and Inter-Act Corp. v. Information Systems Iran Organization, et al., 80 Civ. 0031 (LWP)	Advanced Computer Techniques Corp. Inter-Act Corp.	NONE NONE	NONE NONE
Offshore International S.A. v. Iran Pan American Oil Company, et al., 79 Civ. 6483 (HFW)	Offshore International S.A.	Southern Natural Resources, Inc. The Offshore Company	NONE
American International Group, Inc. v. Islamic Republic of Iran, 79 Civ. 6696 (GLG)	American International Group, Inc.	C.V. Starr & Co., Inc.	<ul style="list-style-type: none"> - Mt. Mansfield Company, Inc. - Stowe Country Club Corp. - Nan Shan Life Insurance Company Ltd. - American International Assurance Company, Ltd. - La Interamericana S.A. (Mexico) - The Philippine American Life Insurance Company - Inmobiliaria Insurgentes Sur Sociedad Anonima - A.L. Date Centre Limited - Reliance Motors Federal Inc. U.S.A. - American International Company Limited - Kapatiran Realty Corporation - Underwriters Bank (Overseas) Limited - The Philippine American Assurance Company, Inc. - P.T. (Ltd.) Asuransi Indonesia Amerika Baru - Metropolitan Land Company, Ltd. - Malaysian American Assurance Company Berhad - Compagnie D'Assurance D Haiti S.A. - American International Company (Nigeria) Limited - AIG Realty, Inc.

CASE CAPTION	PLAINTIFF	PLAINTIFF'S PARENT	SUBSIDIARIES (EXCLUSIVE OF WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES
			<ul style="list-style-type: none"> - Transatlantic Reinsurance Company - New Hampshire Insurance Company - AIG Multi-line Syndicate, Inc. - Philippine Home Assurance Corporation - Korean Adjusters and Surveyors Corporation - Compagnie Europeenne D'Assurance Sur La Vie - The Uganda American Insurance Company Ltd. - La Seguridad Salvadorena Compania de Seguros, Sociedad Anonima - American Life and General Insurance Company (Trinidad) Ltd. - European American Underwriters Agency Ges.m.b.H. - Inter-Hemispheric Reinsurance Company, Ltd. - "Hellas" Insurance Co. Societe Anonyme - Egyptian American Insurance Company - Hungarian American Insurance Company, Ltd. - Polish American Insurance Company, Ltd. - Romanian American Insurance Company, Ltd.
Eastman Whipstock, Inc. v. The Government of Iran and Oil Services Company of Iran, 80 Civ. 4932 (EW)	Eastman Whipstock, Inc.	Petrolane, Inc.	NONE
Seahorse, Inc. v. The Government of Iran and Iranian Pan American Oil Company, 80 Civ. 3933 (CBM)	Seahorse, Inc.	Petrolane, Inc.	NONE
Republic National Bank of New York v. Bank of Tehran, et al., 79 Civ. 6371 (GLG)	Republic National Bank of New York	Republic New York Corporation Trade Development Bank Holding S.A.	NONE

CASE CAPTION	PLAINTIFF	PLAINTIFF'S PARENT	SUBSIDIARIES (EXCLUSIVE OF WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES
Republic National Bank of New York et al. v. National Iranian Gas Co., et al., 80 Civ. 1679 (VLB)	Republic National Bank of New York	Republic New York Corporation Trade Development Bank Holding S.A.	NONE
Republic National Bank of New York v. Giesfour, Inc. et al., 80 Civ. 1680 (VLB)	Republic National Bank of New York	Republic New York Corporation Trade Development Bank Holding S.A.	NONE
McCullough & Company, Inc. v. The Government of Iran and The Ministry of Posts, Telegraph, and Telephone, an Instrumentality of the Government of Iran, 80 Civ. 0406 (RWS)	McCullough & Company, Inc.	NONE	NONE
Westinghouse Electric Corporation v. State of Iran, et al., 80 Civ. 0838 (LWP)	Westinghouse Electric Corporation	NONE	NONE
Westinghouse Electric Corporation v. State of Iran, et al., 80 Civ. 0989 (HPW)	Westinghouse Electric Corporation	NONE	NONE
Offshore International S.A. v. National Iranian Oil Company, 80 Civ. 1744 (HPW)	Offshore International S.A.	Southern Natural Resources, Inc. The Offshore Company	NONE
Lockheed Corporation v. Government of Iran, The Iranian Ministry of War, The Iranian Air Force, The Iranian Military Industries Organization, and Iran Aircraft Industries, 79 Civ. 6606 (WK)	Lockheed Corporation	Lockheed Corporation	<ul style="list-style-type: none"> - Lockheed SALT Electronics S.A. - Honolulu Fueling Facilities Corporation - Transnational Housing Company - Panel Lock Homes - Ocean Minerals Inc.

CASE CAPTION	PLAINTIFF	PLAINTIFF'S PARENT	SUBSIDIARIES (EXCLUSIVE OF WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES
Lockheed Corporation (continued)			<ul style="list-style-type: none"> - Portland Fueling Facilities Corp. - CTL Corporation - Arizona Fueling Facilities Corp. - Reno Fueling Facilities Corp. - Oklahoma Fueling Facilities Corp. - Utah Fueling Facilities Corp.
(Consortium) Joint Venture S.A. Enterprises, Jan De Nul and Dragomar, S.p.A. v. Brown & Root International, Ltd., Brown & Root and The National Iranian Navy, the Iranian Ministries of Defense, The Government of Iran, et al., 80 Civ. 0791 (PNL)	Joint Venture S.A. Enterprises	NONE	NONE
	Jan De Nul and Dragomar, S.p.A.	NONE	NONE

I Statutory Issues

Three statutes: International Economic Emergency Powers Act (IEEPA); Hostage Act and Foreign Sovereign Immunities Act (FSIA)

1. IEEPA authorized voiding of attachments
The license was conditional (revocable)

Even in cases where attachments were effect prior to Pres' action, the language of IEEPA may be broad enough to authorize "nullifying"

2. IEEPA does not authorize the "settling" of claims. (Agreement uses term "suspending" - but SG argues this to "settling" claims.

Briefs cite many examples of settlements

3. Hostage Act may well be broad enough to authorize "settling claims" to effect release of hostages - the Act is old (1868) & extremely vague.

4. FSIA (with Amity Act of 1955) may even authorize - as SG argues - that attachments were void because Iran had not "explicitly waived immunity" as to such attachment. But ~~the~~ Amity Act can be construed as a "waiver":
Immunity is waived as to suits.

II "Inherent Power" to Settle Claims

Altho IEPA does not authorize "settlement" (compromising) claims, the Hostages Act - in extremely general language - can be read as a grant of this power when necessary to release hostages.

Briefs cite numerous examples.

CADC & CAI found an "implied power" to settle claims - relying on Executive settlement agreements long accepted by Congress, as well as ~~the~~ language of Hostages Act.

Prink & Belmont, though distinguishable, are supportive. See also RES.

Youngstown Sheet & Tube turns ~~on~~ on fact that Congress had refused to confer power on Pres. to settle Ry strike.

lfp/ss 6/21/81

80-2078 Dames & Moore v. Regan and U.S.

MEMORANDUM TO FILE

This memo is dictated as an aid to memory. It is limited to the "taking" issue. I have read the parties' opening briefs and several of the amici briefs. Reply briefs have not yet been received; nor have the memos I requested from my clerks.

Among the briefs I have read, petitioner's is the most helpful on the taking issue. See also amici briefs filed on behalf of Electronic Data Systems by Steptoe & Johnson, and on behalf of Flag, Inc., by Covington & Burling. This memo is a brief, incomplete and unstructured series of notes based primarily on petitioner's brief.

I am not at rest on the principal issues presented by the present case: (i) whether under the relevant statutes, the International Emergency Economic Powers Act (IEEPA) (the successor statute to the Trading with the Enemy Act), and the Foreign Sovereign Immunities Act (FSIA), the President had the authority to enter into the Algiers Agreement, and (ii) whether under his implied powers under the Constitution the President had the authority - as summarized by the SG's brief:

"(1) To terminate all legal proceedings in the United States courts involving claims

of United States persons and institutions against Iran and its state enterprises; (2) to nullify all attachments and judgments obtained therein; (3) to prohibit all further litigation based on such claims, and (4) bring about the termination of such claims through binding arbitration." (SG's brief, p. 7), that I believe is a quotation from the Algiers Agreement itself.

I view these questions as serious indeed, and doubt that either the statutes or the Constitution were every intended to confer this extraordinary power on a President - apparently without review by Congress or the courts, according to the SG. Yet, for whatever reasons, two Presidents now have approved the Agreement and its provisions. Moreover, Secretary Haig has filed an affidavit that - in strong language - advises us that the foreign policy of the United States would suffer "serious consequences" if we fail to up hold the agreement. I may join such a judgment in the interest of our country, and under the special circumstances that prevailed at an election time with two Presidents - perhaps for different reasons sharing responsibility and concurring. I would hope, however, if the Court so decides, that Congress acts to restrict presidential power at least to the extent of requiring congressional approval - as is true with respect to all treaties.

* * *

If the Court's judgment should be to affirm, my view at this time - rather strongly - is that I could join such a judgment only if we made clear (or at least left clearly open) the taking question, and held that the Court of Claims under the Tucker Act may entertain taking cases. If the Court's opinion is not entirely clear to this effect, I will write separately perhaps saying that my understanding of the holding (unless it is categorically to the contrary) is that the taking issue remains and may be litigated.

Petitioner's brief p. 33-43, is persuasive.

Footnote 32 (p. 34) recognizing that the taking issue may not be ripe, and reserves its Fifth Amendment claim if any of these events occur:

"(1) Petitioner is denied the opportunity to present its claims to the arbitral tribunal; (2) petitioner establishes that its rights before the tribunal are demonstrably inferior to its rights to obtain redress in federal courts; or (3) petitioner's claim is adjudicated by the tribunal but its recovery is less than the amount it would have obtained by proceeding on its judgment (and attachment of Iranian assets) in federal court".

In WJB's dissent in San Diego Gas & Electric Co. (March 24, 1981), that I joined, he said:

"When one persons is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute the economic cost from the individual to the public at large."

I said the same thing in Agins. The Court also made this point in Armstrong v. U.S., 364 U.S. 40, 49.

If there ever was a case where a relatively small group of Americans would bear the burdens of the Algiers Agreements, this is it. No one disputes that its purpose was to resolve what Carter declared to be a major foreign policy crisis and the citizens who benefitted specifically were the hostages, their families and friends.*

In a word, in the event of any of the contingencies occurring that are mentioned in fn. 32 (see above), the citizens who seem likely to suffer are American creditors of Iran. The petitioner in this case, like several hundred other identifiable creditors, had valid liens on assets that clearly were within the in rem jurisdiction of United States courts. Indeed, under the Foreign Sovereign Immunities Act, there may have been in personam jurisdiction also. As the SG acknowledges the agreement effects a change in the "substantive law" of the United States to the disadvantage of these creditors. The SG is compelled to make this argument, as he relies on it for his further argument that the agreement does not

*See brief of Flag, Inc., that points out the adverse consequences of the agreement even for the hostages - who are deprived, apparently, of the right to bring damage suits.

violate the separation of powers by removing the
jurisdiction of federal courts. I therefore conclude
without difficulty that the nullification of petitioner's
attachments, judgment and judgment liens constitutes a
taking of property. It is clear that a valid attachment
lien, at least, is a property interest. See Louisville Bank
v. Bedford, 295 U.S. 555, 68-692; Armstrong v. United
States, 364 U.S. 49.*

Petitioner argues that enforcement of the Iranian
Agreement should be enjoined because an assured benefit of the
"just compensation" will be paid for the taking" (p. 40-
41). The agreement, as I understand it, calls considerably
short of requiring enough money to be secured to cover
all American claims (this should be made clear in my
opinion that I write). The agreement does, however,
that Iran will pay American creditors for any deficiency in
the payment of valid claims by arbitration. I pause here to
say that, as presently stated, I do not know whether the
agreement permits Iranian courts subsequently to determine

*If I write, as I expect to, my opinion should address the
effect of revocation of the license issued by the Secretary
of Treasury to obtain attachments (brief p. 17-18).
Revocation of the power to revoke is irrelevant to my view,
but we should address it.

whether a claim is valid and also whether there has been a "short fall" in its payment. I am inclined to think that the agreement leaves this exclusively to the Tribunal: it provides that decisions of the Tribunal shall be final and binding everywhere.

Despite these reservations, I do not think an injunction is indicated if we sustain the validity of the agreement, and if - and only if - we make clear that a remedy exists against the United States in the event of a short fall.

As presently advised, I would hold that a remedy does exist in the Court of Claims under the Tucker Act. See pp. 42-43 of petitioner's brief. Section 1502 is not applicable for various reasons, including the fact that the agreement is not a treaty. A treaty does not become valid until it has been approved by the Senate.

* * *

The Algerian Agreement would be null and void under the most elementary principles of law and fairness in any domestic controversy. It was not an agreement that resulted from voluntary bargaining. Iran, correctly characterized by President Reagan as a country controlled by "barbarians", had kidnapped American citizens and held them for well over a year. Not only were our citizens kidnapped but they were being held under conditions equivalent to

imprisonment potentially serious to their physical and mental health. Nor were these ordinary citizens (though this would make no difference with me); they were diplomats and diplomatic staff. Finally, they were under constant threat of execution by the criminals who held them.

In short, this was no "agreement" at all. The United States acted under coercion of the most barbarous kind. Such an agreement has no more validity under international law than a private agreement being examined in our courts. I know little about international law, but the International Court of Justice at the Hague has decided that the Iranian crime was a continuing violation of international law. I therefore would conclude - were it not for President Reagan's approval of it and Secretary Haig's representation to us - that the agreement is null and void, and we should proclaim this to the world. We have the hostages. I am not sure that any Iranian funds are still held in the United States, as they were transferred - as I understand it - to the Bank of England. I would assume, however, that Great Britain would recognize international law also, and that British courts would follow our judgment invalidating this coerced document. In sum, in almost any other circumstances, I would hold that our country is not bound. Yet, apparently such a holding, in the special circumstances of this case, would seriously damage the

broder interests of the U.S. I may therefore affirm on this issue.

L.F.P., Jr.

6/21/81
Peter Hunter Pres. acted within
his "inherent power" to "settle
claims" that apparently he
has exercised many times.

Peter relies primarily on the
Hortyger Act.

BENCH MEMORANDUM

TO: Mr. Justice Powell
FROM: Peter Byrne
DATE: June 21, 1981
RE: No. 80-2078, Dames & Moore v. Regan, Sec'y

Question Presented

Does the President have power to "settle" the claims
of American nationals against foreign sovereigns?

I

There are, of course, no statutes or Court cases that
directly control the question of whether Presidents Carter and
Reagan had the power to "suspend" petr's suit for damages
against Iran and require petr to submit to the adjudication of
an international arbitral tribunal. Courts and Congress speak
about the Presidents power's to act in foreign affairs in only
the broadest terms. Indeed there is so little precise legal
anticipation or precedent for this action that characterization
of what the President has done is crucial.

The President acted primarily to secure the release of American hostages. In return for this, he took steps to allow Iran to recover Iranian assets held in American banks and to settle American claims against Iran in a forum acceptable to Iran. Seen this way, the President has bartered the rights of private American concerns to compel adjudication of valid claims in the courts of the United States to gain the public benefit of the return of the hostages. This is one aspect of the situation.

you It can also fairly be said, although the SG urges the interpretation too strenuously, that the President has acted to provide some compensation for American private concerns who had valid, but practically unenforceable claims against an unfriendly and radical foreign sovereign. Under this interpretation, pre-judgment attachment of Iranian assets by American creditors were unlawful because of the Foreign Sovereign Immunities Act¹, but the President's blocking order

7 ¹ Paul Smith has explained this relevance of the Foreign Sovereign Immunities Act in his memorandum. The basic point is that the President could have left the American creditors in a worse situation if he had never taken any action with respect to the Iranian assets or the creditors' claims. Indeed he might, to release the hostages, have merely transferred the blocked Iranian assets out of the country. While this might have been politically unpopular or could constitute a "taking" which the United States would have to compensate, there can be little debate that the President had the power under the International Economic Emergency Powers Act (IEEPA) to accomplish this result. The question whether the President had the additional power "to settle" the creditors' claims should be addressed with awareness of this possibility.

marshalled the Iranian assets, prevented them from being removed from the country, and gave him a substantial bargaining chip to secure some settlement of American claims from the Iranians. The President rationally could have concluded that the chance of gaining a judgment from the tribunal, backed by the \$1 billion settlement fund, was better than the greater certainty of getting a full judgment from a federal court that might not be enforced. While this interpretation provides only a partial truth, it should be kept in mind. The Algerian Declarations concluded a number of outstanding issues between the two countries and brought a measure of order out of chaotic circumstances.²

The question of the power of the President to settle the petr's claim should be distinguished from the power of the United States to settle petr's claim and the question of whether the settlement will violate the Fifth Amendment if petr does not receive just compensation. The case of United States v. Schooner Peggy, 1 Cranch 103 (1803) would seem to give the United States power by Treaty to barter a national's claim. In

² The Algerian Declarations also arranged the return of Iranian assets held in the overseas branches of American banks and in the Federal Reserve Bank of New York minus the satisfaction of various loans previously extended to Iran by American banking syndicates. The SG represents that these arrangements have worked very well so far: \$3.7 billion has been paid to the banks, another \$1.4 Billion has been placed in escrow. Brief for United States at 7, n. 8. The SG wishes the Court to see that American interests have received already substantial economic benefit from the Agreement. The Banks have supported the Agreement in litigation.

that case, Americans who had been commissioned by the President as privateers had lawfully captured a French vessel and had won a condemnation in the District Court, affirmed in the Circuit Court, when the United States concluded a Treaty with France promising the restoration of ships captured but not yet condemned. The Court held that the Treaty, as the supreme law of the land had altered prior law and that the judgment below, not being final, must be reversed. The Court wrote, [I]f the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. Id. at 110. In the modern context of the Takings Clause and the Tucker Act, I would read this statement as meaning that the government has the power to extinguish a lawful claim recognized in Court, even if it is liable for compensation.

no treaty is involved Thus, the question that must be addressed is not whether the United States has the power to settle the claims by Treaty, but whether the President has the power to do so by Executive Agreement. The question is one of separation of powers: has the President the power to act in this regard without the consent of the Senate? The touchstone for any analysis of Presidential power is Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). 9

Youngstown held that President Truman lacked inherent power to seize the nation's steel mills to continue production during a strike during the Korean conflict, when Congress had rather explicitly rejected the idea of giving the President

such power. Justice Black's opinion for the Court directs attention to the President's enumerated powers: his executive authority, his status as commander-in-chief, and his power to see that the laws are faithfully executed. In my view, however, the lasting lesson of Youngstown is that the President's power to take particular steps must be examined in light of the positions of the other branches. The Constitution allocates powers among the branches, particularly between the President and the Congress, only in general terms. Determining whether the President has a certain power depends in large measure on the attitude of the Congress toward his exercise of that power.

This analysis is presented most directly by the opinion of Justice Jackson, who established three categories of Presidential power. First, where the President acts pursuant to an express or implied authorization of Congress, he possess all the power that the United States itself possesses." Id. at 635-36. Second, where he acts without any authorization or denial of such by Congress, we are in a "zone of twilight", where "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events rather than on abstract theories of law." Id. at 636. Finally, when "the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only on his own constitutional powers minus any constitutional powers

of Congress over the matter." Id. Understandably, the parties have argued over into which category the Iran Agreement should be placed; accordingly after addressing directly the President's power to settle individual claims, I will turn to statutes drawing his act into one or another category. Preliminarily, it should be noted that Jackson's categories might more precisely be understood as a continuum with the first and third categories forming the poles.

The same sensitivity to the actual relation between President and Congress informed the opinion of Justice Frankfurter. He stressed that "the content of the three authorities of government is not to be derived from abstract analysis." Id. He denied the power to the President in the case at hand because Congress had specifically concluded that he lacked the power. But, he wrote:

"In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by §1 of Art. II." Id. at 610-611.

This observation can be profitably employed as an elaboration of Justice Jackson's second category.

II

Assuming Congress has neither authorized nor denied authority to the President to settle claims of Americans, does he have inherent authority. The SG argues that he does, and the CA1 and CADC, with some qualification agreed. The President has

Were these settlements made with consent of the creditors?

settled the claims of nationals with foreign nations since the earliest days of the Republic; he has extinguished the claims in return for lump-sum payments. J.B. Moore was able to say in 1905: "It would be a work of superogation to attempt to cite all the cases in which the Executive of the United States has settled individual claims against foreign governments without reference to the Senate." Moore also noted that arbitration had repeatedly been employed. Moore, Treaties and Executive Agreements, 1905 Political Science Q. 385. Professor Henkin has observed that the President has "sometimes disposed of the claims of citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." Henkin, Foreign Affairs and the Constitution 262 (1972). Finally, the Restatement (Second) of Foreign Relations Law § 213 (1965) states as black letter law that "The President may waive or settle a claim against a foreign state for an injury to a United States national, without the consent of such national."

Wow!

While these establish that the President customarily has settled claims and that such settlements are effective in international law, the question remains whether such an executive agreement is binding in a United States court. This Court seems to have held that they are. In United States v. Belmont, 301 U.S. 324 (1937), the Court, in construing the settlements collateral to Litvinov Agreement by which the United States recognized the Soviet Union, seemed to equate the

Q

agreement in force of law with a Treaty.

"Plainly the external powers of the United States are to be exercised without regard to state laws or policies.... And while this rule in respect of treaties is established by the express language of cl. 2 Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." Id. at 331.

To be sure, this language is not controlling here, because there is no question of state law superceding federal, but the Court's acceptance of the executive agreement, concluded in furtherance of the President's power to establish diplomatic relations, supports the notion that the President had power to enter into the Algerian declarations, and that that agreement is as binding as the treaty in Schooner Peggy. ?

In United States v. Pink, 315 U.S. 203 (1942), the Court considered more particularly the President's power to settle the claims of nationals by an executive agreement. In that case, the United States was assigned by the Soviet Union assets of private Russian companies that the USSR had nationalized; the United States would settle claims of American nationals against the Soviet Union with these funds. This settlement agreement as part of the agreement by which the countries entered into normal relations. The court noted that this settlement was a method of removing "objections" raised by Soviet nationalization of american assets in Russia. In giving effect to the agreement the Court stated:

Power to remove such obstacles to full recognition as settlement of claims of our nationals ... certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.' United States v. Curtis-Wright Export Corp., [299 U.S. 304,] 320. Effectiveness in handling the delicate problems of foreign relations requires no less. Unless such a power exists, the power of recognition might be thwarted or seriously diluted. No such obstacles can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers of the President in the conduct of foreign affairs [cite to J.B. Moore article discussed above] is to be drastically revised. It 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. We would usurp the executive function if we held that the decision was not final and conclusive in the courts." Id. at 220-230.

Concurring, Justice Frankfurter stated flatly, "That the President's control of foreign relations includes the settlement of claims is indisputable." Id. at 240.³

³ The views of Learned Hand in an analogous case are well worth noting:

"The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies. The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations." Ozanic v. United States, 188 F.2d 228, 231 (CA2 1951).

The parties attempt to distinguish Pink and it is helpful to examine their arguments with care. Petr argues that Pink and Belmont are only Supremacy Clause cases, holding that an Executive Agreement preempts contrary state law. Pet Brief at 19-20. But, if the Agreement preempts state law, it must be because it is federal law. Stating that the agreement is law necessarily implies that the President had power to achieve it. Petrs are incorrect in arguing that the Litvinov Agreement did not involve settlement of the claims of American creditors; the President there was marshalling assigned Russian assets to satisfy the claims of American creditors for the expropriations of the communist regime. While it is true that the acts before the Court were the marshalling rather than a settlement of claims at less than their face value, the reasoning of the Court approved the entire process of settlement. It could well be argued that the Litvinov Agreement was a better deal than the Algerian Declarations, that the former agreement obtained much larger payments to creditors than the present. But this objection involves only the question of whether the settlement is a "taking", a question we believe is separate from the question of the President's power to settle.

CADC declined to rest its decision on Pink and Belmont essentially because the cases too blithely accepted vague Presidential powers. American Int'l Group v. Iran, Slip Op at 17. Rather, it chose to rest its decision on the history of Executive settlement agreements acquiesced in by Congress. But, in reaching this decision, the court again looked to Pink

*Rational
of
CADC*

and Belmont, noting that "they do lend support to the proposition that the President need not seek the advice and consent of the Senate for all such settlements." Id. at 33. This reluctance to rely squarely on Pink and Belmont is understandable. The cases were decided in the shadow of a world crisis when the authority of the President and our alliance with the Soviet Union each seemed vital to national welfare. The cases, while I think correctly decided, seem unconcerned with balancing power among the branches and are deferential to the President to a degree inapposite to contemporary attitudes. The cases are lax in identifying the source of the President's power. To a large extent they seem to suggest that the President has some plenary authority over the field of foreign affairs conferred by the necessities of foreign diplomacy. A contemporary court rightfully is reluctant to embrace the old idea that the President is the "sole organ" of nation in foreign affairs, particularly as regards a power, making executive agreements, potentially in conflict with the constitution's explicit Treaty power, requiring the participation of the Senate. Pink might be read as placing the President's power to make settlements in J. Jackson's category 3, where the President has inherent power to act regardless of the Congress's opposition. CADC relied on the history of Congressional acquiescence to bring their holding into category 2.

The argument based on Congressional acquiescence in the President's power to settle claims is strong. As noted

Not
contradicting

above, the President has exercised his power since early times without general disapproval from Congress. As CADC noted, the Congress disapproved the particular settlement made by the President of \$105 million in claims against Czechoslovakia for \$20.5 million. In that case the President held many millions in Czech gold as a bargaining chip. Thus, it may be inferred that Congress could have disapproved of the Algerian Agreements if it had chosen to do so.

I believe that the holding of this case can be further narrowed. As noted, Pink addressed only the President's power to make settlements incident to his acknowledged power to recognize foreign governments.⁴ The making of settlements has been recognized by the Court only as an incidental power to the effectuation of an object within the scope of the President's lawful authority. I think that in this case the Court need go no further. As Paul Smith will have discussed, Congress in the so-called Hostage Act, 22 U.S.C. § 1732, placed upon the President the duty to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release". I tend to think that the President may use his recognized incidental power to settle the claims of american nationals to achieve an object which Congress clearly has authorized. This approach would provide a narrow foundation

⁴ This power appears to be included in the President's enumerated power to "receive Ambassadors and other public Ministers." Art. II, sec. 3.

for affirming the President's power by bringing the case almost into J.Jackson's category 1. It would not hold that Congress conferred any new power to the President in the Hostage Act, but merely that they authorized him to use such power as he possessed to accomplish a proper end. Also, it does not set up the power to enter settlements on an independent basis where the President can without compunction enter settlements in any international context; the reach of the power need not be addressed. As of now, I would hold thusly.

III

Petr's strongest argument that the President lacks power is that Congress in the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602, et seq., places petr's claim unambiguously in federal court for a judicial determination free from political interference. According to this theory, the history of Presidential settlements prior to the passage of FSIA is unimportant. The President is now in conflict with Congress, which has directed that federal courts have jurisdiction over the matter, and with the courts, because he is interfering with their Article III power by depriving them of jurisdiction over these claims. In my view, this argument mischaracterizes the President's acts and overstates the scope of the FSIA. Petr. relies on FSIA

The FSIA granted jurisdiction to federal courts to entertain suits between American citizens and foreign sovereigns involving commercial disputes. It also sought to place these suits more in the ordinary course of business and yes

remove them from politics by for the first time directing federal courts to make the decision whether the foreign sovereign defendant was entitled to a defense of sovereign immunity. Prior to this, the State Dep't had issued an advisory letter to the court concerning immunity, which was almost always followed. Foreign nations were wise to this and sought to bargain with the State Dep't to obtain immunity. The Act established a legal test for sovereign immunity and directed it to govern unless an existing agreement between the foreign nation and the U.S. was to the contrary.

Petr argues primarily that the FSIA evinces a Congressional intent to remove the Executive from commercial disputes, by depriving him of the sovereign immunity decision and allowing private litigation in federal court rather than the nation to nation settlements that the President historically had engaged in. This argument reads the statute too broadly. First, the FSIA does not address in any terms the President's power to settle claims as part of an international agreement. No decision about sovereign immunity is involved in this case. It must be doubtful that Congress would oust the President from a customary power only by implication. Second, that petrs have a judicial remedy does not go to the President's power to act for the general welfare. Petrs would have it that the President settles claims only to confer a benefit on private Amercians, but as the Pink stresses and Schooner Peggy illustrates, the President may settle privte claims to remove obstacles to the acheivement of a public accord rather than

merely to recover funds for private parties. Finally, the intent behind FSIA seems to have been to depoliticize "ordinary legal disputes" when one party was an entity of a foreign government, because "foreign state enterprises are every day participants in commercial activities", H.R. 94-1487, at 1-2 (1976), not to cabin the President's authority to deal with public crises. The examples of cases that could now be litigated without executive interference given in the legislative history include: contract litigation over delivered goods or the sale of land, or a tort suit when an American is struck by an embassy car. Id. I find nothing directed to extraordinary situations such as presented by the taking of hostages by a renegade nation.

2 ? Judge Duffy in one of these cases held that the Executive was attempting to oust federal courts from jurisdiction conferred on them by Congress when he directed that these claims be brought before the Tribunal. This holding is irresponsible. The President does not assert any power to alter the jurisdiction of federal courts and the unnecessary characterization of his actions as such ill serves the separation of powers. Presumably it would not be argued that the President had ousted the court from jurisdiction if he had settled these claims by receiving a lump sum payment. The analysis should be no different because he has received an agreement to arbitrate backed by an escrow fund. ?

The President's order does not address the jurisdiction of the courts but the validity of the private

Why not if
the settlement
was, say, 50c

claims. If he has "taken" anything it is not judicial power, but a chose in action. In my view, it is folly for a federal court to willfully characterize what the President has done as an unconstitutional incursion on Art III power. A significant underlying question in this case is the role of the judiciary. It seems to me broadly that the question of whether to make an agreement of the type at issue here is a political question. If Congress doesn't like it it can say so; if the People don't like it they can vote. The proper role for the judiciary is not to second guess the judgment of the President that this agreement was a proper response to difficult events, when the Congress has been silent. However, the judiciary has a significant role to play in seeing that individual rights are not washed away in the attempt to secure a public benefit. This role is most properly exercised in regard the "taking" question rather than in the question of the power of the President. The judiciary should not say that the political arm cannot act, but should state that the political arm must pay for the private rights they employ to achieve their aims. This allows discretion, but protects the individuals rights.

In summary, I would hold that the President acted pursuant to the Hostage Act and exercised his traditional power to settle claims.

PS 06/22/81

See my memo to file.

To: Mr. Justice Powell

From: Paul Smith

Re: No. 80-2078, Dames & Moore v. Regan--Statutory Issues

There are three different statutes that have some relevance to this case: the International Economic Emergency Powers Act (IEEPA), 50 U.S.C. § 1701 et seq., the "Hostage Act," 22 U.S.C. § 1732, and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq. The first two are possible sources of congressional authorization of the Iran Agreement. The third may indirectly support the President's power to void the attachments by making those attachments void ab initio on immunity grounds. I will treat each act in turn.

I. The IEEPA

The First Circuit and the DC Circuit both concluded that this statute, passed in 1977, gives the President the power to vacate the attachments entered under licenses issued by the Secretary of the Treasury after the initial "blocking" of the Iranian assets. They refused to accept the Government's argument that this statute also authorized the "suspension" of the cases pending in American courts and transfer of those cases to the Tribunal. These holdings appear to be correct.

A. The Statute

The IEEPA was passed in 1977 to provide standards for Presidential regulation of economic matters in times of emergency that fall short of actual war. Prior to that time, the Trading With the Enemy Act, 50 U.S.C. App. § 5(b), applied both to wartime and to other emergencies declared by the President. It gave the President somewhat broader powers over foreign assets, including the power to seize and vest those assets. The Trading With the Enemy Act is now limited in effect to wartime, and the IEEPA "does not include ... the power to vest, i.e., to take title to foreign property." H.R. Rep. No. 95-459, p. 15 (1977).

Instead, the emphasis ^{by IEEPA} is on regulation of assets ₄ during a short period of actual emergency. The President is empowered to

investigate, regulate, direct and compel, nullify,
void, prevent or prohibit, any acquisition,

3.
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
....

In the exercise of these powers, the President is not totally free of congressional control. He ^①must declare an emergency first, and ^②consult with Congress prior to doing so. 50 U.S.C. § 1703(a). He must transmit a full report specifying the reasons for his action and the specific actions to be undertaken. Id., § 1703(b). In addition, the Congress may terminate the President's actions by a concurrent resolution under the National Emergencies Act, id., § 1622(b), as long as it specifies in the resolution that it wishes to terminate Presidential authority under the IEEPA, id., § 1706(b).

*Congress
may
terminate
Pres' action*

The purpose of the IEEPA was to restrict the broad grant of authority to the President in the Trading with the Enemy Act, which had been used by Presidents in many non-emergency situations to regulate trade. Congress saw a need for "regulation of international economic transactions," House Report at 10-11, in times of emergency, but no need for the kinds of seizures and distributions of enemy property that are possible in wartime under the Trading with the Enemy Act. It also sought to ensure that the emergencies invoked would be short-term and real. *How?*

B. Voiding the Attachments

4.

~~Under IEEPA, Pres. had power to revoke:~~

Using these powers, in November of 1979 the President blocked removal of the Iranian assets and ordered that no attachment be entered on them unless licensed by the Government. The President ultimately did license attachments on these assets, but he also issued a regulation stating that "the provisions of this part and any rulings, licenses, authorization, instructions, orders, or forms issued thereunder may be amended, modified, or revoked at any time." 31 C.F.R. § 535.805. Thus it appears that most of the attachments, including those in this case, were conditioned at least implicitly on possible revocation of this authorization. Another category of cases involves attachments entered prior to the initial invocation of the President's IEEPA powers.

The Act is easier to apply to the first category of attachments. As in the First Circuit case, petr here obtained its attachment under license from the government, after "the assets were within the President's control, under the umbrella of his IEEPA powers." Id., at 10. Therefore, it is much easier to argue that petr "could [not] obtain such an interest in the blocked assets as would later hamper the President in disposing of them." Id. The argument is that the President clearly could bar all future attachments against the funds after the entry of the blocking order and, if so, could allow such attachments subject to possible voiding at a later date under the President's IEEPA powers.

5.

In his decision from the Southern District of New York, Judge Duffy takes the contrary view, arguing that the attachments, once entered, were property rights that the President could not void. In his view, the license to impose attachments could only be revoked prospectively. While this view is not illogical, it seems less than compelling in light of the case law under the old provisions of the Trading with the Enemy Act. The principal case is Orvis v. Brownell, 345 U.S. 183 (1953), involving a blocking order entered by the government against Japanese assets under the TWEA. The Court previously had held that this blocking order did not prevent state attachment orders, which were then necessary in order to obtain jurisdiction over the Japanese defendants. However, in Orvis, the Court held that such an attachment could not narrow the prerogatives of the federal government (the "Custodian") with respect to these assets under the TWEA. The attachment did not constitute a "transfer," because to so interpret it would be to "ignore the express conditions on which the consent [to the attachment] was extended." Id., at 187.

As Judge Duffy's opinion demonstrates, there are ways to distinguish Orvis. It did not involve the formal voiding of an attachment--merely the vesting of the property itself by the Government. And the blocking order issued here was more explicit in its authorization of attachment orders--and therefore less clear on any conditions. But the

basic thrust of the case supports the government: an attachment may be allowed against blocked assets, but it does not destroy the power of the government to regulate the assets under the statute allowing the initial blocking order--at least where preservation of this governmental power may fairly be implied in the terms of the license granted.

Even disregarding the conditional licensing argument, there is support in the language of the IEEPA for the view that the President may nullify any attachment of foreign property--even those entered prior to the emergency. The Act authorizes the President to "nullify ... any holding ... of, or ... exercising any right, power, or privilege with respect to ..." foreign property. This would seem to include the power to "nullify" attachments. This reading is reinforced by ~~ten~~ President's apparent power to "direct and compel ... transfer ... or exportation of" foreign property. Such a transfer would have the effect of "voiding" an attachment. In the present case, the Court need not rely on this more general Presidential power, but choice of such a rationale might have an effect on other pending cases involving pre-emergency attachments.

C. Suspending the Pending Court Cases

The Iran Agreement did more than void existing attachments. It ordered "suspension" of court cases in favor of adjudication at the tribunal. The question thus

7.

becomes whether such an action can be brought within the statutory authorization of the IEEPA. Judge McGowan in the CADC case and the majority in the CAI case, refused to find such an authorization in the admittedly broad and vague terms of the Act. However the Government makes this argument, and was able to convince Judge Breyer of the CAI, who wrote a concurring opinion. Judge Breyer's theory was that the President has the power to "regulate, ... nullify, ... or prohibit ... [the] exercising [of] any right, power, or privilege with respect to ... any property in which any foreign country or a national thereof has any interest; by any person ... subject to the jurisdiction of the United States." 50 U.S.C. § 1702(a)(1)(B). For him, a lawsuit against Iran (leaving aside any question of attached assets in the U.S.) is the "exercising" of a "right" with respect to "property" in which a foreign national has an interest by a person subject to the jurisdiction of the United States. If so, the President is authorized to regulate or nullify such a lawsuit.

It seems clear that the statutory terms can be made to fit the order issued in this case. This is true because the property involved need not itself be in the United States, as long as someone subject to United States jurisdiction is seeking to exercise a right to that property. But there are a number of reasons why it probably is not fair to read the statute this broadly. First, it is

clear that Congress meant (at least principally) to authorize Presidential regulation of assets. Here, the question is not regulation of assets--merely the validity of a lawsuit by an American company suing a foreign entity. The word property apparently was intended to refer to a tangible thing--since the IEEPA grew out of the TWEA, which was concerned with the disposition of enemy assets left in the United States. While the IEEPA gives the President broad power to regulate all forms of international transactions, it goes pretty far to say that, under the IEEPA, he is authorized to stop a person from suing a foreigner. The proper distinction is analogous to the distinction between jurisdiction in rem and jurisdiction in personam. The President can control a res, and control Americans seeking to obtain a res, but cannot prevent Americans from suing foreign countries altogether.

In rem
vs

In personam

Second, it seems odd to allow the President to use this statutory authority to benefit the "enemy" and injure Americans. The Act grew out of an earlier one, the TWEA, which sought to ensure that enemies could not withdraw assets, as well as to ensure that American creditors received a fair share. Here, however, a "ransom" is being "paid" by means of a sacrifice of the rights of Americans to file a lawsuit. Whatever the constitutional power of the President to do this, I think it is unfair to find an authorization in the IEEPA. Perhaps this is why the SG

Purpose
of
TWEA
was to
protect
Americans

Yes

Ask
p 53
SG's
Answer

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makes only a perfunctory argument for the view that the President's suspension of the claims was authorized by the Act. SG's Br. at 53. If I am correct in my interpretation of the IEEPA, the voiding of the attachments was authorized, but the suspension of the court cases themselves must be justified on other statutory or constitutional grounds.

II. The "Hostage Act" (1868)

The SG also makes a short argument for the view that the President's actions are authorized by the Hostage Act, a statute passed in 1868 in response to the actions of other countries in detaining naturalized American citizens. The statute states that when a foreign government detains an American and refuses a demand for release, "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." 22 U.S.C. § 1732. The argument is that this constitutes a delegation of power to the President to deal with hostage-taking by foreign governments, and that such a broad delegation is permissible in the foreign affairs area.

It seems clear to me that the statute, on its face, applied to these facts. It requires only that "any citizen of the United States [be] unjustly deprived of his liberty by or under the authority of any foreign government." Id. One could argue that the statute should be limited to situations in which governments have refused

to recognize the naturalization of foreign-born persons as Americans (the problem in 1868 in Great Britain). But in Zemel v. Rusk, 381 U.S. 1 (1965), the Court suggested that this statute might apply to illegal imprisonments more like the present one--those undertaken in the early days of the Castro regime. Id., at 15. The Court cited the President's "statutory obligation" to take "necessary and proper" actions as one reason for denying Americans access to Cuba in the first place. Id.

The question therefore becomes whether this statute can be said to authorize the particular response chosen by the President in this case--suspending pending court cases brought by American citizens. There appear to be two possible interpretations of what Congress did in 1868. One might argue that Congress did not authorize the President to take any actions that were not already within his constitutional powers, and merely sought to ensure that he would take some action. The statute, after all, merely states that the President "shall use such means ... as he may think necessary and proper" to seek the release of the imprisoned persons. And the sponsor of the language ultimately adopted, Senator Williams of Oregon, stated that his main concern was presidential inaction at the time. Congressional Globe, pt. 5, at 4330 (July 22, 1868). See also id., at 4333 (President must act within the Constitution and other federal laws). Alternatively, as

Judge McGowan stated in his concurring opinion in the CADC case, the statute may be viewed as an authorization to the President to take any action within the power of the federal government as a whole, without further statutory authorization. This certainly was the view of the opponents of the bill, who saw it as a vague and broad license to the President. There is also support for this view in the statements of Senator Williams, who called on the Senate to rely on the judgment of the President concerning what action was appropriate, id., at 4333, and argued that it was impossible to meet these international problems without allowing the President discretion to tailor the remedy to the nature of the particular country involved, id., at 4359.

My view is that the Hostage Act does provide some congressional authorization to the President in this case by authorizing him to undertake some actions that might not be within the power of the President absent any statute. In other words, it is my view that the existence of this statute does lessen the separation-of-powers problem in this case by bringing the President's actions within the first of Justice Jackson's categories in Youngstown--where the President acts with legislative authorization. Of course, the legislative authorization here is extremely vague, and very old as well, and thus is not necessarily as convincing as a more specific and more recent statute. But the Hostage Act can be used at least to indicate general congressional

*Paul's
view of
Hostage
Act*

*But it is
extremely
vague*

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acceptance of wide Presidential discretion in the face of
hostage problems. And very general delegations of power to
the President in foreign affairs have been validated in the
past. United States v. Curtiss-Wright Export Corp., 299
U.S. 304, 320 (1936). If so, the Hostage Act can be used to
fill the gap in the IEEPA identified above--authorizing not
only the voiding of the attachments but also the suspension
of the court cases themselves. This interpretation would
allow the Court to avoid deciding whether the President has
a general power to take such an action in an emergency that
does not involve hostages--without congressional
authorization. Unless the Court is convinced that the
limitations in the IEEPA impliedly prohibit more extensive
actions affecting the court claims under the Hostage Act,
this is the rationale I would advocate--at least as an
alternative holding in addition to a constitutional one.

III. The Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act is relevant
to this case in two distinct ways. First, petr argues, and
Judge Duffy held, that it constitutes an affirmative
indication from Congress that commercial claims against
foreign governments are to be handled judicially, and not
compromised by the President. Second, the SG argues in a
footnote, Br. at 26, n. 19, that the Act helps his cause
because the attachments voided by the President were already
illegal. The argument is that Iran had not waived its

*Paul
would
rely on
the
general
language
of the
Hostage
Act as
authorities
to "suspend"
the court cases*

*SG says
attachments
already
were
illegal
because
immunity
not waived.*

immunity with respect to pre-judgment attachments, as
required by the Act. The first argument will be handled by
Peter in the context of his constitutional discussion. The
second I will discuss here.

I have already argued that the President has the
power under the IEEPA to void the attachments entered by
courts under licenses issued after the initial blocking of
Iran's assets. This FSIA argument would constitute an
additional reason why the President could void these
attachments. Its main significance would be in cases
involving attachments entered prior to the invocation of
IEEPA powers by the President. In those cases, the
President may only be able to void the attachments if they
were void ab initio under the FSIA.

The question of whether Iranian entities are
immune from pre-judgment attachment depends on the
interpretation given to the relevant FSIA provisions and to
the Treaty of Amity between the two countries. The Act,
passed in 1976, provides that "the property of a foreign
state ... used for commercial activity in the United States,
shall not be immune from attachment prior to the entry of
judgment ... if--(1) the foreign state has explicitly waived
its immunity" 28 U.S.C. § 1610(d). This is the only
portion of the Act requiring an "explicit" waiver of
immunity by the foreign state. In the present case, it
would be difficult to argue that Iran has explicitly waived

yes

immunity from pre-judgment attachment. The relevant portion of the 1955 Treaty of Amity, Art. XI, ¶ 4, states:

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

As several courts have noted, this language does not contain anything approaching an explicit reference to pre-judgment attachment. E.g., E-Systems, Inc. v. Islamic Republic of Iran, 491 F. Supp. 1294, 1301-1302 (N.D. Tex. 1980); Behring International, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383, 393 (D.N.J. 1979).

There is, however, one possible way for plaintiffs to get around this problem. The Act preserves in effect existing international agreements, 28 U.S.C. § 1609, and those agreements probably need not ^{be} interpreted according to the standards established in the Act itself. Thus, if the 1955 Treaty of Amity can fairly be interpreted as effecting an "implied waiver of immunity" from pre-judgment attachment, that waiver would still be in effect--despite § 1610's requirement of an explicit waiver. The argument would be that the Treaty implied a waiver in its reference to "other liability to which privately owned and controlled

enterprises are subject." If a pre-judgment attachment can be viewed as a form of "liability," it may be that the Treaty meant for Iranian assets to be treated just like those of private firms.

The lower courts are split on this issue. Compare Behring International, supra, at 395 (Treaty waives immunity) with E-Systems, supra (rejecting this view because waivers of immunity are not inferred lightly and a waiver with respect to pre-judgment attachments would have contravened the normal practice in 1955). I lean toward the view that pre-judgment attachments are not among the forms of "liability" that clearly fall within the statutory terms.

The Government raises a separate argument for the view that many of the attachments entered were invalid. Br. at 26, n. 19. It argues that the Treaty only waives immunity of any kind with respect to Iranian commercial entities--relying on the Treaty's reference to enterprises that "engage[] in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party." In its ^{SG's} view, the Iranian Army would be immune as a non-commercial entity, even if it purchases goods in America. The Government also argues that this limited waiver still controls despite the possibly broader language of the FSIA waiving immunity relating to "commercial activity carried on in the United States by the foreign state." This argument seems ^{more than} a little strained,

Which
side is
SG on?

since the distinction between commercial entities and governmental entities engaged in commerce is hard to draw and not really required by the Treaty or the Act.

Perhaps the best thing to do with these questions is to state that they are an added reason for the Court's recognition of Presidential power to void the attachments. If the requisite waiver of immunity was absent, these attachments had no legal validity. ?

One remaining argument must be addressed in this context. In an earlier case, Judge Duffy held that the President's actions in blocking the assets and licensing attachments themselves constituted a waiver of Iran's immunity. New England Merchants National Bank v. Iran Power and Transmission Co., 502 F. Supp. 120, 131 (SDNY 1980). The court read the IEEPA as authorizing the President, in his regulation of foreign assets in time of emergency, to strip a foreign sovereign of any immunity with respect to those assets. It also found an intent to take this action in the general 1979 order issued by the President blocking Iran's assets. I find this argument unconvincing. First, it is far from clear that in the 1977 IEEPA the Congress meant to allow the President this extraordinary power only one year after, in the 1976 FSIA, it transferred control over foreign immunity issues from the State Department to the courts. Moreover, there is no explicit language affecting Iran's immunity in the President's blocking order,

and one would expect something specific before finding an intent on the part of the President to waive immunity. See McGreevey, The Iranian Crisis and U.S. Law, 2 N.W. J. of Int'l Law and Business 384, 407-10 (1980).

Summary

The IEEPA provides authorization for the President's action in voiding the attachments. For one thing, it appears that the the license to enter the attachments was conditional, and did not restrict the President's power to control the assets under the IEEPA. See Orvis v. Brownell. Moreover, the Act appears to authorize nullification of any attachment against foreign assets in time of emergency. The IEEPA does not constitute Congressional authorization of the President's action in suspending the court cases.

The Hostage Act of 1868 probably should be read as authorizing the President to take any legal actions within the power of the federal government as a whole, when he is seeking to obtain the release of citizens wrongfully detained by foreign governments. If so, this can help to justify the suspension of the court cases.

The Foreign Sovereign Immunities Act, along with the Treaty of Amity, probably renders the attachment legally void ab initio--although there is a split in authority on this issue. I would not infer a "waiver" of this immunity

in the President's blocking order and subsequent licensing
of attachments.

*"Off-the cuff" suggestion to Greig's**draft
of a
memo.*

The President extinguished property rights of private American citizens in order to obtain release of the hostages. He agreed in the Declarations of Algiers *See my* "to terminate all legal proceedings in United States courts *memo. to* involving claims of United States persons and institutions *file.* against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, and to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration." (Decl.) This action was taken pursuant to a "finding" made by the President under the International Emergency Economic Powers Act, 50 U.S.C. (Supp. III) 1701(a), that there was an "extraordinary threat. . .to the national security, foreign policy, or economy of the United States." Thus, for purposes only unrelated to the claim of petitioner and other American citizens similarly situated, the President acted for a public purpose.

I think it clear that this use of private claims of citizens for a public purpose may effect a taking of property within the meaning of the Fifth Amendment.

The government disposes of petitioner's "taking" argument in little more than two pages of its 66-page brief. The argument is said to be "without merit". The President is said to have the power "to settle claims against Iran by providing for their submission to arbitration". And, "[i]f there are insufficient funds in the escrow account, the Tribunal's awards may be enforced "in the courts of any nation in accordance with its laws". Bk. 64, 65.

One would have thought that the government of the United States would be sympathetic, rather than hostile, to assuring the ultimate payment of all just claims if - as seems entirely possible - payment in full is not made under the procedures required by the Declarations of Algiers. Apart from what the Constitution may require, private citizens with valid claims normally would expect their government, in circumstances such as these, voluntarily to assure that valid claims are fully paid at the expense of the Treasury of the United States if this should become necessary.* I therefore find the Government's position singularly insensitive to what many would view as at least a moral obligation.

SEE FOOTNOTE PAGE 2.

*It approaches a high level of naivete to rely on the recovery "in the courts of any nation" if there are insufficient funds in the escrow account. Even if this means that petitioner may sue Iran or its instrumentalities in the courts of the United States for any shortfall, this would assume the presence here of assets to attach - an unlikely prospect indeed. In view of the demonstrated hostility that exists in Iran toward the United States, and the 16th century fanaticism of its rulers, it is irrational to predicate any legal decision on the assumption that Iran would leave assets in the United States if there is any possibility of suits for deficiency judgments.

NOTE TO GREG:

I am under the impression that the Agreement expressly states that all claims against Iran are extinguished. The SG repeatedly claims the power to "settle" these claims which - if it means anything - is to settle them finally without full payment. I do not want you to interrupt your draft, but when you have the opportunity, let me know what you think the SG is talking about in saying that deficiency claims may be enforced in courts of any nation.

lfp/ss 6/22/81

80-2078 Dames & Moore v. Regan

TO MY CLERKS

In view of the "flood" of filings here in this case, including petitions to intervene and for permission to file amici briefs, I have been concerned whether there was any "recusal" problem.

We need not worry about amici briefs, as the settled practice ever since I have been here is that one does not disqualify because of amicus briefs. Otherwise, a Justice deliberately could be knocked out of any case.

There is no problem with Dames & Moore, as there are no "et als" except on the government's side. We have, however, granted several petitions to intervene as parties. I have tried to keep up with these, and check the parties.

But with the pressures to move ahead with this case, and the multiplicity of papers and briefs filed, I would like the three of you who have worked on this case to double check me. The only possible recusal that came to my attention was United Virginia Bank. Its general counsel advises me that the bank has been paid off in full and has no interest in the case.

As no conflict has come to my attention, I will sit tomorrow and attend the Conference. If you should

discover some party we have not previously identified, I would, of course, recuse myself from the decision.

L.F.P., Jr.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

June 22, 1981

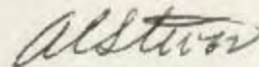
Memorandum to the Conference

Re: Dames & Moore v. Regan, Secretary of
the Treasury, et al., No. 80-2078

In the above-entitled case to be argued on Wednesday, June 24, 1981, Mr. Leonard Boudin informed the Clerk's Office today that he will be unable to argue because he was admitted to a New York hospital late Thursday evening with a heart infection and a 103° temperature. His physician refuses to release him.

Mr. Eric M. Lieberman will argue in his stead.

Respectfully submitted,



Alexander L. Stevas
Clerk

0\$2078G GREG-POW

GM 06/22/81

DRAFT: No. 80-2078: Dames & Moore v. Regan

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Justice Powell, memorandum.

This memorandum addresses the question whether
petitioner has a legal remedy in the Court of Claims under 10
the Tucker Act, 28 U.S.C. §1491, in the event that the
President's actions effect a taking of petitioner's
property for public use. The availability of the Tucker
Act remedy is ripe for adjudication, and in my view it
must be answered now rather than later. I conclude that 15
such a remedy is available to petitioner.

The President used legal claims of private American citizens and enterprises in order to obtain the release of the hostages. He agreed "to terminate all legal proceedings in the United States courts involving 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." Declaration of the Government of the Democratic and Popular Republic of Algeria, ¶ B. Petitioner's attachment ~~of~~ ^{of} Iranian assets is among the attachments nullified by this agreement, and its breach-of-contract claim against Iran and Iranian instrumentalities is among the claims terminated in United States courts and submitted to arbitration.

I think it clear that this public use of the private claims of petitioner and other American citizens and enterprises may effect a taking of private property within the meaning of the Just Compensation Clause. Petitioner's breach-of-contract claim represents a

property interest,¹ which will be diminished if, for

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example, petitioner is denied the opportunity to present

its claims to the Claims Tribunal; if petitioner

establishes that its rights to redress before the Claims

Tribunal are demonstrably inferior to its rights in United

States courts; or if the Claims Tribunal awards petitioner

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an amount that falls demonstrably short of a fair

satisfaction of its claim.² Petitioner^{also} contends that the

order of attachment it obtained upon Iranian assets is

another property interest which, by nullification, the

President already has taken. But the precise manner and

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extent of diminution are inconsequential, for "however

accomplished," and whether or not intended by the

President, a diminution of petitioner's property interest

will entitle petitioner to just compensation. It cannot

be disputed that the President's action^s were largely

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unrelated to legal claims such as petitioner's. Rather,

the President acted in the national interests of obtaining

the hostage's freedom and resolving an international

crisis. But the burden of his actions falls upon the

relatively few citizens and enterprises with legal claims.

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*July -
this
may
need
qualification
in light
of oral
argument*

The Just Compensation Clause applies in these circumstances, for it "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 48-49 (1960). See Gray v. United States, 21 Ct.Cl. 340, 3420343 (18886);³; cf. Agins v. City of Tiburon, 447 U.S. 255, 260-261 (1980); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-124 (1978).

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The Government contends that petitioner's "taking" argument is "without merit." Brief 64. It is said that petitioner's breach-of-contract claim is "unaffected," for the President "simply" has "provide[d] for the same claim to be heard in a different forum." Id., at 65. And if the funds in the escrow account are insufficient to satisfy the awards of the Claims Tribunal, it is said that petitioner may enforce the Tribunal's

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Reply
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I would have thought that the Government of the United States would be solicitous to assure the payment of just claims if, as seems to me entirely possible, payment in full is not made under the procedures established in the Declaration of Algeria. Apart from what the Constitution requires, citizens and enterprises with valid claims normally would expect the Government, in circumstances such as these, voluntarily to assure that they are fully paid at the expense of the Treasury of the United States if necessary. I find the Government's position singularly insensitive to what many would view as at least its moral obligation. Furthermore, I cannot rely as the Government urges on the "right" given by the Declaration to recover "in the courts of any nation" if insufficient funds are deposited in the escrow account. Even if this means that petitioner may sue Iran and its instrumentalities in United States courts for a shortfall, the prospect that Iranian assets will be found in this country is highly unlikely. In view of Iran's demonstrated hostility toward the United States, it is hardly rational to predicate our decision on the

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Revised

assumption that Iran would leave assets in this country if there is any possibility of suits for deficiency judgments.

As The possibility ~~exists, therefore,~~ that the President's actions will effect a taking of petitioner's private property for a public use. That possibility makes ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims under the Tucker Act, 28 U.S.C. §1491.⁴ I would have serious reservations about the constitutionality of a Presidential power that could effect a taking of property for which the property holder had no remedy against the United States. That the ~~fact and extent of the~~ taking in this case is yet speculative is ~~inconsequential~~ *irrelevant*, for "there must be at the time of taking 'a reasonable, certain and adequate provision for obtaining compensation.'" Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-125 (1974), quoting Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 659 (1890); see also Cities Service Co. v. McGrath, 342 U.S. 330, 335-336 (1952); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 94, n. 39

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(1978).⁵ I therefore turn to the availability of a remedy under the Tucker Act.

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II

Petitioner will have a remedy in the Court of Claims in the event of a taking of its property. Section 1491 provides in pertinent part that "[t]he Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded...upon the Constitution" A claim that the President's actions took its property for public use without just compensation "plainly would fall within the literal words" of §1491, Regional Rail Reorganization Act Cases, *supra*, at 126, for "[i]f there is a taking, the claim is 'founded upon the Constitution,'" United States v. Causby, 328 U.S. 256, 267 (1946); accord Jacobs v. United States, 290 U.S. 13, 16 (1933).

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"Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations."

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As consistently construed by this Court and the Court of Claims, §1502 is not a bar to jurisdiction over taking claims such as petitioner might raise. This section divests the Court of Claims of jurisdiction only where a treaty itself confers the right that the claimant relies upon as against the United States. United States v. Weld, 127 U.S. 51 (1888); United States v. Old Settlers, 148 U.S. 427 (1893); Eastern Extension Telephone Co. v. United States, 231 U.S. 326 (1913).⁶ In this case, the right upon which petitioner would rely is conferred by the Just Compensation Clause, not by the Agreements entered into by the President with Iran nor by any of the Executive Orders or Department of Treasury regulations.⁷

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breach-of-contract claim to arbitration or by the
nullification of its attachments. The availability of
this remedy is significant to my conclusion as to the
President's powers, for the Just Compensation Clause "was
designed to bar Government from forcing some people alone
to bear public burdens which, in all fairness and justice,
should be borne by the public as a whole." Armstrong v.
United States, supra, at 49.⁸

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¹Petitioner's complaint ~~seeks~~ ^{sought} \$3,788,930, plus interest, as money due for services rendered under a contract. *A judgment for this amount was entered by the District Court on February 18, 1981*

Greg - add what happened subsequently.

²The Declaration provides that the Claims Tribunal is to be funded initially with \$1 billion of Iranian assets to satisfy awards to American claimants, and that Iran would maintain a minimum balance of \$500 million in a security account until all awards of the Tribunal have been paid. Declaration, ¶ 7. It is estimated, however, that American claims eligible for arbitration in the Tribunal total \$3-4 billion. It is at yet unclear, of course, whether Iran will fulfill its promise to maintain the security account until all awards are paid.

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territorial possessions on this continent, the United States relinquished certain claims of American nationals against France. When asked whether this relinquishment implicated the Just Compensation Clause, the Court of

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Claims stated:

"That any Government has the right to do this, as it has the right to refuse in war the protection of a wronged citizen, or to take other action, which, at the expense of the individual, is most beneficial to the whole people, is too clear for discussion. Nevertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation It seems to us that this 'bargain'...which was brought about by the sacrifice of the interests of individual citizens, falls within the intent and meaning of the Constitution, which prohibits the taking of private property for public use without just compensation." 21 Ct. Cl. at 342-343.

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See also Cushing v. United States, 22 Ct. Cl. 721 (1886).

I think that Gray correctly concluded that the relinquishment of legal claims in the settlement of an international dispute was a taking of property interests for a public use compensable under the Just Compensation Clause. I do not read Blagge v. Balch, 162 U.S. 439, 457 (1896), to express any opinion on the legal reasoning in Gray. In any event, any opinion expressed on Gray would be dictum, as the only issue in Blagge was the interpretation of a congressional Act that governed the

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manner of paying claims found by the Court of Claims to be due as compensation for the relinquishment of legal claims at issue in Gray. See Aris Gloves, Inc. v. United States, 420 U.S. 1386, 1395-1397 (Ct. Cl. 1970) (Nichols, J., concurring); McGreevey, The Iranian Crisis and U.S. Law, 2 Nw. J. Int'l Law & Bus. 384, 439-440 (1980).

⁴The Tucker Act vests jurisdiction in federal district court, concurrent with the Court of Claims, for claims against the United States involving less than \$10,000. 28 U.S.C. §1346(a)(2). Although nothing in the record indicates whether a taking of petitioner's property would exceed \$10,000, if a taking occurs at all, the nature of petitioner's commercial contracts with Iran make it unlikely that less than \$10,000 would be involved. Accordingly, my concern is with the availability of a

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⁵Cities Service Co. v. McGrath, 342 U.S. 330 (1952), well illustrates this rule of law. The Attorney General, acting as successor to the Alien Property Custodian, sought payment of certain negotiable debentures from the obligor on the debentures and the indenture trustee. The obligations represented by the debentures had been seized by the Alien Property Custodian under the Trading with the Enemy Act, 50 U.S.C. App. §1 et seq., but the debentures themselves were not in the Custodian's possession. Petitioners argued that the seizure provisions of the Act would effect a taking of their property in the event that a foreign court subsequently held them liable to a holder in due course of the debentures, and that the taking would be without just compensation unless they had a remedy against the United States. Petitioners conceded that they could plead payment in this country as a defense to suit in another country. The Court considered the availability of a Tucker Act remedy despite skepticism as to petitioners' concern over the prospect of double payment. It stated:

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"While their defense to such litigation seems adequate and final payment by them improbable, we agree that petitioners might suffer judgment the payment of which would effect a double recovery against them. In that event, petitioner will have the right to recoup from the United States, for a 'taking' of their property within the meaning of the Fifth Amendment, 'just compensation' to the extent of their double liability. Such cause of action will accrue when, as, and if a foreign court forces petitioners to pay a holder in due course of the debentures. We agree...that only with this assurance against double liability can it fairly be said that the present seizure is not itself an unconstitutional taking of petitioners' property." Id., at 335-336.

⁶In United States v. Weld, 127 U.S. 51, 57 (1888), the Court held:

"In order to make the claim one arising out of a treaty within the meaning of [the predecessor provision to §1502], the right itself, which the petition makes to be the foundation of the claim, must have its origin--drive its life and existence--from some treaty stipulation" (emphasis in original).

To illustrate its point, the Court contrasted the claim asserted in Weld with the claim asserted in Great Western Insurance Co v. United States 112 U.S. 193 (1884). As

arising from or growing out of a treaty is one involving rights given or protected by a treaty." The Court of Claims has consistently followed this construction of §1502. Hughes Aircraft Co. v. United States, supra, at 902-906; Societe Anonyme Des Ateliers Brillie Freres v. United States, 160 Ct.Cl. 192, 196-99 (1963); S.N.T. Fratelli Gondrand v. Unites States, 166 Ct.Cl. 473, 477 (1964).

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⁷The word "treaty" in §1502 has been construed to include executive agreements. Hughes Aircraft Co. v. United States, 534 F.2d 889, 903, n. 17 (Ct. Cl. 1976). Because §1502 is inapplicable to this case, I do not question that construction.

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⁸This case does not involve a situation in which governmental action that already ~~was~~ effected a taking is determined to be unauthorized. A taking that is not authorized expressly or by necessary implication "is not

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the act of the Government," and recovery against the Government is not available in the Court of Claims. Hooe v. United States, 218 U.S. 322, 336 (1910); Regional Rail Reorganization Act Cases 419 U.S. 102, 127 n. 16 (1974).

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I do not address the question whether petitioner would have a remedy in some other court under another cause of action if unauthorized Presidential action had taken its property for a public use.

80-2078 Dames & Moore v. Regan

STATUTORY ISSUES - MEMO TO FILE

Paul Smith's memo of June 22 on these issues is persuasive - more so than the SG's rather arrogant brief. Indeed, the Iranian parties really don't need a lawyer with the SG so enthusiastic on their side.

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The three statutes are: the International Economic Emergency Powers Act (IEEPA), the Hostage Act, and the Foreign Sovereign Immunities Act (FSIA). The first two are possible sources of congressional authorization of the type of agreeemtn before us. FSIA affords some basis for arguing that the prejudgment attachments were void initially because Iran had not "explicitly" waived immunity.

I. IEEPA

Passed in 1977 to replace the Trading with the Enemy Act, IEEPA authorizes presidential regulation of economic matters in an emergency short of actual war. To my surprise, Paul notes that there is some congressional oversight. The President may declare an emergency to make the Act effective, but must first consult Congress. Also,

Congress may terminate a President's action by a concurrence resolution.

Ask Paul:

1. What constitutes consulting? What does the record in this case show with respect to consulting?
2. Elaborate on the power to terminate. When?

Voiding Attachments. Petitioner in this case did not attach until a license was issued that, by its terms, was revocable. Paul thinks IEEPA authorized revocation, and therefore whatever property interest petitioner gained by the attachment was subject to be divested. Paul cites Orvis v. Brownell as persuasive but not controlling authority.

Even with respect to the cases where attachments were obtained prior to the President's restrictive regulations, Paul thinks a fairly persuasive argument can be made that IEEPA authorized the President to "nullify" the attachments. I find it difficult to believe that Congress intended any such broad grant of power.

Power to Suspend Pending Cases. The Iran agreement, in addition to voiding the attachments, "suspended" all court cases in favor of adjudication by the tribunal.

Both CA1 and CADC held that IEEPA did not authorize this action.

Paul observes that a "President can control a res, and control Americans seeking to obtain a res, but cannot prevent Americans from suing foreign countries". Paul also notes that it would be "odd to allow the President to use IEEPA to benefit the 'enemy' and injure Americans". Thus, Paul concludes that IEEPA does not authorize suspension of the law suits. Peter will conclude, I think, that the President has inherent power to do this - as CADC and CAL have held.

II. The Hostage Act (1968).

This ancient statute provides that "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" of Americans held by other nations.

Although this statute is extremely vague, the government relies on it - and Paul thinks with some reason - as a eliminating any argument as to the separation of powers. The Act appears to make a broad grant of authority to do as he pleases - within the Constitution - to release American citizens. I would have a hard time "buying" the full sweep of this argument.

Specifically, Paul thinks that the Hostage Act does constitute arguable authority for the right of a President to "suspend" these suits.

III. Foreign Sovereign Immunities Act (FSIA).

Both sides rely heavily on this Act. Petitioner argues that it constitutes an affirmative indication from Congress that commercial claims against foreign governments are to be handled judicially, and not compromised by the President. The SG also argues (fn. 19, p. 26) that FSIA supports the view that the attachments were already illegal.

The Act (1976) provides that:

"The property of a foreign state . . . used for commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment . . . if (1) the foreign state has explicitly waived its immunity . . ." 26 U.S.C. 1610(d).

Although the purpose of the Act is to protect American creditors, § 1610(d) is the only provision that requires an "explicit" waiver of immunity. The question then is whether Iran has so waived immunity from prejudgment attachment by its 1955 treaty of amity that states:

"No [Iranian] enterprise of . . . shall . . . claim or enjoy either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein."

Although this language makes no explicit reference to prejudgment attachment, FSIA preserves existing international agreements such as the 1955 treaty of amity. 18 U.S.C.A §1609. It can be argued, therefore, that the broad language above includes at least an "implied waiver of

immunity from prejudgment attachment". The language of the treaty waiving immunity with respect to suits, execution of judgments "or other liability to which privately owned" enterprises are subject, could well include prejudgment attachments. Such attachments are commonly available in private litigation.

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lfp/ss 6/23/81

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* * *

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to return the "frozen assets" to
obtain release of hostages
w/o making any provision for
settlement of claims of U.S. creditors - 1, 2

JUN 23 1981

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-2078

2. Under Const. (implied power), Hostages Act, &
the 1955 Treaty, Pres. had power to "settle" + "discharge"
In the Supreme Court of the United States claims - 2

OCTOBER TERM, 1980

DAMES & MOORE, A PARTNERSHIP, PETITIONER

Claims only suspended - 1, 2

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

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1. Petitioner challenges two distinct actions by the President in this case: (1) the ordering of the transfer of Iranian assets subject to the jurisdiction of the United States, and (2) the provision for the settlement of claims against Iran by means of their presentation to the Iran-United States Claims Tribunal. Although both of these measures were taken in connection with the Agreement with Iran, they implicate quite different powers of the President.

As we explain in our opening brief (Govt. Br. 28-29), the President had the power under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. (Supp. III) 1701 *et seq.*, to direct the return of frozen Iranian property to Iran solely in order to obtain the release of the

hostages and resolve the crisis with Iran, without making any provision for settlement of the claims of United States nationals. Thus, the validity of the Presidential order to transfer assets which are subject to judicial orders obtained by petitioner does not depend on whether petitioner's claim against the Iranian defendants is subject to the jurisdiction of the Claims Tribunal and is thereby settled by the Agreement. See, e.g., *American Bell Int'l, Inc. v. Islamic Republic of Iran*, No. 80-321 (D.D.C. June 11, 1981), cert. before judgment denied, No. 80-2111 (June 22, 1981). Nor does it depend on whether the President even had authority to settle claims of any American nationals. Conversely, the President's power under the Constitution, the Hostage Act (22 U.S.C. 1732), and the 1955 Treaty with Iran,¹ to provide for the settlement and discharge of the claims of American nationals against Iran through submission to arbitration does not depend on whether he also has the authority under IEEPA to direct the transfer of blocked Iranian property, up to \$1 billion of which will be deposited in a security account to fund awards by the Tribunal in favor of American claimants.

2. Petitioner concedes (Pet. Br. 18) that the President has authority to settle the claims of United States nationals against a foreign government. See Govt. Br. 40-50. The entire burden of its argument on the claims settlement issue (see Pet. Br. 9-18, 20-21) is that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1602 *et seq.*, implicitly carves out an exception to this broad authority in the case of claims for which that Act permits a suit against the foreign government. For the reasons given in our opening brief (Govt. Br. 56-63), however, the FSIA is wholly irrelevant to the claims settlement issue.

¹Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853.

The pertinent provisions of that Act (28 U.S.C. 1604-1607) deal solely with issues of immunity (H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 20 (1976); S. Rep. No. 94-1310, 94th Cong., 2d Sess. 19 (1976); see also *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. May 22, 1981), at 20) and confer jurisdiction on the district courts of in personam actions against a foreign sovereign whenever the sovereign is not entitled to immunity (28 U.S.C. 1330(a)).² The settlement by the Executive of a claim on which a claimant has filed suit against a foreign government no more interferes with the *jurisdiction* of the court or confers an *immunity* to that jurisdiction—the subjects addressed by the FSIA—than would a settlement entered into by the claimant himself. For example, if petitioner entered into an out-of-court agreement with the Iranian defendants settling its claims, that settlement would furnish a basis for the Iranian defendants to assert the affirmative defense of accord and satisfaction (Fed. R. Civ. P. 8(c)), not a lack of subject matter jurisdiction under 28 U.S.C. 1330(a) because of an immunity to suit. By the same token, if the President settles the claim pursuant to his constitutional or other authority, the Iranian defendants presumably could assert a similar defense (cf. *Heckman v. United States*, 224 U.S. 413, 444-446 (1912)) or one based upon the failure to state a claim upon which relief could be granted (Fed. R. Civ. P. 12(b)(6); *American Int'l Group, Inc. v. Islamic Republic of Iran*, Nos. 80-1779, 80-1891 (D.C. Cir. June 5, 1981), slip op. 23); they could not, however, obtain a dismissal for lack of jurisdiction because of a supposed immunity to the jurisdiction of the courts.

²The legislative history of the FSIA cited by petitioner (Pet. Br. 10-15) refers exclusively to the issue of a foreign government's immunity to suit and the State Department's previous role in making "suggestions of immunity" to the courts (*id.* at 12 & n.10). Petitioner still has cited no reference suggesting a congressional intent in the FSIA to abrogate the established practice of Executive claims settlement.

Moreover, as relevant here, the FSIA did not represent a break with the past with respect to foreign sovereign immunity; it merely codified the previously extant restrictive theory of sovereign immunity under which a foreign government is generally subject to suit for its commercial and other private acts. See H.R. Rep. No. 94-1487, *supra*, at 7. That theory of sovereign immunity had been adopted by the State Department itself in 1952. See *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 698-699, 711-715 (1976). Yet since 1952, as the District of Columbia Circuit observed, the Executive has entered into at least ten lump sum settlement agreements with other nations.. *American Int'l Group, Inc. v. Islamic Republic of Iran*, *supra*, slip op. 30. Significantly, three of those agreements settled commercial contract claims, on which the foreign government may not have been immune to suit in this country. See United States-Hungary Claims Settlement, Mar. 6, 1973, Art. 2(2), 24 U.S.T. 552, T.I.A.S. No. 7569; United States-Bulgaria Claims Settlement, July 2, 1963, Art. 1(1)(c), 14 U.S.T. 969, T.I.A.S. No. 5378; United States-Rumania Claims Settlement, Mar. 30, 1960, Art. 1(1)(c), 11 U.S.T. 317, T.I.A.S. No. 4451. If these settlements of commercial contract claims were not inconsistent with the restrictive theory of sovereign immunity adopted by the State Department in 1952, there is no reason to believe that Executive settlement of commercial claims became inconsistent with that same theory when it was codified in the FSIA. Similarly, the *Restatement*, which incorporates the restrictive theory of sovereign immunity with respect to commercial activities (*Restatement (Second) of Foreign Relations Law* § 69 (1965)), explicitly notes that the Department of State will espouse and settle contract claims in appropriate circumstances even without the claimant's consent (*id.* at § 212 Reporters' Note, § 213. The drafters of the *Restatement* therefore apparently saw no inconsistency between the proposition that foreign governments are subject to suit

on claims arising out of their commercial activities and the proposition that the President may settle the same claims. Accordingly, there is no reason to believe that Congress perceived such an inconsistency when it enacted the FSIA.³

Finally, the FSIA subjects a foreign sovereign to suit on more than commercial contract claims. For example, 28 U.S.C. 1605(a)(3) provides that a foreign sovereign is not immune from suit in the United States on certain expropriation claims.⁴ Expropriation claims have frequently been the subject of claims settlement agreements. Yet under petitioner's argument that claims may not be settled by the Executive where they are (or perhaps may be) the subject of a suit filed under the FSIA, the Executive would be required to exclude certain expropriation claims from claims settlement agreements as well. See also 28 U.S.C. 1605(a)(1) (permitting suits where the foreign government has waived immunity). As we noted in our opening brief (Govt. Br. 59 n.55), such an approach would pose an insurmountable barrier to claims settlement by the Executive, which would not be in a position to make the complex legal and factual

³The congressional reports on the FSIA also reflect an intent to ensure that the practice in the United States with respect to immunity is in line with that in other nations. H.R. Rep. No. 94-1487, *supra*, at 7; S. Rep. No. 94-1310, *supra*, at 7. The statutory purpose of bringing the United States into line with the international community would not be served by a construction of the FSIA that would disable the United States government from settling the claims of its nationals through negotiations with another nation, especially in circumstances as compelling as the Iranian crisis.

⁴28 U.S.C. 1605(a)(3) provides that a foreign state shall not be immune in any case in which rights in property taken in violation of international law are in issue and that property (or property exchanged for it) is present in the United States in connection with commercial activity or that property is owned or operated by an instrumentality of the foreign state that is engaged in commercial activity in the United States.

judgments necessary to determine whether each of a multitude of claims was one for which a suit would lie under the FSIA and which was therefore not subject to settlement between nations.

3. Petitioner contends (Pet. Br. 23-33) that IEEPA does not authorize the President to provide for the transfer of blocked Iranian assets to Iran and to the security account intended to fund awards by the Claims Tribunal. In petitioner's view, the power to allow foreign assets to leave the country is an "awesome" one (Pet. Br. 24) that defeats the rights of American creditors.

The language of IEEPA is indeed "sweeping and unqualified" (*Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, supra*, at 9) with respect to the powers the President may exercise over blocked assets of a foreign country. But the legal principle that explains how those powers may affect petitioner and other claimants who obtained orders of attachment against Iranian property after the President's November 14, 1979, blocking order is quite simple. By issuing the blocking order, the President obtained, in effect, a congressionally authorized "lien" or right in those assets in order to enable him to deal with the "unusual and extraordinary threat * * * to the national security, foreign policy, or economy of the United States" (50 U.S.C. (Supp. III) 1701(a)) that was created by the hostage crisis. Petitioner and other individual claimants who obtained orders of attachment against that property after November 14, 1979, were thereby rendered, in effect, junior creditors whose interest in Iranian property was necessarily subordinate to and contingent upon the exercise of the President's prior and paramount authority to control the property in the national interest and for the benefit of claimants generally, rather than for the benefit of the relatively few individual claimants who happened to have filed suit and obtained attachments. Petitioner therefore cannot

complain of the President's exercise of the very powers Congress conferred on him.

Petitioner was on notice of the contingent and subordinate nature of its interest when it filed suit, by virtue of regulations providing that "any attachment * * * is null and void" with respect to Iranian property "[u]nless licensed or authorized" under the regulations (31 C.F.R. 535.203(e) (1980)) and making clear that the general license for pre-judgment attachments and other proceedings (31 C.F.R. 535.418, 535.504 (1980)) "may be * * * revoked at any time" (31 C.F.R. 535.805 (1980)). When that general license for pre-judgment attachments was revoked, the legal basis for the attachments was eliminated and the attachments were rendered "null and void."⁵ Moreover, as we explain in our opening brief (Govt. Br. 28-38), past decisions of this Court make clear that a pre-judgment attachment of frozen assets in a suit against the foreign debtor does not restrict the President in his control over the property in any event.

In petitioner's view, however, IEEPA does not allow the President "permanently to dispose" of foreign property out

⁵Petitioner argues (Pet. Br. 37-40) that these regulations meant only that no *new* attachments could be obtained after the license was revoked, but that attachments that were obtained while the license was in effect would remain valid. Such an interpretation is inconsistent with the very concept of a license, which ordinarily allows the use of property only at the sufferance of the licensor, without creating any vested interest in the property that survives the revocation of the privilege. Cf. *DeHaro v. United States*, 72 U.S. (5 Wall.) 599, 627 (1867). Because a license by definition may be revoked at any time, petitioner's construction renders the explicit revocability provision redundant. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Furthermore, petitioner's interpretation is entirely inconsistent with the purpose of the assets control regulations, which is to leave control of the assets by the President unfettered by the creation of interests in property, by court order or otherwise. See *Propper v. Clark*, 337 U.S. 472 (1949).

of the country (Pet. Br. 28).⁶ This argument is answered by the very language of IEEPA itself. The statute authorizes the President to "regulate" or "direct and compel" the "transfer, withdrawal, transportation, * * * or exportation of * * * any property in which [a] foreign country * * * has any interest * * * by any person, or with respect to any property, subject to the jurisdiction of the United States" (50 U.S.C. (Supp. III) 1702(a)(1)(B)). This language plainly authorizes the President to license a foreign country to "withdraw" or "export" the property it has in the United States or, as here, to bring about the same result by "directing" and "compelling" "any person" in possession of Iranian property to "transfer," "transport," and "export" it so that it will be placed in the security account or in the custody and control of Iran, the country to which it belongs. See McLaughlin & Teclaff, *The Iranian Hostage Agreements: A Legal Analysis*, 4 Fordham Int'l L.J. 223, 235 (1981).

Petitioner has pointed to nothing in IEEPA or its legislative history to suggest that Congress did not intend these words to mean exactly what they say. To the contrary, the House Report emphasizes that the power granted in IEEPA is "sufficiently broad and flexible to enable the President to respond as appropriate and necessary to unforeseen contingencies" (H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 10 (1977)). Here, the President determined that the transfers of Iranian property contemplated by the Agreement with Iran

⁶Petitioner argues (Pet. Br. 27-28) that this supposed "permanent" disposition of the assets conflicts with IEEPA's purpose of allowing only temporary freezing of foreign assets. But petitioner loses sight of the fact that the President's withholding of the assets from Iran, the owner of the property, was temporary in nature, lasting only so long as necessary to accomplish the objectives of the blocking order.

were an "appropriate and necessary" response to the "unforeseen contingencies" of the crisis following the seizure of the American hostages, because they implemented the Agreement providing for the release of the hostages and resolution of claims of United States nationals and prepared the way "to begin the process of normalization of relations between the United States and Iran" (Executive Order Nos. 12279, 12280, 12281 (46 Fed. Reg. 7919, 7921, 7923 (1981)); Pet. App. 43, 46, 49).

Petitioner takes a narrower view of the statute's purposes, however, contending that the President cannot dispose of the assets in a way that affects its attachments and, therefore, its ability to recover on its claim in district court. It is true that the blocking powers authorized by IEEPA were intended in part to protect American claimants. See Govt. Br. 29-30. But Congress expected that this would be accomplished by the *President*, through a lump sum or other form of *settlement* of claims generally. See, e.g., H.R. Rep. No. 95-459, *supra*, at 17. IEEPA was not intended to be a mere supplement to whatever powers of attachment individual claimants might have obtained in United States courts, as petitioner would have it.

If attachments obtained by claimants in the United States were held to prevent the President from transferring or freeing up blocked assets, they would prevent the President from resolving the crisis that first led to the blocking order, as IEEPA obviously contemplates. In the particular circumstances of this case, such judicial restraints would prevent the transfer of the \$1 billion in bank-held assets that are to be placed in the security account to pay awards by the Claims Tribunal. And if the remainder of Iranian assets that are subject to attachment could not be returned to Iran in accordance with the terms of the Agreement, there is every likelihood that Iran would not make any additional payments into the security account to fund awards by the

Tribunal. In that event, the mechanism established by the President for the settlement of claims of United States nationals generally would be rendered ineffective. Such a result, reached for the benefit of those relatively few claimants who obtained pre-judgment attachments,⁷ would plainly conflict with the clear congressional purpose in enacting IEEPA that nothing in the Act was intended "to impede the settlement of claims of U.S. citizens against foreign countries" (S. Rep. No. 95-466, 95th Cong., 1st Sess. 6 (1977); emphasis added).⁸

⁷The passages in the IEEPA hearing and markup transcripts cited by petitioner (Pet. Br. 26 n.27) do not support its assertion that Congress intended to permit the President to freeze assets and negotiate a settlement *only* where the claimants could not sue the foreign government in United States courts.

⁸We have answered petitioner's argument (Pet. Br. 25-27) that, by virtue of Sections 9 and 34 of the Trading with the Enemy Act (TWEA), 50 U.S.C. app. 9 and 34, the President would have been prohibited under the TWEA from transferring frozen assets overseas rather than satisfying the claims of particular American claimants. See Govt. Br. 36-38. Those sections provided a right for claimants to recover only out of assets that were vested in the federal government—*i.e.*, foreign assets to which the United States had taken *title*. There is no comparable right under the TWEA to recover out of assets that were only frozen or blocked, as is the case with Iranian assets. See *Markham v. Cabell*, 326 U.S. 404, 409-410 (1945). Congress declined to permit the President to vest foreign assets under IEEPA. This omission obviously was not meant to assist American claimants, because they are thereby deprived of the benefits of Sections 9 and 34; the omission was instead intended for the protection of the foreign property owner whose property might be taken over by the federal government. Thus, the deletion of the vesting power cuts strongly against recognizing a right in petitioner, through its post-blocking attachments, to prevent the disposition of foreign assets in the manner agreed to by their owner. See McLaughlin & Teclaff, *supra*, 4 Fordham Int'l L.J. at 236.

4.a. Petitioner contends (Pet. Br. 33-43) that the President's Executive Orders requiring the transfer of property notwithstanding the orders of attachment and other judicial orders petitioner obtained constitute a taking of property without just compensation and should, for that reason, be enjoined. But these attachments were acquired pursuant to a license that was expressly made revocable at any time, and all such judicial orders were in any event subordinate to the President's previously invoked power to direct the transfer of assets pursuant to IEEPA. See Govt. Br. 36 n.29, 64; *Markham v. Cabell*, *supra*; see also note 5, *supra*. Thus, petitioner had no property interest resulting from these judicial orders that could be asserted against the federal government, and the President's directing the transfer of the property therefore does not constitute a taking of property requiring the payment of just compensation.⁹

*Taking
argument*

b. Petitioner concedes (Pet. Br. 34 n.32) that any taking argument with respect to the President's exercise of his distinct power to settle claims of United States nationals "may not yet be ripe for review" because it has not yet presented its claim to the Tribunal and therefore does not know how that claim will be received by the Tribunal.¹⁰ See

⁹Petitioner also contends (Pet. Br. 34, 36) that it is entitled to just compensation because the President has "nullified" the judgment petitioner obtained against the Government of Iran and AEOL. However, Executive Order No. 12294 (46 Fed. Reg. 14111 (Feb. 26, 1981)) does not purport to "nullify" petitioner's judgment; that order merely *suspends* the domestic effect of claims that may be submitted to the Claims Tribunal. Cf. *American Int'l Group, Inc. v. Islamic Republic of Iran*, *supra*, slip op 32-34. See also Govt. Br. 55-56 & n.52.

¹⁰Petitioner states (Pet. Br. 4) that it is "highly uncertain" whether its claim against the Iranian defendants is within the jurisdiction of the Claims Tribunal, because that jurisdiction does not extend to "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" (Decl. 11, Art. 11; Pet. App. 31). Petitioner's contract provides that if a dispute between the parties cannot be

also *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, supra*, at 23-24; *American Int'l Group, Inc. v. Islamic Republic of Iran, supra*, slip op. 34-38. We agree with petitioner that this aspect of the taking issue need not be considered here. Petitioner's suit against the Iranian defendants in California has not been dismissed, thereby terminating its cause of action in United States courts. The claim underlying that suit has only been suspended, and this suspension will in turn require only a stay of judicial proceedings pending presentation of the claim to arbitration. Thus, there can be no argument at this stage that petitioner's property has been taken. There will be time enough to consider a taking argument if the district court eventually

resolved through discussions, the dispute shall be submitted to conciliation by three conciliators, one to be appointed by each party and the third to be appointed by an agency of the Government of Iran. If either party does not accept the decision of the conciliators, the contract provides that "the matter shall be decided finally by resort to the courts of Iran" (Pet. Br. 4 n.2).

The United States has taken the position that a clause giving Iranian courts jurisdiction over disputes arising under the contract may not be "binding" within the meaning of the clause excluding claims arising under certain contracts from the Tribunal's jurisdiction, because circumstances have so changed in Iran that enforcement of the provision would be inconsistent with the parties' intent when they entered into the contract. See *Iranian Asset Settlement: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. 68 (1981). Under the Agreement, the Tribunal is to decide cases on the "basis of respect for law, * * * taking into account relevant usages of the trade, contract provisions and changed circumstances" (Decl. II, Art. V; Pet. App. 33). The reference to "changed circumstances" in Article V was included for the specific purpose of bringing the changed circumstances doctrine into play with respect to forum clauses. *Hearing, supra*, at 68. In addition, the government has taken the position that, even if forum clauses are "binding" for purposes of the Agreement, clauses such as the one in petitioner's contract that provide for arbitration or conciliation prior to resort to the courts of Iran do not relate to disputes "within the sole jurisdiction of the competent Iranian courts" for purposes of the exclusionary clause in Declaration II, Article II (emphasis added).

compare
with n 9
of opening
Panel

only
"suspended"

orders petitioner's suit against the Iranian defendants dismissed following a ruling by the Claims Tribunal on the merits of petitioner's claim—assuming, of course, that petitioner would be dissatisfied with the award and would oppose the order of dismissal.¹¹

There would, moreover, be a host of factors to be taken into account in considering the taking issue, many of which are necessarily speculative at the present time. First, of course, is the question whether there could ever be a taking of property for purposes of the Just Compensation Clause resulting from the United States' settlement of a claim against a foreign government, in view of the established doctrine that claims taken up by the United States belong to the United States. See Govt. Br. 49; see also *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *Great Western Insurance Co. v. United States*, 19 Ct. Cl. 206, 217-218; *aff'd on other grounds*, 112 U.S. 193 (1884); *Arts Gloves, Inc. v. United States*, 420 F. 2d 1386 (Ct. Cl. 1970).¹²

¹¹Thus, this is not a case that will lead inexorably to a final conveyance of property without an opportunity for prior judicial review to consider the availability of a Tucker Act remedy. Compare *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127, 138-141 (1974). In any event, an injunction should not be entered to prevent the implementation of an Executive Agreement of the President in circumstances such as this on the basis of mere speculation that the remedies provided will not be adequate in a few individual cases.

¹²*Gray v. United States*, 21 Ct. Cl. 340 (1886), does not indicate that there would be a compensable claim. Unlike the present situation, there the court found a taking because the American claims were valid, would have been honored by the French, and were released in full by the United States. See *Arts Gloves, Inc. v. United States*, *supra*, 420 F. 2d at 1396-1397 (Nichols, J., concurring). In the present case, the Executive has not *renounced* petitioners claim in a similar fashion. Moreover, *Gray* was "strictly an advisory opinion [for Congress] which was not binding upon either of the parties and cannot be binding upon subsequent courts" (420 F. 2d at 1393). As this Court said of *Gray*, "[w]e think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace and not of right." *Blagge v. Balch*, 162 U.S. 439, 457 (1896).

Second, assuming that a taking could be found in some such circumstances, the appropriate test in a situation involving an en bloc settlement of claims, we submit, should be whether, under the circumstances, the settlement provided for a reasonable recovery (or procedure for recovery) for the claimants as a group (cf. *United States v. Sioux Nation of Indians*, No. 79-639 (June 30, 1980), slip op. 35-50), not whether any particular claimant would have received more in United States courts than he did in a lump sum settlement or through an arbitration mechanism. Indeed, any other rule would perhaps end the long-standing practice of en bloc claims settlement by the Executive.

Third, if it were necessary to focus on the effects of a settlement on each individual claim comprised therein, a court considering a taking claim would be required to conduct a complex trial to determine whether the value received in settlement was in fact less than would have been received in domestic litigation. This would in turn depend on a variety of factors, many of which are unrelated to the merits of the particular contract, expropriation, or other claim that had been settled.¹³

¹³Thus, in order to prove a taking of property in the context of the Iranian Agreement, a claimant would have to demonstrate some or all of the following: (1) that its underlying claim is meritorious; (2) that the claim would have been decided by an American court notwithstanding such defenses as sovereign immunity, act of state, lack of sufficient contacts for in personam jurisdiction, or perhaps an Iranian forum clause; (3) that the claimant could have executed on a domestic judgment against Iranian property that would have remained in this country even absent the President's blocking order; (4) that the Tribunal's award was less than that a domestic court would have rendered; (5) that the claimant could not recover on an award from the Tribunal either from the \$1 billion Security Account or the funds used to replenish and maintain that account at a minimum of \$500 million; (6) that the claimant could not satisfy any Tribunal award in the courts of other nations, even those who are a party to the Convention on Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997; and (7) that its award would not be satisfied out of funds received by the United States as damages if Iran should default under the Agreement.

Finally, there is the question of what would constitute just compensation for the settlement of an international claim for less than its estimated value in domestic courts. Cf. *United States v. Fuller*, 409 U.S. 488, 490 (1973).

These issues obviously are better left for resolution in the case of a particular claimant who can demonstrate a concrete effect on his financial position. *Hodel v. Virginia Surface Mining & Reclamation Association*, Nos. 79-1538, 79-1596 (June 15, 1981), slip op. 26-31.

For the foregoing reasons and the additional reasons stated in our opening brief, it is respectfully submitted that the judgment of the district court should be affirmed.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1981

DOJ-1981-06

WEDNESDAY, JUNE 24, 1981

CASE FOR ARGUMENT TODAY

<p>C. STEPHEN HOWARD Los Angeles, Cal. (60 minutes--Dames & Moore)</p> <p>REX E. LEE Off. of the Sol. Gen. Dept. of Justice Washington, D. C. (40 minutes--Regan)</p> <p>THOMAS G. SHACK, JR. Washington, D. C. (10 minutes--Islamic Republic of Iran)</p> <p>ERIC M. LIEBERMAN New York, N. Y. (10 minutes--Bank Markazi Iran)</p>	<p><u>No. 80-2078</u></p> <p>DAMES & MOORE,</p> <p>Petitioner</p> <p>v.</p> <p>DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.</p>	<p>2 hours for argument.</p>
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Howard (Petr)

Suit filed after "blocking order"

Judg. obtained.

Ex. Order signed by Reagan is broader than Carter's Ex. Order. It asserts power to "settle" claims. This necessarily includes power to release liens on prop.

Claims right to attach funds regardless of the "blocking" order - so long as attachment doesn't interfere with the "freeze" (blocking).

Never before ~~the~~ has Pres. - acting alone - done this. i.e. Transfer claims out of our courts to a Tribunal

Government by Treaty could do this - if it paid.

Not questioning validity of freeze.

Pres. has power to freeze but not to release prop. & send it out of country.

Howard (cont)

As to implied power, the examples relied on by SG are irrelevant.

No way prior to these statutes for citizens to sue because of immunity.

The examples are of Govt's effort to help U.S. citizens.

Rex Lee (SG)

Situation of creditors is now better.

There were immunity & lack of juries defenses & act of state.

A single issue ~~concerns~~ power of Pres to act in

Lee says claims are only suspended not terminated. "Order" is different from "Agreement"

~~The~~ Can't decide now any "taking" question.

Rail Organization case conceded to be close.

Lee (cont.)

If there is a ~~remedy~~ taking,
Lee expressed his opinion that there
will be a remedy under the Tucker
Act.

"Heart of Case" is power of Pres
to settle claims. Hostage Act
squarely authorizes. It gives Pres
power to do anything short of war.
(as P.S. said, to exchange 10 innocent
Americans for a single hostage).

Leg. Branch has recognized Pres power
over many years.

Argues Art III quest. Relies on
Schooner Case 9 U.S. 281 & 11 U.S. 116

Pres. didn't just give up of courts;
he changed the relevant "substantive
law".

Shack (for Govt of Iran)

U.S.

Tribunal now has juris,
with power to impose a judgment vs,
the U.S.

Int. law is binding despite
domestic law.

~~U.S. has~~

Two Declarations:

→ | Obligated to terminate all
court proceedings & to settle
all claims.

Clear language requires
"Termination" of all claims. - even
~~those which Tribunal cannot~~

Lieberman (Iranian Bk)

(Did not understand argument)

Even in absence of any
legislative authority, Pres would
have implied power - political
power.

Tucker Act provides a remedy.

Howard (Reply)

Reagan has not conceded that the Agreement is enforceable under International Law. The Agt. was under duress.

Whatever we decide "will be new law". There is no precedent.

OK if a Treaty had been approved by $\frac{2}{3}$ rd of Senators.

The Chief Justice Agrees

President had authority under IEPA to block assets & to nullify attachment.

Under Jackson's Steel Case opinion, Pres was acting within maximum power.

Under Harbors Act, Pres. "shall" do whatever he thinks proper & - short of War - to release Harbors. Presers not to rely on implied power.

No taking ^{yet} Attachments were reversible.

Pres. changed substantive law, Did not invade jurisdiction of courts.

Govt. concedes no jurisdiction under Tucker Act.

Mr. Justice Brennan Agrees

Agree generally with C.J.

Power to settle international claims is well established.

FSIA did not abridge their power to settle claims in furtherance of foreign policy.

IEPA is explicit auth. to revoke attachment & transfer assets.

~~Brainerd~~ Brainerd of law suit is not a prop. right.

Hostages Act authorizes a Pres to punish foreign country - not our citizens. But Pres has inherent power ~~should say Tucker Act applies~~.

Mr. Justice Stewart Agrees

Not fully at rest.

Tentatively agree with C.J. & W.J.B.

On Art III issue, agree with S.G. &

CAJCL (Carl McGowan)

Taking issue in to be resolved - not w/ respect to attachment. But suspension of litigation may involve a taking within the meaning of the 5th Amendment. Agree Tucker Act - but not now. Agree Tucker Act - remedy applies. We should say so.

W.J.B.'s views →

May be a present
taking as to creditors
who can't go to the Tribunal

Mr. Justice White Affirm

Congress can say & did in ^{IEEPA}~~IEEPA~~ that
foreign assets may not be attached.

Q is whether Pres is authorized to require
a license. Answer is yes. Thus, property interest
in attachment was subject to divestment.

Q Orban & Detman are troublesome (attachments
were valid as to other countries?) but can be
distinguished.

~~Congress~~ Congress has acquiesced in Pres' settlement
of claims.

Rather rely on inherent power than on
Hostage Act.

Agree may go to Court of Claims, but would
not find a present taking. Should say Ct/Claims have jurisdiction.

Mr. Justice Marshall Affirm

Claims not ripe yet.

Would not go on Pres. inherent power.

(Doesn't expect to write now).

Mr. Justice Blackmun Affirm

No problem with attachment issue.

Would not rely on Hostages Act -
would rely on inherent power.

Regional Rail Case could perhaps
say there has been a taking - but
would prefer to leave this issue

Mr. Justice Powell Agree

Tentative views:

1. IEPA authorized the blocking of assets & probably the voiding of attachments
2. Hortage Act authorizes "settlement of claims". SG seems in doubt whether they are to be settled - but claim inherent power. I'd rather rely on Hortage Act primarily
3. There ^{probably} has been a "taking" - as Petr's claim has been destroyed or seriously diminished. It can't sue in Court. Its attachment has been voided. Whether damages will result is not now known. We should say remedy under

Mr. Justice Rehnquist Agree

Trustee's
rights.

Hortage Act is broad but Congress can correct this. Congress cannot limit inherent power. Can say there is a limited inherent power.
IEPA authorizes voiding of attachments.
" did not authorize settlement of claims.

Should say no power. ~~to~~ ^{to suit} ~~bar~~ in Ct/claims.
But taking issue is not here.

Mr. Justice Stevens Agree

In this case, etc. of creditor agreed to suit in Iranian courts.

Taking claim is frivolous

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 24, 1981

Re: 80-2078 - Dames & Moore v. Regan

MEMORANDUM TO THE CONFERENCE:

To "get the show on the road" Bill Rehnquist has agreed to get an opinion in our hands by noon Sunday, next - if not before.

Regards,

WR



June 26, 1981

Re: No. 80-2078 - Dames and Moore v. Regan, Secretary
of the Treasury

Dear Bill:

I may possibly have a few inconsequential suggestions, but you may regard this as a "join."

I will place ten Brownie Points in your personnel file and grant you two weekends leave.

Regards,

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

June 26, 1981

CHAMBERS OF
JUSTICE BYRON R. WHITE

Re: 80-2078 - Dames & Moore v. Regan

Dear Bill,

After a quick reading of your draft, which I think is very good and which I shall study more carefully, I have the following comments:

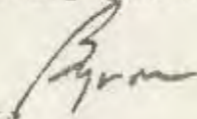
First, my own view, and I thought the view espoused in Conference, is that because of the President's authority to prevent and condition attachments and because of the orders he issued to this effect, it was not feasible for any creditor to acquire a property interest by attachment. Hence, there is no barrier to the transfer of the attached funds by the President and so no taking of a property interest giving rise to a claim for compensation. I had thought that this would decide the taking question with respect to liquidating the attachments.

Second, what we are withholding is a decision on the taking question with respect to suspending or cancelling claims rather than the attachments. That discussion, along with the matter of the Court of Claims' jurisdiction, perhaps should come after the section of the opinion dealing with claims settlement.

Third, and this is a minor matter with respect to the attachment issue, it seems to me that we should say a word in response to the argument that although the President could have forbidden attachments, he allowed them and hence permitted the acquisition of a property interest. Of course, this merely requires a construction of the licensing regulation as anticipating retroactive revocation.

Otherwise, I am quite content.

Sincerely yours,



Justice Rehnquist
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 26, 1981

Re: 80-2078 - Dames & Moore v. Regan

Dear Bill:

Congratulations and thanks for putting together a first class opinion in such a short time span. I am prepared to join all of it except the two paragraphs on pages 25-26 concerning jurisdiction in the Court of Claims. I have serious doubts on the jurisdictional question and would simply not address it. I will not, however, write anything except something like the enclosed brief statement.

My other suggestions, none of which is critical, are these:

1. Page 28, line 10. Perhaps you should delete the word "unanimous" in view of Judge Breyer's separate opinion.

2. Page 36, line 9. If, instead of stating "crucial to our decision" you could merely state something like "strongly supporting our decision" I would be a little happier because I would reach the same result without the congressional approval.

3. Page 47, line 10. If you could leave out the words "are reasonable. The President has" I would be happier because I would like to avoid expressing an opinion that may be read as approving the merits of the settlement and I think your opinion will make the same point if you thereby simply combine the first two sentences of that paragraph.

As I indicated, whether you accept or reject the last three suggestions, I will join your opinion except for the two paragraphs I identified at the outset.

Respectfully,

A handwritten signature in dark ink, appearing to be "J. H. Rehnquist", written in a cursive style.

Justice Rehnquist

Copies to the Conference

Enclosure

0\$2078I

80-2078 - Dames & Moore v. Regan

JUSTICE STEVENS, concurring.

In my judgment the possibility that requiring this petitioner to prosecute its claim in another forum will constitute an unconstitutional "taking" is so remote that I would not address the jurisdictional question considered in the last two paragraphs of Part III of the Court's opinion. However, I join the remainder of the opinion.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Brandenburg

Circulated: 6/26/81

Recirculated: _____

No. 80-2078 Dames & Moore v. Regan, Secretary of the

Treasury

JUSTICE REHNQUIST delivered the opinion of the Court.

The questions presented by this case touch ~~fundamentally~~

upon the manner in which our Republic is to be governed.

Throughout the nearly two centuries of our nation's existence

under the Constitution, *the powers of the President has been the subject of* ~~this subject has generated~~ considerable

debate. We have had the benefit of commentators such as John

Jay, Alexander Hamilton, and James Madison writing in The

Federalist Papers at the nation's very inception, the benefit of

astute foreign observers of our system such as Alexis

d'Tocqueville and James Bryce writing during the first century of

the nation's existence, and the benefit of many other treatises

as well as more than 400 volumes of reports of decisions of this Court. As these writings reveal it is ~~doubtless~~ both futile and ~~perhaps~~ ^{offer} dangerous to ~~find~~ any epigrammatical explanation of how this country has been governed. Indeed, as Justice Jackson noted, "[a] judge...may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (concurring opinion).

Our decision today will not dramatically alter this situation, for the Framers "did not make the judiciary the overseer of our government." Id., at 594 (Frankfurter, J., concurring). We are confined to a resolution of the dispute presented to us. That dispute involves various executive orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States, directed that these assets be transferred to Iran, and suspended claims against Iran that may be presented to an international Claims Tribunal. This

action was taken in an effort to comply with an Executive Agreement between the United States and Iran. We granted certiorari before judgment in this case, and set an expedited briefing and argument schedule, because lower courts had reached conflicting conclusions on the validity of the President's actions and, as the Solicitor General informed us, ^{it is} unless the Government acted by July 19th, Iran could consider the United States to be in breach of the Executive Agreement.

But before turning to the facts and law which we believe determine the result in this case, we stress that the expeditious treatment of the issues involved by all of the courts which have considered the President's actions makes us acutely aware of the necessity to rest decision on the narrowest possible ground capable of deciding the case. Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This does not mean that reasoned analysis may give way to judicial fiat. It does mean that the statement of Justice Jackson that we decide difficult cases presented to us by virtue of our commissions, not our

competence, is especially true here. We attempt to lay down no general "guide-lines" covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case.

Perhaps it is because it is so difficult to reconcile the foregoing definition of Article III judicial power with the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive, without either challenge or interference by the Judiciary, that the decisions of the Court in this area have been rare, episodic, and ^{of} ~~afford~~ little precedential value for subsequent cases. The tensions present in any exercise of executive power under the tri-partite system of ~~federal~~ government established by the Constitution have been reflected in opinions by members of the Court more than once. The Court stated in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-320 (1926):

"[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the

not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."

And yet 15 years later, Justice Jackson in his concurring opinion in Youngstown, supra, which both parties agree brings together as much combination of analysis and common sense as there is in this area, 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." 343 U.S., at 641.

As we ~~now~~ turn to the factual and legal issues in this case, we freely confess that we are obviously deciding only one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances.

I

On November 4, 1979, the American Embassy in Tehran was seized and our diplomatic personnel were captured and held hostage. In response to that crisis, President Carter, acting pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (Supp. II 1978) (hereinafter "IEEPA"), declared a national emergency on November 14, 1979,¹ and blocked the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States...." Executive Order No. 12170, 44 Fed. Reg. 65279.² President Carter

¹Title 50 U.S.C. § 1701(a) (Supp. II 1978) states that the President's authority under the Act "may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or in substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." Petitioner does not challenge President Carter's declaration of a national emergency.

²Title 50 U.S.C. § 1702(a)(1)(B) (Supp. II 1978) empowers 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

authorized the Secretary of the Treasury to promulgate regulations carrying out the blocking order. On November 15, 1979, the Treasury Department's Office of Foreign Assets Control issued a regulation providing 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 on or since [November 14, 1979] there existed an interest of Iran." 31 C.F.R. § 535.203(e) (1980). The regulations also made clear that any licenses or authorizations granted could be "amended, modified, or revoked at any time." 31 C.F.R. § 535.805 (1980).³

On November 26, 1979, the President granted a general license authorizing certain judicial proceedings against Iran but which did not allow the "entry of any judgment or of any decree

to, or transactions involving, any property in which any foreign country or a national thereof has any interest...."

³31 C.F.R. § 535.805 (1980) provides in full: "The provision of this part and any rulings, licenses, instructions, orders, or forms issued thereunder may be amended, modified, or revoked at any time."

or order of similar or analogous effect...." 31 C.F.R. §

535.504(a) (1980). On December 19, 1979, a clarifying regulation was issued stating that "the general authorization for judicial proceedings contained in § 535.504(a) includes pre-judgment attachment." 31 C.F.R. § 535.418 (1980).

On December 19, 1979, petitioner Dames & Moore 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, and a number of Iranian banks. In its complaint, petitioner alleged that its wholly owned subsidiary, Dames & Moore International, S. R. L., was a party to a written contract with the Atomic Energy Organization, and that the subsidiary's entire interest in the contract had been assigned to petitioner. Under the contract, the subsidiary was to conduct site studies for a proposed nuclear power plant in Iran. As provided in the terms of the contract, the Atomic Energy Organization terminated the agreement for its own convenience on June 30, 1979. Petitioner contended, however, that it was owed

\$3,436,694.30 plus interest for services performed under the contract prior to the date of termination.⁴ The District Court issued orders of attachment directed against property of the defendants, and the property of certain Iranian banks was then attached to secure any judgment that might be entered against them.

On January 19, 1981, the Americans held hostage were released by Iran pursuant to an Agreement embodied in two Declarations of the Democratic and Popular Republic of Algeria. Declaration of the Government of the Democratic and Popular Republic of Algeria (App. to Pet. for Cert., at 21-29), and Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the

⁴The contract stated that any dispute incapable of resolution by agreement of the parties would be submitted to conciliation and that, if either party was unwilling to accept the results of conciliation, "the matter shall be decided finally by resort to the courts of Iran." Pet. for Cert., at 7, n.2. In its complaint, which was based on breach of contract and related theories, petitioner alleged that it had sought a meeting with the Atomic Energy Organization for purposes of settling matters relating to the contract but that the Organization "has continually postponed [the] meeting and obviously does not intend that it take place." Complaint in Dames & Moore v. Atomic Energy Organization of Iran, No. 79-04918 LEW (Px) (C.D. Cal.), at ¶ 27.

Government of the United States of America and the Government of the Islamic Republic of Iran (App. to Pet. for Cert., at 30-35). The Agreement stated that "it is the purpose of [the United States and Iran]...to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration." App. to Pet. for Cert., at 21-22. In furtherance of this goal, the Agreement called for the establishment of an Iran-United States Claims Tribunal which would arbitrate any claims not settled within six months. Awards of the Claims Tribunal are to be "final and binding" and "enforceable...in the courts of any nation in accordance with its laws." Id., at 32. Under the Agreement, the United States is obligated

"to terminate all legal proceedings in United States courts involving 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." Id., at 21-22.

terminate

In addition, the United States must "act to bring about the

transfer" by July 19, 1981, of all Iranian assets held in this country by American banks. Id., at 24-25. One billion dollars of these assets will be deposited in a security account in the Algerian Central Bank and used to satisfy awards rendered against Iran by the Claims Tribunal. Id.

On January 19, 1981, President Carter issued a series of executive orders implementing the terms of the Agreement. Executive Order Nos. 12276-12285, 46 Fed. Reg. 7913-7932. These orders revoked all licenses permitting the exercise of "any right, power, or privilege" with regard to Iranian funds, securities, or deposits; "nullified" all non-Iranian interests in such assets acquired subsequent to the blocking order of November 14, 1979; and required those banks holding Iranian assets to transfer them "to the Federal Reserve Bank of New York, to be held or transferred as directed by the Secretary of the Treasury." Executive Order No. 12279, 46 Fed. Reg. 7919. *Carter's orders*

On February 24, 1981, President Reagan issued a second Executive Order in which he "ratified" the January 19th

Executive Orders. Executive Order No. 12294, 46 Fed. Reg. 14111.

Moreover, he "suspended" all "claims which may be presented to the...Tribunal" and provided that such claims "shall have no legal effect in any action now pending in any court of the United States." Ibid. The suspension of any particular claim terminates if the Claims Tribunal determines that it has no jurisdiction over that claim; claims are discharged for all purposes when the Claims Tribunal either awards some recovery or determines that no recovery is due. Ibid.

Meanwhile, on January 27, 1981, petitioner moved for summary judgment in the District Court against the Government of Iran and the Atomic Energy Organization, but not as against the Iranian banks. The District Court granted petitioner's motion and awarded petitioner the amount claimed under the contract plus interest. Thereafter, petitioner attempted to execute the judgment by obtaining writs of garnishment and execution in state court in the State of Washington, and a sheriff's sale of Iranian property in Washington was noticed to satisfy the judgment.

However, by order of May 28, 1981, as amended by order of June 8, the District Court stayed execution of its judgment pending appeal by the Government of Iran and the Atomic Energy Organization. The District Court also ordered that all pre-judgment attachments obtained against the Iranian defendants be vacated and that further proceedings against the bank defendants be stayed in light of the executive orders discussed above. App. to Pet. for Cert. at 106-107.

On April 28, 1981, petitioner filed this action in the District Court for declaratory and injunctive relief against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the executive orders and Treasury Department regulations implementing the Agreement with Iran. In its complaint, petitioner alleged that the actions of the President and the Secretary of the Treasury implementing the Agreement with Iran were beyond their statutory and constitutional powers and, in any event, were unconstitutional to the extent they adversely affect petitioner's final judgment

against the Government of Iran and the Atomic Energy Organization, its execution of that judgment in the State of Washington, its pre-judgment attachments, and its ability to continue to litigate against the Iranian banks. Id., at 1-12. On May 28, 1981, the District Court denied petitioner's motion for a preliminary injunction and dismissed petitioner's complaint for failure to state a claim upon which relief could be granted. Id., at 106-107. Prior to the District Court's ruling, the United States Courts of Appeals for the First and the District of Columbia Circuits upheld the President's authority to issue the executive orders and regulations challenged by petitioner. See Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (CA 1 May 22, 1981); American Int'l Group, Inc. v. Islamic Republic of Iran, No. 80-1779 (CA DC May 22, 1981) (Opinion filed June 5, 1981).

On June 3, 1981, petitioner filed a notice of appeal from the District Court's order, and the appeal was docketed in the United States Court of Appeals for the Ninth Circuit. On June 4,

the Treasury Department amended its regulations to mandate "the transfer of bank deposits and certain other financial assets of Iran in the United States to the Federal Reserve Bank of New York by noon, June 19." App. to Pet. for Cert., at 151-152. The District Court, however, entered an injunction pending appeal prohibiting the United States from requiring the transfer of Iranian property that is subject to "any writ of attachment, garnishment, judgment, levy, or other judicial lien" issued by any court in favor of petitioner. Id., at 168. Arguing that this is a case of "imperative public importance," petitioner then sought a writ of certiorari before judgment. Pet. for Cert. at 10. See 28 U.S.C. § 2101(e); this Court's Rule 18 (1980). Because the issues presented here are of great significance and demand prompt resolution, we granted the petition for the writ, adopted an expedited briefing schedule, and set the case for oral argument on June 24, 1981. ___ U.S. ___ (1981).

II

The parties and the lower courts confronted with the instant

questions have all agreed that much relevant analysis is contained in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Justice Black's opinion for the Court in that case, involving the validity of President Truman's effort to seize the country's steel mills in the wake of a nation-wide strike, recognized that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." Id., at 585. Justice Jackson's concurring opinion elaborated in a general way the consequences of different types of interaction between the two democratic branches in assessing presidential authority to act in any given case. When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." Id., at 637. When the President acts in the absence of

congressional authorization he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." Id., at 637. In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation of powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the legislative branch toward such action, including "congressional inertia, indifference or quiescence." Ibid. Finally, when the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." Id., at 637-638.

Although we have in the past and do today find Justice Jackson's classification of executive actions into three general categories analytically useful, we should be mindful of Justice Holmes' admonition, quoted by Justice Frankfurter in Youngstown, 343 U.S., at 597 (concurring opinion), that "The great ordinances

of the Constitution do not establish and divide fields of black and white." Springer v. Phillipine Islands, 277 U.S. 189, 209 (1928) (dissenting opinion). Justice Jackson himself recognized that his three categories represented "a somewhat over-simplified grouping," 343 U.S., at 635, and it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeon-holes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.

III

In nullifying post-November 14, 1979, attachments and directing those persons holding blocked Iranian funds and securities to transfer them to the Federal Reserve Bank of New York for ultimate transfer to Iran, President Carter cited five sources of express or inherent power. The Government, however,

has principally relied on § 1702 of the IEEPA as authorization
for these actions. Section 1702(a)(1) provides in part:

"At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise --

(A) investigate, regulate, or prohibit --

(i) any transactions in foreign exchange,

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

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

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States."

The Government contends that the acts of "nullifying" the attachments and ordering the "transfer" of the frozen assets are specifically authorized by the plain language of the above statute. The two Courts of Appeals that have considered the issue agreed with this contention. In Chas. T. Main Int'l., Inc.

for the First Circuit explained:

"The President relied on his IEEPA powers in November 1979, when he 'blocked' all Iranian assets in this country, and again in January 1981, when he 'nullified' interests acquired in blocked property, and ordered that property's transfer. The President's actions, in this regard, are in keeping with the language of IEEPA; initially he 'prevent[ed] and prohibit[ed]' 'transfers' of Iranian assets; later he 'direct[ed] and compel[led]' the 'transfer' and 'withdrawal' of the assets, 'nullify[ing]' certain 'rights' and 'privileges' acquired in them.

"Main argues that IEEPA does not supply the President with power to override judicial remedies, such as attachments and injunctions, or to extinguish 'interests' in foreign assets held by United States citizens. But we can find no such limitation in IEEPA's terms. The language of IEEPA is sweeping and unqualified. It provides broadly that the President may void or nullify the 'exercising [by any person of] any right, power or privilege with respect to ... any property in which any foreign country has any interest' 50 U.S.C. § 1702(a)(1)(B) (emphasis added)." Id., at 9.

In American Int'l Group, Inc. v. Islamic Republic of Iran, supra,

the Court of Appeals for the District of Columbia Circuit

employed a similar rationale in sustaining President Carter's

action:

"The Presidential revocation of the license he issued permitting prejudgment restraints upon Iranian assets is an action that falls within the plain language of the IEEPA. In vacating the attachments, he acted to 'nullify [and] void ... any ... exercising any right, power, or privilege with respect to ... any property in which any foreign country ... has any interest ... by any person ... subject to the jurisdiction of the United States.'" Id., at 19 (footnote omitted).

Petitioner contends that we should ignore the plain language of this statute because an examination of its legislative history as well as the history of § 5(b) of the Trading With the Enemy Act (TWEA), 50 U.S.C. App. § 5(b), from which the pertinent language of § 1702 is directly drawn, reveals that the statute was not intended to give the President such extensive power over the assets of a foreign state during times of national emergency. According to petitioner, once the President instituted the November 14, 1979, blocking order, § 1702 authorized him "only to continue the freeze or to discontinue controls." Brief of Petitioner at 32.

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) of the TWEA requires such a result. To the contrary, we think both the legislative history and cases interpreting the TWEA fully sustain the broad authority of the Executive when acting under this congressional grant of power. See, e.g., Orvis v. Brownell, 345

U.S. 183 (1953).⁵ 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. We likewise note that by the time petitioner instituted this action, the President had already entered the

⁵Petitioner argues that under the TWEA the President was given two powers: (1) the power temporarily to freeze or block the transfer of foreign-owned assets; and (2) the power summarily to seize and permanently vest title to foreign-owned assets. It is contended that only the "vesting" provisions of the TWEA gave the President the power to permanently dispose of assets and when Congress enacted the IEEPA in 1977 it purposefully did not grant the President this power. According to petitioner, the nullification of the attachments and the transfer of the assets will permanently dispose of the assets and would not even be permissible under the TWEA. We disagree. Although it is true that the IEEPA does not give the President the power to "vest" or to take title to the assets, it does not follow that the President is not authorized under both the IEEPA and the TWEA to otherwise permanently dispose of the assets in the manner done here. Petitioner errs in assuming that the only power granted by the language used in both § 1702 and § 5(b) of the TWEA is the power to temporarily freeze assets. As noted above, the plain language of the statute defies such a holding. Section 1702 authorizes the President to "direct and compel" the "transfer, withdrawal, transportation, ... or exportation of ... any property in which any foreign country ... has any interest...."

We likewise reject the contention that Orvis v. Brownell, 345 U.S. 183 (1953), and Zittman v. McGrath, 341 U.S. 446 (1951), grant petitioner the right to retain its attachments on the Iranian assets. To the contrary, we think Orvis supports the proposition that an American claimant may not use an attachment that is subject to a revocable 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 § 1702 respecting the frozen assets. While an attachment so obtained may determine the relationships between the creditor and the foreign debtor, it is in every sense subordinate to the President's power under the IEEPA.

zero
analysis
transfer
possession

freeze order. Petitioner proceeded against the blocked assets only after the Treasury Department had issued revocable licenses authorizing such proceedings and attachments. The Treasury regulations provided that "unless licensed" any attachment is null and void, 31 C.F.R. § 535.203(e), and all licenses "may be amended, modified or revoked at any time." 31 C.F.R. § 535.805. As such, the attachments obtained by petitioner were specifically made subordinate to further actions which the President might take under the IEEPA. Petitioner was on notice of the contingent nature of its interest in the frozen assets.

Included, the assets might have been moved by respondents from the country, as the President

This Court has previously recognized that the congressional purpose in authorizing blocking orders is "to put control of foreign assets in the hands of the President...." Propper v.

Clark, 337 U.S. 472, 493 (1949). Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country. Accordingly, it

is difficult to accept petitioner's argument because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this "bargaining chip" through attachments, garnishments or similar encumbrances on property. Neither the purpose the statute was enacted to serve nor its plain language supports such a result.

Because the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." Youngstown, 343 U.S., at 637 (Jackson, J., concurring). Under the circumstances of this case, we cannot say that petitioner has sustained that heavy burden. A contrary ruling would mean that the Federal Government as a whole lacked the power exercised by the President, see id., at 636-637, and that we are not prepared to say.

United Organization

- 25 -

We do not think it is appropriate at the present time to address petitioner's contention that even if the President had the authority to nullify the attachments, transfer the assets, and "suspend" all claims pending in United States courts (discussed infra), such actions would constitute an unconstitutional taking in violation of the Fifth Amendment to the United States Constitution in the absence of just compensation. However, this contention, and the possibility that the President's actions may effect a taking of petitioner's property, makes ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims under the Tucker Act, 28 U.S.C. §§ 1941, et seq., in such an event. That the fact and extent of the taking in this case is yet speculative is inconsequential because "there must be at the time of taking 'a reasonable, certain and adequate provision for obtaining compensation.'" Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-125 (1974), quoting Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 659 (1890); Cities Service

Co. v. McGrath, 342 U.S. 330, 335-336 (1952); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 94, n.39 (1978).

It has been contended that the "treaty exception" to the Tucker Act, 28 U.S.C. § 1502, might preclude the Court of Claims from exercising jurisdiction over any takings claim the petitioner might bring. At oral argument, however, the Government conceded that § 1502 would not act as a bar to petitioner's action in the Court of Claims. Transcript of Oral Arg. at _____. We agree. See United States v. Weld, 127 U.S. 51 (1888); United States v. Old Settlers, 148 U.S. 427 (1893); Hughes Aircraft Co. v. United States, 534 F.2d 889 (Ct. Cl. 1976). Accordingly, to the extent petitioner believes it has suffered an unconstitutional taking by any of the President's actions discussed here today, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act. 6

⁶We are not implying that petitioner has in fact suffered a taking of his property by the President's actions nullifying the attachments. That question, however, should be addressed

IV

Although we have concluded that the IEEPA constitutes specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets, there remains the question of the President's authority to suspend claims pending in American courts. Such claims have, of course, an existence apart from the attachments which accompanied them. In terminating these claims through Executive Order No. 12294, the President purported to act under authority of both the IEEPA and 22 U.S.C. § 1732, the so-called "Hostage Act".⁷ App. to Pet. for Cert. 52.

We conclude that although the IEEPA authorized the

initially by the Court of Claims if the occasion should arise. We also note that we agree with petitioner and the Government that the question of whether the "suspension" of the claims constitutes a "taking" is not ripe for review. Brief of Petitioner at 34, n. 32; Brief of the United States at 65. Accord Chas. T. Main Int'l., Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (CA 1, May 22, 1981) at 23-24; American Int'l Group, Inc. v. Islamic Republic of Iran, Nos. 80-1779, 80-1891 (CA DC June 5, 1981) at 34-38.

⁷ Judge Mikva, in his separate opinion in American Int'l Group, Inc. v. Islamic Republic of Iran, slip op., at 1, argued that the moniker "Hostage Act" was newly-coined for purposes of this litigation. Suffice it to say that we focus on the language of 22 U.S.C. §1732, not any short-hand description of it. See

3 *Lowell*

nullification of the attachments, it cannot be read to authorize the suspension of the claims. The claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property. An in personam lawsuit, although it might eventually be reduced to judgment and that judgment might be executed upon, is an effort to establish liability and fix damages and does not focus on any particular property within the jurisdiction. The terms of IEEPA therefore do not authorize the President to suspend claims in American courts. This is the unanimous view of all the courts which have considered the question. Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, slip op., at 13-14A; American Int'l Group v. Islamic Republic of Iran, slip op., at 27 n. 15; The Marschalk Co., Inc. v. Iran National Airlines, 79 Civ. 7035 (CBM), slip op., at 17-20 (SDNY, June 11, 1981); Electronic Data Systems v. Social Security Organization of Iran, No. CA3-79-218-F, slip op., at 20 (ND Tex., June 7, 1981).

The Hostage Act, passed in 1868, provides:

"Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress." 22 U.S.C. § 1732.

We are reluctant to conclude that this provision constitutes specific authorization to the President to suspend claims in American courts. Although the broad language of the Hostage Act suggests it may cover this case, there are several difficulties with such a view. The legislative history indicates that the Act was passed in response to a situation unlike the recent Iranian crisis. Congress in 1868 was concerned with the activity of certain countries refusing to recognize the citizenship of naturalized Americans travelling abroad and repatriating such citizens against their will. See, e.g., Cong. Globe 4331, 40th Cong., 2d Sess. (1868) (Sen. Fessenden); id., at 4354 (Sen. Conness); see also 22 U.S.C. § 1731. These countries were not

interested in returning the citizens in exchange for any sort of ransom. This also explains the reference in the Act to imprisonment "in violation of the rights of American citizenship." Although the Iranian hostage-taking violated international law and common decency, the hostages were not seized out of any refusal to recognize their American citizenship--they were seized precisely because of their American citizenship. The legislative history is also somewhat ambiguous on the question whether Congress contemplated presidential action such as that involved here or rather simply reprisals directed against the offending foreign country and its citizens. See, e.g., Cong. Globe 4205, 40th Cong., 2d Sess. (1868); American Int'l Group v. Islamic Republic of Iran, slip op. 1-3 (opinion of Mikva, J.).

*I doubt
this is
relevant*

Concluding that neither IEEPA nor the Hostage Act constitutes specific authorization of the President's action suspending claims, however, is not to say that these statutory provisions are entirely irrelevant to the question of the

validity of the President's action. We think both statutes highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case. As noted above in Part III, supra, at 18-20, the IEEPA delegates broad authority to the President to act in times of national emergency with respect to property of a foreign country. The Hostage Act similarly indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns. As Senator Williams, draftsman of the language eventually enacted as the Hostage Act, put it:

too general

"If you propose any remedy at all, you must invest the executive with some discretion, so that he may apply the remedy to a case as it may arise. As to England or France he might adopt one policy to relieve a citizen imprisoned by either one of those countries; as to the Barbary powers, he might adopt another policy; as to the islands of the ocean another. With different countries that have different systems of government he might adopt different means." Cong. Globe 4359, 40th Cong., 2d Sess. (1868).

Proponents of the bill recognized that it placed "a loose discretion" in the President's hands, id., at 4238 (Sen. Stewart), but argued that "[s]omething must be intrusted to the

Executive" and that "[t]he President ought to have the power to do what the exigencies of the case require to rescue [a] citizen from imprisonment". Id., at 4233, 4357 (Sen. Williams). An original version of the Act, which authorized the President to suspend trade with a foreign country and even arrest citizens of that country in the United States in retaliation, was rejected because "there may be a great variety of cases arising where other and different means would be equally effective and where the end desired could be accomplished without resorting to such dangerous and violent measures." Id., at 4233 (Sen. Williams).

Although we have declined to conclude that the IEEPA or the Hostage Act directly authorizes the President's suspension of claims for the reasons noted, we cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible

situation in which he might act. Such 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.

Haig v. Agee, ___ U.S. ___, ___ (1981). When Congress has enacted legislation delegating broad authority to the President to act in certain circumstances, and the President takes action in a similar and analogous circumstance, though perhaps not precisely covered by the statute, it is reasonable to suppose similar congressional willingness that the President have broad authority. The enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility," Youngstown, 343 U.S., at 637 (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of

the sort engaged in by the President. It is to that history which we now turn.

Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. United States v. Pink, 315 U.S. 203, 225 (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. As one treatise writer puts it, international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory". L. Henkin, *Foreign Affairs and the Constitution* 262 (1972). Consistent with that principle, the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries.⁸ Though those settlements have sometimes been made by

⁸ At least since the case of the "Wilmington Packet" in 1799, Presidents have exercised the power to settle claims of

treaty, there has also been a long standing practice of settling such claims by executive agreement without the advice and consent of the Senate. Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments, in return for lump sum payments or the establishment of arbitration procedures. To be sure, many of these settlements were encouraged by the United States claimants themselves, since a claimant's only hope of obtaining any payment at all might lie in having his government negotiate a diplomatic settlement on his behalf. But it is also undisputed that the "President has sometimes disposed of the claims of citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation of the whole." Henkin,

Gravel Amendment to the Trade Reform Act of 1974, 69 Am. J. Int'l L. 837, 844 (1975). In fact, during the period of 1817-1917, "no fewer than eighty executive agreements were entered into by the United States looking to the liquidation of claims of its citizens." McClure, International Executive Agreements 53 (1941). See also 14 M. Whiteman, Digest of International Law 247 (1970).

supra, at 263. Accord, The Restatement (Second) of the Foreign Relations Law of the United States §213 (1965) (President "may waive or settle a claim against a foreign state...even without the consent of the [injured] national"). It is clear that the practice of settling claims continues today. Since 1952, the President has entered into at least ten binding settlements with foreign nations, including an \$80 million dollar settlement with the People's Republic of China.⁹

Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress' enactment of the International Claims Settlement Act of 1949, 22 U.S.C. § 1621, et seq., as amended (1980). The Act had two purposes: (1) to allocate to United States nationals funds received in the course of an executive claims settlement with

⁹ Those agreements are 30 U.S.T. 1957 (1979) (People's Republic of China); 27 U.S.T. 3993 (1976) (Peru); 27 U.S.T. 4214 (1976) (Egypt); 25 U.S.T. 227 (1974) (Peru); 24 U.S.T. 522 (1973) (Hungary); 20 U.S.T. 2654 (1969); (Japan); 16 U.S.T. 1 (1965) (Yugoslavia); 14 U.S.T. 969 (1963) Bulgaria; 11 U.S.T. 1953 (1960) (Poland); 11 U.S.T. 317 (1960) (Czechoslovakia).

Yugoslavia, and (2) to provide a procedure whereby funds resulting from future settlements could be distributed. To achieve these ends Congress created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds. By creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements. Indeed, the legislative history of the Act observed that the United States was seeking settlements with countries other than Yugoslavia and stated that the bill "contemplates that settlements of a similar nature are to be made in the future". H. Rep. No. 81-770, 81st Cong., 1st Sess. 4, 8 (1949).

Over the years Congress has frequently amended the International Claims Settlement Act to provide for particular problems arising out of settlement agreements, thus demonstrating Congress' continuing acceptance of the President's claim settlement authority. With respect to the Executive Agreement

with the Peoples Republic of China, for example, Congress established an allocation formula for distribution of the funds received pursuant to the Agreement. 22 U.S.C. § 1627. As with legislation involving other executive agreements, Congress did not question the fact of the settlement or the power of the President to have concluded it. In 1976, Congress authorized the Foreign Claims Settlement Commission to adjudicate the merits of claims by United States nationals against East Germany, prior to any settlement with East Germany, so that the Executive would "be in a better position to negotiate an adequate settlement...of these claims." S. Rep. No. 94-1188, 94th Cong., 1st Sess. 2 (1976); 22 U.S.C. § 1644b. Similarly, Congress recently amended the International Claims Settlement Act to facilitate the settlement of claims against Vietnam. 22 U.S.C. § 1645; § 1645a(5). The House Report stated that the purpose of the legislation was to establish an official inventory of losses of private U.S. property in Vietnam so that recovery could be achieved "through direct Government-to Government negotiation of

private property claims." H.R. Rep. No. 96-915, 96th Cong. 2d Sess. 2-3 (1980). Finally, the legislative history of the IEEPA further reveals that Congress has accepted the authority of the Executive to enter into settlement agreements. Though IEEPA was enacted to provide for some limitation on the President's emergency powers, Congress stressed that "nothing in this Act is intended to interfere with the authority of the President to [block assets], or to impede the settlement of claims of United States citizens against foreign countries." S. Rep. No. 95-466, 95th Cong., 2d Sess. 6 (1977); 50 U.S.C. § 1706(a)(1).¹⁰

¹⁰ Indeed, Congress has consistently failed to object to this long-standing practice of claim settlement by executive agreement, even when it has had an opportunity to do so. In 1972, Congress entertained legislation relating to congressional oversight of such agreements. But Congress took only limited action, requiring that the text of significant executive agreements be transmitted to Congress. 1 U.S.C. § 112b. In Haig v. Agee, ___ U.S. ___ (1981), we noted that "Despite the longstanding and officially promulgated view that the Executive has the power to withhold passports for reasons of national security, Congress in 1978, 'though it once again enacted legislation relating to passports, left completely untouched the broad rule-making authority granted in the earlier Act.'" Id., at 20, quoting Zemel v. Rusk, 381 U.S. 1, 12 (1965). Likewise in this case, Congress, though legislating in the area, has left "untouched" the authority of the President to enter into settlement agreements.

The legislative history of 1 U.S.C. § 112b further reveals that Congress has accepted the President's authority to settle claims. During the hearings on the bill, Senator Case, the

In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate. In United States v. Pink, 315 U.S. 203 (1942), for example, the Court upheld the validity of the Litvinov Assignment, which was part of an Executive Agreement whereby the Soviet Union assigned to the United States amounts owed to it by American nationals so that outstanding claims of other American nationals could be paid. The Court explained that the resolution of such claims was integrally connected with normalizing United States' relations with a foreign state.

"Power to remove such obstacles to full recognition as settlement of claims of our nationals...certainly is a modest implied power of the President....No such obstacle can be placed in the way of rehabilitation of relations between this country and

settlements that:

"I think it is a most interesting [area] in which we have accepted the right of the President, one individual, acting through his diplomatic force, to adjudicate and settle claims of American nationals against foreign countries. But it is a fact."

Transmittal of Executive Agreements to Congress: Hearings before the Senate Comm. on Foreign Relations, 92nd Cong., 1st Sess. 74 (1971).

another nation, unless the historic conception of his power and responsibilities...is to be drastically revised." Id., at 229-230.

Similarly, Judge Learned Hand recognized:

"The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies. The continued mutual amity between this nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations."

Ozanic v. United States, 188 F.2d 228, 231 (CA 2 1951).

Petitioner raises two arguments in opposition to the proposition that Congress has acquiesced in this long-standing practice of claims settlement by executive agreement. First, it suggests that all pre-1952 settlement claims, and corresponding court cases such as Pink, should be discounted because of the evolution of the doctrine of sovereign immunity. Petitioner observes that prior to 1952 the United States adhered to the doctrine of absolute sovereign immunity, so that absent action by the Executive there simply would be no remedy for an United

States in 1952 adopted a more restrictive notion of sovereign immunity, by means of the so-called "Tate" letter, it is petitioner's view that United States nationals no longer needed Executive aid to settle claims and that, as a result, the President's authority to settle such claims in some sense "disappeared". Though petitioner's argument is not wholly without merit, it is refuted by the fact that since 1952 there have been at least ten claim settlements by executive agreement. Thus, even if the pre-1952 cases should be disregarded, congressional acquiescence in settlement agreements since that time supports the President's power to act here.

Petitioner next asserts that Congress divested the President of the authority to settle claims when it enacted the Foreign Sovereign Immunities Act of 1976 (hereinafter "FSIA"), 28 U.S.C. § 1602 et seq. The FSIA granted personal and subject matter jurisdiction in the federal district courts over commercial suits brought by claimants against those foreign states which have waived immunity. 28 U.S.C § 1330. Prior to the enactment of the

FSIA, a foreign government's immunity to suit was determined by the Executive Branch on a case-by-case basis. According to petitioner, the principal purpose of the FSIA was to depoliticize these commercial lawsuits by taking them out of the arena of foreign affairs--where the Executive Branch is subject to the pressures of foreign states seeking to avoid liability through a grant of immunity--and by placing them within the exclusive jurisdiction of the courts. Petitioner thus insists that the President, by suspending its claims, has circumscribed the jurisdiction of the United States courts in violation of Article III of the Constitution.

We disagree. In the first place, we do not believe that the President has attempted to divest the federal courts of jurisdiction. Executive Order No. 12294 purports only to "suspend" the claims, not divest the federal court of "jurisdiction". As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will "revive" and become judicially enforceable in United States courts. This

case, in short, illustrates the difference between modifying federal court jurisdiction and directing the courts to apply a different rule of law. See United States v. Schooner Peggy, 5 U.S. 1, 103 (1801). The President has exercised the power, acquiesced in by Congress, to settle claims and, as such, has simply effected a change in the substantive law governing the lawsuit. Indeed, the very example of sovereign immunity belies petitioner's argument. No one would suggest that a determination of sovereign immunity divests the federal courts of "jurisdiction". Yet, petitioner's argument, if accepted, would have required courts prior to the enactment of the FSIA to reject as an encroachment on their jurisdiction the President's determination of a foreign state's sovereign immunity.

Petitioner also reads the FSIA much too broadly. The principal purpose of the FSIA was to codify contemporary concepts concerning the scope of sovereign immunity and withdraw from the President the authority to make binding determinations of the sovereign immunity to be accorded foreign states. See Chas T.

Main, Int'l v. Khuzestan Water & Power Authority, slip. op., at 20; American Int'l Group Inc. v Islamic Republic of Iran, slip op., at 30-32. The FSIA was thus designed to remove one particular barrier to suit, namely sovereign immunity, and cannot be fairly read as prohibiting the President from settling claims of United States nationals against foreign governments. It is telling that the Congress which enacted the FSIA considered but rejected several proposals designed to limit the power of the President to enter into executive agreements, including claims settlement agreements. ¹¹ It is quite unlikely that the same Congress that rejected proposals to limit the President's authority to conclude executive agreements sought to accomplish that very purpose sub silentio through the FSIA. And, as noted

¹¹ The rejected legislation would typically have required congressional approval of executive agreements before they would be considered effective. See Congressional Oversight of Executive Agreements: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong. 1st Sess. 243-261, 302-311 (1975); Congressional Review of International Agreements: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations, 94th Cong. 2d Sess. 167, 246 (1976).

above, just one year after enacting the FSIA, Congress enacted the IEEPA, where the legislative history stressed that nothing in the IEEPA was to impede the settlement of claims of United States citizens. It would be surprising for Congress to express this support for settlement agreements had it intended the FSIA to eliminate the President's authority to make such agreements.

In light of all of the foregoing--the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement--we conclude that the President was authorized to suspend pending claims pursuant to Executive Order No. 12294. As Justice Frankfurter pointed out in Youngstown, 343 U.S., at 610-611, "a systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned...may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II." Past practice does not, by itself, create power, but "long-continued practice, known to and acquiesced in by Congress, would raise a presumption

that the [action] had been [taken] in pursuance of its consent...." United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915). See Haig v. Agee, ___ U.S., at ___, ___. Such practice is present here and such a presumption is also appropriate. In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.

Our conclusion is buttressed by the fact that the means chosen by the President to settle the claims of American nationals are reasonable. The President has provided an alternate forum, the Claims Tribunal, which is capable of providing meaningful relief. The Solicitor General also suggests that the provision of the Claims Tribunal will actually enhance the opportunity for claimants to recover their claims, in that the Agreement removes a number of jurisdictional and procedural impediments faced by claimants in United States courts. Brief for United States at 13-14. Although being overly sanguine about the chances of United States claimants before the Claims

Tribunal would require a degree of naivete which should not be demanded even of judges, the Solicitor General's point cannot be discounted. Moreover, it is important to remember that we have already held that the President has the statutory authority to nullify attachments and to transfer the assets out of the country. The President's power to do so does not depend on his provision of a forum whereby claimants can recover on those claims. The fact that the President has provided such a forum here means that the claimants are receiving something in return for the suspension of their claims, namely, access to an international tribunal before which they may well recover something on their claims. Because there does appear to be a real "settlement" here, this case is more easily analogized to the more traditional claim settlement cases of the past.

Just as importantly, Congress has not disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself,¹² Congress has not enacted legislation,

or even passed a resolution, indicating its displeasure with the Agreement. Quite the contrary, the relevant Senate Committee has stated that the establishment of the Tribunal is "of vital importance to the United States." S. Rep. No. 97-71, 97th Cong., 1st Sess. 5 (1981).¹³ We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of presidential authority.

Finally, we reemphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. As the Court of Appeals for the First Circuit stressed, "the sheer magnitude of such a power, considered against the background of

¹² See Hearings on the Iranian Agreements Before the Senate Comm. on Foreign Relations, 97th Cong. 1st Sess. (1981); Hearings on the Iranian Assets Settlement Before the Senate Comm. on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess. (1981); Hearings on the Algerian Declarations Before the House Comm. on Foreign Affairs, 97th Cong. 1st Sess. (1981).

¹³ Contrast congressional reaction to the Iranian Agreements with congressional reaction to a 1974 Executive Agreement with Czechoslovakia. There the President sought to settle over \$105 million in claims against Czechoslovakia for \$20.5 million. Congress quickly demonstrated its displeasure by enacting legislation requiring that the Agreement be renegotiated. See Lillich, *supra*, at 839-40. Though Congress has shown itself capable of objecting to executive agreements, it has rarely done so and has not done so in this case.

the diversity and complexity of modern international trade, cautions against any broader construction of authority than is necessary." Chas T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, slip. op., at 22. But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 29, 1981

Re: No. 80-2078 Dames & Moore v. Regan

Dear Harry:

Thank you for your letter of June 29th, with its suggestions for possible changes in the opinion. As you might imagine, we are in something of a mad scramble right now, trying to tailor the opinion to the votes taken at Conference this morning, but my tentative views on your suggestions are as follows:

1. Since I would not necessarily reach the same result without at least implicit congressional approval, I would prefer leaving line 9 on page 36 as is.

2. I agree with your suggestion relative to line 10 on page 47, and that should appear in the next draft to be circulated.

3. I think you are quite right that we are now concerned with a deposit in the Bank of England, and I propose to change the opinion to so state. I would prefer not to elaborate any more than necessary as to how the bank funds were transferred, though if you feel strongly on the point and have language to suggest I will certainly consider it.

4. With respect to Orvis, I had thought that a "once over lightly" touch was best for the case. Orvis did not have a license, and given the sharp contrast between the decisions in Orvis and Zittman I would prefer to give as little analysis to these cases as possible, since the present case does not turn upon them. I will try to work into the last sentence of footnote 5 on page 22 some modifications along the line you suggest.

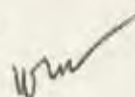
5. I think I have quite consistently maintained that the "delegation doctrine", as you refer to it, has a

different reach in foreign affairs than it does in domestic affairs. I think the Court so stated in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-320 (1936), while at the same time making it clear that such delegation might not be upheld in a purely domestic matter. Since we have chosen to rest the "suspension of claims" neither on the delegation contained in § 1732 nor in IEEPA, but simply refer to them along with a host of similar congressional instances of acquiescence in the exercise of Presidential power in a certain area, I think the language is consistent with Jackson's statement in Youngstown, 343 U.S. at 637, cited on page 33. If you have any modifications to suggest, I would of course be happy to consider them.

6. I felt after the Conference vote that there was neither a majority to place direct reliance on § 1732 nor on IEEPA for the "suspension" of the suits, and therefore attempted to conform the opinion to the views of the Conference. I am pleased to think that you believe I succeeded.

7. The opinion will conclude with a statement that the mandate shall issue forthwith.

Sincerely,



Justice Blackmun

Copies to the Conference

P.S. On further pondering your letter, with respect to paragraph 4, I would certainly be willing to go so far as to say in the last sentence of footnote 6 on page 22:

"An attachment so obtained is in every sense subordinate to the President's powers under the IEEPA."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 29, 1981



RE: No. 80-2078 Dames & Moore v. Regan

Dear Bill:

Confirming what I said at conference this morning I am happy to join your really splendid opinion. I understand that you intend to incorporate Byron's first suggestion in his letter of June 26, and I very much favor that.

Again my thanks and congratulations upon a great job.

Sincerely,

Mr. Justice Rehnquist

cc: The Conference

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 29, 1981

Re: No. 80-2078 - Dames and Moore v. Regan

Dear Bill:

I am generally with you and offer the following minor suggestions for your last minute consideration:

1. As is John, I, too, am concerned about the words "crucial to our decision" in line 9 on page 36. I would go along with his "strongly supporting our decision" alternative suggestion.

2. I also agree with John's suggestion, relative to line 10 on page 47, and the omission of five words in that line.

3. At the top of page 11 reference is made to the coming deposit in a security account in the Algerian Central Bank. I thought we were now concerned with a deposit in the Bank of England. Should some explanation be made, perhaps by way of footnote, as to how this change came about?

4. This comment relates to footnote 5 on page 22. I would have preferred an explicit statement that the attachment in Orvis was valid only as a means of obtaining jurisdiction over the foreign debtor. The footnote's last sentence states that a post-freeze attachment "may determine the relationships between the creditor and the foreign debtor" is true only in a limited number of circumstances. Since the President may override a post-freeze attachment, and since the FSIA forbids the use of attachments for the purpose of obtaining jurisdiction, it is doubtful that an attachment will be of much use in determining the rights and liabilities of the parties. It would be of use only if the President simply decided to lift the freeze without invoking any of his other powers under the Emergency Act, leaving the foreign country free to withdraw its assets unless restrained by an attachment.

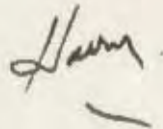
The statement in Orvis that a post-freeze attachment "determined relationships between creditor and enemy debtor," 345 U.S., at 186-187, was the source of petitioner's claim in this case that the President had no power to invalidate its attachment. By repeating that statement, I think we may be creating confusion.

5. I am somewhat concerned about the material, particularly the first 2 sentences, that follow the citation of Haig v. Agee on page 33. Given your views on the delegation doctrine in general, I was a little surprised by the presence of those sentences. More importantly, however, I have no idea where such a rule could lead. As of now, I think the statement of that rule is unnecessary to the decision in this case, in view of the clear history of congressional approval of claims settlements set forth subsequently in the opinion. I would be much happier if those sentences could be deleted.

6. I am pleased that the opinion places no direct reliance on § 1732.

7. Should the opinion conclude with a statement that the mandate shall issue forthwith?

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

CHAMBERS OF
JUSTICE POTTER STEWART

June 29, 1981

Re: 80-2078 - Dames & Moore v. Regan

Dear Bill,

I congratulate you and thank you for a fine job accomplished in a remarkably short time.

It seems to me that the first suggestion in Byron's letter to you of June 26 is correct, and I hope you will incorporate it. With this single qualification, you can count on my joining your opinion if I am still a Member of the Court, when it is announced.

Sincerely yours,

P.S.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 29, 1981

MEMORANDUM TO THE CONFERENCE

Re: No. 80-2078 Dames & Moore v. Regan

In light of today's conference and the various correspondence, I have the following changes to make:

I am happy to make the first and third of the changes suggested in John's letter of June 26, but prefer not to make the second.

Pages 25-26, and n. 6, are deleted. The following is added as a new footnote on page 24, line 6:

Although petitioner concedes that the President could have forbidden attachments, it nevertheless argues that once he allowed them he permitted claimants to acquire property interests in their attachments. Petitioner further argues that only the licenses to obtain the attachments were made revocable, not the attachments themselves. It is urged that the January 19, 1981, order revoking all licenses only affected petitioner's right to obtain future attachments. We disagree. As noted above, the regulations specifically provided that any attachment is null and void "unless licensed", and all licenses may be revoked at any time. Moreover, common sense defies petitioner's reading of the regulations. The President could hardly have intended petitioner and other similarly situated claimants to have the power to take control of the frozen assets out of his hands.

Our construction of petitioner's attachments as being "revocable," "contingent," and "in every sense subordinate to the President's power under the IEEPA," in effect answers petitioner's claim that even if the President had the authority to nullify the attachments and transfer the assets, the exercise of such would constitute an unconstitutional taking of property in violation of the Fifth Amendment absent just compensation. We conclude that because of the President's authority to prevent or condition attachments, and because of the orders he issued to this effect, petitioner did not acquire any "property" interest in its attachments of the sort that would support a constitutional claim for compensation.

I have attached new pages, essentially old pages 25-26, including a new footnote, to appear at the end of the opinion.

Sincerely,

A handwritten signature, likely of the author, written in dark ink. It consists of a series of stylized, overlapping loops and a final upward stroke.

We do not think it is appropriate at the present time to address petitioner's contention that even if the President had the authority to suspend ^{and settle} all claims pending in United States courts such action would constitute an unconstitutional taking in violation of the Fifth Amendment to the United States Constitution in the absence of just compensation.¹ Both petitioner and the Government concede that the question of whether the suspension of the claims constitutes a taking is not ripe for review. Brief of Petitioner at 34, n. 32; Brief of the United States at 65. Accord Chas. T. Main Int'l., Inc. v. Khuzestan Water & Power Authority, Slip Op., at 23-24; American Int'l Group, Inc. v. Islamic Republic of Iran, Slip Op., at 34-38. However, this contention, and the possibility that the President's actions may effect a taking of petitioner's property, makes ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491, in such an event. That the fact and extent of

the taking in this case is yet speculative is inconsequential because "there must be at the time of taking 'a reasonable, certain and adequate provision for obtaining compensation.'"

Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-125 (1974), quoting Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 659 (1890); Cities Service Co. v. McGrath, 342 U.S. 330, 335-336 (1952); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 94, n.39 (1978).

It has been contended that the "treaty exception" to the jurisdiction of the Court of Claims, 28 U.S.C. § 1502, might preclude the Court of Claims from exercising jurisdiction over any takings claim the petitioner might bring. At oral argument, however, the Government conceded that § 1502 would not act as a bar to petitioner's action in the Court of Claims. Transcript of Oral Arg. at 39-42, 47. We agree. See United States v. Weld, 127 U.S. 51 (1888); United States v. Old Settlers, 148 U.S. 427 (1893); Hughes Aircraft Co. v. United States, 534 F.2d 889 (Ct. Cl. 1976). Accordingly, to the extent petitioner believes it has

suffered an unconstitutional taking by any of the President's actions discussed here today, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act.

The judgment of the District Court is accordingly affirmed, and the mandate shall issue forthwith.

13/ Though we conclude that the President has settled petitioner's claims against Iran, we do not suggest that the settlement has terminated petitioner's possible taking claim against the United States. We express no views on petitioner's claims that it has suffered a taking.

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 29, 1981



RE: No. 80-2078 Dames & Moore v. Regan

Dear Bill:

Your proposed changes outlined in your memorandum of June 29 and enclosure are satisfactory to me.

Your responses to Harry respecting his suggestions are also satisfactory.

Sincerely,

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



June 29, 1981

Re: 80-2078 - Dames & Moore v. Regan

Dear Bill:

Your changes are entirely acceptable to me and I therefore join your opinion, except for the discussion of the Court of Claims jurisdiction in Part V. I have sent the attached statement to the printer.

Respectfully,

Justice Rehnquist

Copies to the Conference

Attachment

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

80-2078 - Dames & Moore v. Regan

Circulated: JUN 29 '81

Recirculated: _____

JUSTICE STEVENS, concurring.

In my judgment the possibility that requiring this petitioner to prosecute its claim in another forum will constitute an unconstitutional "taking" is so remote that I would not address the jurisdictional question considered in Part V of the Court's opinion. However, I join the remainder of the opinion.

June 29, 1981

80-2078 Dames & Moore v. Regan

Dear Bill:

I share the same admiration, expressed by others, of your fine opinion and of the remarkable way in which you produced it on such short notice.

The changes you have made in response to the majority vote at Conference this morning with respect to attachments prevent, however, my joining your opinion in its entirety. Accordingly, I am circulating a brief opinion concurring and dissenting in part.

I must add, just for my own personal satisfaction, that if the honor of the United States had not been pledged, I would have had great difficulty in sustaining the validity of the Agreements of Algiers. Having been coerced by the terrorist conduct of Iran in seizing and holding American diplomats for ransom, the United States certainly was not legally bound by these agreements. They would have been voidable, I think, in the courts of any country that had a civilized legal system as well as before the International Court of Justice. Having said this, I agree that the President had authority to enter into these agreements.

We all are much indebted to you and I hope that your severe discomfort over the weekend was merely a natural reaction to the great pressure under which you have worked. The bracing air of New England should be restorative.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

lfp/ss 6/29/81

80-2078

Dawson Moore

IRANC2 SALLY-POW

JUSTICE POWELL, concurring and dissenting in part.

I join the Court's opinion except its decision

that the nullification of the attachments ^{did not} ^a effected ~~no~~ taking

of property interests giving rise to ⁵ a claim for just Ante, at —, n.b. The nullification of ⁵ attachments /compensation. / This presents a separate question from

whether the ^{suspension and proposed settlement} settlement of claims, ^{against Iran} may constitute a taking of

private property for public use requiring compensation. I

would leave ^{both} ~~each type of~~ "taking" claim ^{is open} for resolution on a

case-by-case basis in actions before the Court of Claims. ¹⁷

Even though the Executive Orders purported to make all attachments conditional, there is a substantial question whether these Orders, by imposing restrictions on the timely exercise of legal rights, may not in themselves have

effected a taking. ^{F.S. of} Moreover, the circumstances involved in

the hundreds of ^{and may differ} pending claims are not known to this Court. ²

against Iran

no 41 => ^{therefore} I dissent from the Court's decision ^{2.}
~~of error~~

In my opinion, ~~therefore, today's decisions with respect to~~ ^{The decisions}
~~with respect to attachments. It may well~~
~~attachment is premature. be erroneous, and it~~
~~certainly is premature.~~

~~As I understand~~ the Court's opinion with respect

to the suspension and settlement of claims, I am in

^{out} ~~agreement~~. The opinion makes clear ^{that} under the Agreements of

Algiers* ~~that~~ ^I some valid claims, against Iran and its

instrumentalities, may not be adjudicated ~~at all~~ by the

^{Claims} ~~Arbitral~~ Tribunal, and that others may not be paid in full.

The Court holds that ^{parties who} ~~claim~~ ^{whose claims are} not ~~so~~ adjudicated or not fully

paid may ^{bring a "taking" claim of the US} ~~be asserted~~ in the Court of Claims, the

jurisdiction of ^{which} ~~what~~ this Court acknowledges, and will be

recognized by the United States as a taking under the Fifth

^{by a party holding a valid claim}
~~Amendment for a public purpose upon a showing~~ that the

*We recognize these Agreements because they pledged the honor of the United States of America. The Agreements would not be binding under any rule of civilized law as they were coerced by Iran's lawless seizure of American diplomats.

government's action created loss or damage, ~~with respect to~~

~~the assertion of a valid claim, ^{The} he just claims of a~~

relatively few persons, subject to the jurisdiction of our

courts, may not be appropriated by government as "bargaining

~~chips" to further foreign policy goals on behalf of the~~
^{the nation's}

~~nation,~~ without providing just compensation.* The

extraordinary powers of the President and Congress upon

which our decision today rests cannot, in the circumstances.

of this case, ^{Just Compensation Clause} displace the Bill of Rights.

the Court

*As held in Armstrong v. United States, 364 U.S. 40, 49 (1959):

"The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar government from forcing some people along to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole."

^{Just Compensation Clause}
This basis of the "taking clause" was reaffirmed unanimously
in the recent case of Agins v. Tiburon, ___ U.S. ___ (1980).

lfp/ss 6/29/81

IRANC2 SALLY-POW

JUSTICE POWELL, concurring and dissenting in part.

I join the Court's opinion except its decision that the nullification of the attachments effected no taking of property interests giving rise to a claim for compensation. This presents a separate question from whether the settlement of claims may constitute a taking of private property for public use requiring compensation. I would leave each type of "taking" claim for resolution on a case-by-case basis in actions before the Court of Claims. Even though the Executive Orders purported to make all attachments conditional, there is a substantial question whether these Orders by imposing restrictions on the timely exercise of legal rights, may not in themselves have effected a taking. Moreover, the circumstances involved in the hundreds of pending claims are not known to this Court.

In my opinion, therefore, today's decisions with respect to attachment is premature.

As I understand the Court's opinion with respect to the suspension and settlement of claims, I am in agreement. The opinion makes clear under the Agreements of Algiers* that some valid claims, against Iran and its instrumentalities, may not be adjudicated at all by the Arbitral Tribunal, and that others may not be paid in full. The Court holds that claims not so adjudicated or not fully paid may be asserted in the Court of Claims, the jurisdiction of what this Court acknowledges, and will be recognized by the United States as a taking under the Fifth Amendment for a public purpose upon a showing that the _____

*We recognize these Agreements because they pledged the honor of the United States of America. The Agreements would not be binding under any rule of civilized law as they were coerced by Iran's lawless seizure of American diplomats.

government's action created loss or damage with respect to the assertion of a valid claim, he just claims of a relatively few persons, subject to the jurisdiction of our courts, may not be appropriated by government as "bargaining chips" to further foreign policy goals on behalf of the nation, without providing just compensation.* The extraordinary powers of the President and Congress upon which our decision today rests cannot, in the circumstances of this case, displace the Bill of Rights.

*As held in Armstrong v. United States, 364 U.S. 40, 49 (1959):

"The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar government from forcing some people along to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole."

This basis of the "taking clause" was reaffirmed unanimously in the recent case of Agins v. Tiburon, ___ U.S. ___ (1980).

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JUN 29 1981

Recirculated: _____

6/29/81

JUSTICE POWELL, concurring and dissenting in part.

I join the Court's opinion except its decision that the nullification of the attachments did not effect a taking of property interests giving rise to claims for just compensation. Ante, at ___, n. 6. The nullification of attachments presents a separate question from whether the suspension and proposed settlement of claims against Iran may constitute a taking. I would leave both "taking" claims open for resolution on a case-by-case basis in actions before the Court of Claims. The facts of the hundreds of claims pending against Iran are not known to this Court and may differ from the facts in this case. I therefore dissent from the Court's decision with respect to attachments. The decision may well be erroneous,¹ and

¹Even though the Executive Orders purported to make attachments conditional, there is a substantial question whether the Orders themselves may have effected a taking by making conditional the attachments that claimants against Iran otherwise could have obtained without condition. Moreover, because it is settled that an attachment entitling a creditor to resort to specific property for the satisfaction of a claim is a property

it certainly is premature.

I agree with the Court's opinion with respect to the suspension and settlement of claims against Iran and its instrumentalities. The opinion makes clear that some claims may not be adjudicated by the Claims Tribunal, and that others may not be paid in full. The Court holds that parties whose claims are not adjudicated or not fully paid may bring a "taking" claim against the United States in the Court of Claims, the jurisdiction of which this Court acknowledges. The Government must pay just compensation when it furthers the nation's foreign policy goals by making "bargaining chips" of claims held by a relatively few persons and subject to the jurisdiction of our courts.² The extraordinary powers of the President and

right compensable under the Fifth Amendment, Armstrong v. United States, 364 U.S. 40 (1960), Louisville Bank v. Radford, 295 U.S. 555 (1935), there is a question whether the revocability of the license under which petitioner obtained its attachment suffices to render revocable the attachment itself. See Marschalk Co. v. Iran National Airlines Corp., No. 79 Civ. 7035 (CBM) (June 11, 1981).

²As the Court held in Armstrong v. United States, 364 U.S. 40, 49 (1960):

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar

Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause.

Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The Court unanimously reaffirmed this basis of the Just Compensation Clause in the recent case of Agins v. City of Tiburon, 447 U.S. 225, 260-261 (1980).

157
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JUN 29 1981

Recirculated: _____

6/29/81

JUSTICE POWELL, concurring and dissenting in part.

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¹Even though the Executive Orders purported to make attachments conditional, there is a substantial question whether the Orders themselves may have effected a taking by making conditional the attachments that claimants against Iran otherwise could have obtained without condition. Moreover, because it is settled that an attachment entitling a creditor to resort to specific property for the satisfaction of a claim is a property

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right compensable under the Fifth Amendment, Armstrong v. United States, 364 U.S. 40 (1960), Louisville Bank v. Radford, 295 U.S. 555 (1935), there is a question whether the revocability of the license under which petitioner obtained its attachment suffices to render revocable the attachment itself. See Marschalk Co. v. Iran National Airlines Corp., No. 79 Civ. 7035 (CBM) (June 11, 1981).

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Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause.

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The Court unanimously reaffirmed this basis of the Just Compensation Clause in the recent case of Agins v. City of Tiburon, 447 U.S. 225, 260-261 (1980).

2nd Draft

lfp/ss 6/29/81

IRANCON SALLY-POW

Revised
Substantially
before
circulating

80-2087 Dames & Moore v. Regan

JUSTICE POWELL, concurring.

File

The Court's opinion makes clear under the Agreements of Algiers* that some valid claims, against Iran and its instrumentalities, may not be adjudicated at all by the Arbitral Tribunal, and others may not be paid in full. I join the Court's opinion on the understanding that claims not so adjudicated or not fully paid may be asserted in the Court of Claims, the jurisdiction of which this Court acknowledges, and will be recognized by the United States as

*We recognize these Agreements because they pledged the honor of the United States of America. The Agreements would not be binding under any rule of civilized law as they were coerced by Iran's lawless seizure of American diplomats.

a taking under the Fifth Amendment for a public purpose to the extent such a claim has not been paid in full. The just claims of a relatively few persons, subject to the jurisdiction of our courts, may not be appropriated by government as "bargaining chips" to further foreign policy goals on behalf of the nation, without providing just compensation.* The extraordinary powers of the President and Congress upon which our decision today rests cannot displace the Bill of Rights.

*Here pick up a quote from Agins.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 25 '81

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-2078

Dames & Moore, Petitioner, } On Writ of Certiorari to the
v, } United States Court of
Donald T. Regan, Secretary of } Appeals for the Ninth
the Treasury, et al. } Circuit.

[June —, 1981]

JUSTICE STEVENS, concurring.

In my judgment the possibility that requiring this petitioner to prosecute its claim in another forum will constitute an unconstitutional "taking" is so remote that I would not address the jurisdictional question considered in Part V of the the Court's opinion. However, I join the remainder of the opinion.

June 30, 1981

No. 80-2078 Dames & Moore v. Regan

Dear Bill:

This refers to your letter concerning the certified questions in Marschalk.

It seems to me that the proper disposition would be to dismiss the certified questions, and cite our opinion that should speak for itself. You have written a full and informative opinion. I do not think we should answer major, substantive questions in monosyllables, any more than we should write a syllabus for one of our opinions. My recollection is that we have dismissed questions in other cases: e.g., U. S. v. Will and Foley v. Carter (No. 80-444).

Sincerely,

Mr. Justice Rehnquist

LFP/lab

Copies to the Conference

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 30, 1981

Re: No. 80-2078 - Dames & Moore v. Regan

Dear Bill:

As of now, please join me.

Sincerely,

TM
T.M.

Justice Rehnquist

cc: The Conference

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

July 1, 1981

Proposed Order in No. 80-2127Q, Iran National Airlines v. The Marschalk Co.

It is the opinion of this Court that the questions certified by the United States Court of Appeals for the Second Circuit must be answered as follows:

(1). Yes. See No. 80-2078, Dames & Moore v. Regan, Secretary of the Treasury (July 2, 1981).

(2). Yes. See No. 80-2078, Dames & Moore v. Regan, Secretary of the Treasury (July 2, 1981).

(3). The President's action in nullifying the attachments did not constitute a taking of property for which compensation must be paid. We dismiss question (3) so far as it concerns whether the action of the President in suspending the claims constituted a taking of property for which compensation must be paid. See No. 80-2078, Dames & Moore v. Regan, Secretary of the Treasury (July 2, 1981).

WHR

To

Powell

Chambers

[Fe JULY 1, 1991]

Supreme Court of the United States
Memorandum

19

Peter -

Add T. M.'s
and J. P. S.'s names
to my dissent
as to the
Certified Questions

No. 80-2127 Iran National Airlines v. The Marschalk Co.

with whom Justice Marshall and Justice Stevens join,

JUSTICE POWELL, *h* dissenting.

I would dismiss the certificate, citing ~~the~~

~~Court's opinion in~~ Dames & Moore v. Regan, ___ U.S. ___

(1981), announced today. The Court's opinion in that case provides the only answers that this Court should give to the questions certified to us by the Court of Appeals for the Second Circuit. Having rendered an opinion on the subject of those questions, we should not ~~undertake to~~ answer them in monosyllables nor attempt a syllabus of a portion of the Court's opinion. We recently have dismissed certification of questions where the Court has addressed the subject of the questions in a full opinion. ~~See~~ Foley v. Carter, ___ U.S. ___ (1981). See also United States v. Will, ___ U.S. ___ (1981).

STYLISTIC CHANGES THROUGHOUT

Pg 6, 7, 14-16, 20, 21, 28, 30-31

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: JUL 1 1981

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-2078

Dames & Moore, Petitioner,	} On Writ of Certiorari to the	
v.		United States Court of
Donald T. Regan, Secretary of the Treasury, et al.		Appeals for the Ninth Circuit.

[June —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The questions presented by this case touch fundamentally upon the manner in which our Republic is to be governed. Throughout the nearly two centuries of our Nation's existence under the Constitution, this subject has generated considerable debate. We have had the benefit of commentators such as John Jay, Alexander Hamilton, and James Madison writing in *The Federalist Papers* at the Nation's very inception, the benefit of astute foreign observers of our system such as Alexis deTocqueville and James Bryce writing during the first century of the Nation's existence, and the benefit of many other treatises as well as more than 400 volumes of reports of decisions of this Court. As these writings reveal it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed. Indeed, as Justice Jackson noted, "[a] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 634 (1952) (concurring opinion).

Our decision today will not dramatically alter this situation, for the Framers "did not make the judiciary the overseer of our government." *Id.*, at 594 (Frankfurter, J., concur-

ring). We are confined to a resolution of the dispute presented to us. That dispute involves various Executive Orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States, directed that these assets be transferred to Iran, and suspended claims against Iran that may be presented to an International Claims Tribunal. This action was taken in an effort to comply with an Executive Agreement between the United States and Iran. We granted certiorari before judgment in this case, and set an expedited briefing and argument schedule, because lower courts had reached conflicting conclusions on the validity of the President's actions and, as the Solicitor General informed us, unless the Government acted by July 19, 1981, Iran could consider the United States to be in breach of the Executive Agreement.

But before turning to the facts and law which we believe determine the result in this case, we stress that the expeditious treatment of the issues involved by all of the courts which have considered the President's actions makes us acutely aware of the necessity to rest decision on the narrowest possible ground capable of deciding the case. *Ashwander v. TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). This does not mean that reasoned analysis may give way to judicial fiat. It does mean that the statement of Justice Jackson—that we decide difficult cases presented to us by virtue of our commissions, not our competence—is especially true here. We attempt to lay down no general “guide-lines” covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case.

Perhaps it is because it is so difficult to reconcile the foregoing definition of Art. III judicial power with the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive, without either challenge or interference by the Judiciary, that the decisions of the

Court in this area have been rare, episodic, and afford little precedential value for subsequent cases. The tensions present in any exercise of executive power under the tri-partite system of Federal Government established by the Constitution have been reflected in opinions by Members of this Court more than once. The Court stated in *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 319-320 (1926):

"[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."

And yet 16 years later, Justice Jackson in his concurring opinion in *Youngstown, supra*, which both parties agree brings together as much combination of analysis and common sense as there is in this area, 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." 343 U. S., at 641.

As we now turn to the factual and legal issues in this case, we freely confess that we are obviously deciding only one more episode in the never-ending tension between the President exercising the executive authority in a world that pre-

sents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances.

I

On November 4, 1979, the American Embassy in Tehran was seized and our diplomatic personnel were captured and held hostage. In response to that crisis, President Carter, acting pursuant to the International Emergency Economic Powers Act, 50 U. S. C. §§ 1701-1706 (Supp. II 1978) (hereinafter "IEEPA"), declared a national emergency on November 14, 1979,¹ and blocked the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States. . . ." Executive Order No. 12170, 44 Fed. Reg. 65279.² President Carter authorized the Secretary of the Treasury to promulgate regulations carrying out the blocking order. On November 15, 1979, the Treasury Department's Office of Foreign Assets Control issued a regulation providing that "[u]nless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment,

¹ Title 50 U. S. C. § 1701 (a) (Supp. II 1978) states that the President's authority under the Act "may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or in substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." Petitioner does not challenge President Carter's declaration of a national emergency.

² Title 50 U. S. C. § 1702 (a)(1)(B) (Supp. II 1978) empowers 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 foreign country or a national thereof has any interest. . . ."

or other judicial process is null and void with respect to any property in which on or since [November 14, 1979] there existed an interest of Iran." 31 CFR § 535.203 (e) (1980). The regulations also made clear that any licenses or authorizations granted could be "amended, modified, or revoked at any time." 31 CFR § 535.805 (1980).³

On November 26, 1979, the President granted a general license authorizing certain judicial proceedings against Iran but which did not allow the "entry of any judgment or of any decree or order of similar or analogous effect. . . ." 31 CFR § 535.504 (a) (1980). On December 19, 1979, a clarifying regulation was issued stating that "the general authorization for judicial proceedings contained in § 535.504 (a) includes pre-judgment attachment." 31 CFR § 535.418 (1980).

On December 19, 1979, petitioner Dames & Moore 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, and a number of Iranian banks. In its complaint, petitioner alleged that its wholly owned subsidiary, Dames & Moore International, S. R. L., was a party to a written contract with the Atomic Energy Organization, and that the subsidiary's entire interest in the contract had been assigned to petitioner. Under the contract, the subsidiary was to conduct site studies for a proposed nuclear power plant in Iran. As provided in the terms of the contract, the Atomic Energy Organization terminated the agreement for its own convenience on June 30, 1979. Petitioner contended, however, that it was owed \$3,436,694.30 plus interest for services performed under the contract prior to the date of termination.⁴ The District Court issued orders

³ 31 CFR § 535.805 (1980) provides in full: "The provision of this part and any rulings, licenses, instructions, orders, or forms issued thereunder may be amended, modified, or revoked at any time."

⁴ The contract stated that any dispute incapable of resolution by agreement of the parties would be submitted to conciliation and that, if either party was unwilling to accept the results of conciliation, "the matter shall

of attachment directed against property of the defendants, and the property of certain Iranian banks was then attached to secure any judgment that might be entered against them.

On January 20, 1981, the Americans held hostage were released by Iran pursuant to an Agreement entered into the day before and embodied in two Declarations of the Democratic and Popular Republic of Algeria. Declaration of the Government of the Democratic and Popular Republic of Algeria (App. to Pet. for Cert., at 21-29), and Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (App. to Pet. for Cert., at 30-35). The Agreement stated that "it is the purpose of [the United States and Iran] . . . to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration." App. to Pet. for Cert., at 21-22. In furtherance of this goal, the Agreement called for the establishment of an Iran-United States Claims Tribunal which would arbitrate any claims not settled within 6 months. Awards of the Claims Tribunal are to be "final and binding" and "enforceable . . . in the courts of any nation in accordance with its law." *Id.*, at 32. Under the Agreement, the United States is obligated:

"to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify

be decided finally by resort to the courts of Iran." Pet. for Cert., at 7, n. 2. In its complaint, which was based on breach of contract and related theories, petitioner alleged that it had sought a meeting with the Atomic Energy Organization for purposes of settling matters relating to the contract but that the Organization "has continually postponed [the] meeting and obviously does not intend that it take place." Complaint in *Dames & Moore v. Atomic Energy Organization of Iran*, No. 79-04918 LEW (Px) (CD Cal.), at ¶ 27.

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." *Id.*, at 21-22.

In addition, the United States must "act to bring about the transfer" by July 19, 1981, of all Iranian assets held in this country by American banks. *Id.*, at 24-25. One billion dollars of these assets will be deposited in a security account in the Bank of England, to the account of the Algerian Central Bank, and used to satisfy awards rendered against Iran by the Claims Tribunal. *Ibid.*

On January 19, 1981, President Carter issued a series of Executive Orders implementing the terms of the Agreement. Executive Order Nos. 12276-12285, 46 Fed. Reg. 7913-7932. These orders revoked all licenses permitting the exercise of "any right, power, or privilege" with regard to Iranian funds, securities, or deposits; "nullified" all non-Iranian interests in such assets acquired subsequent to the blocking order of November 14, 1979; and required those banks holding Iranian assets to transfer them "to the Federal Reserve Bank of New York, to be held or transferred as directed by the Secretary of the Treasury." Executive Order No. 12279, 46 Fed. Reg. 7919.

On February 24, 1981, President Reagan issued an Executive Order in which he "ratified" the January 19th Executive Orders. Executive Order No. 12294, 46 Fed. Reg. 14111. Moreover, he "suspended" all "claims which may be presented to the . . . Tribunal" and provided that such claims "shall have no legal effect in any action now pending in any court of the United States." *Ibid.* The suspension of any particular claim terminates if the Claims Tribunal determines that it has no jurisdiction over that claim; claims are discharged for all purposes when the Claims Tribunal either awards some recovery and that amount is paid, or determines that no recovery is due. *Ibid.*

Meanwhile, on January 27, 1981, petitioner moved for summary judgment in the District Court against the Government of Iran and the Atomic Energy Organization, but not against the Iranian banks. The District Court granted petitioner's motion and awarded petitioner the amount claimed under the contract plus interest. Thereafter, petitioner attempted to execute the judgment by obtaining writs of garnishment and execution in state court in the State of Washington, and a sheriff's sale of Iranian property in Washington was noticed to satisfy the judgment. However, by order of May 28, 1981, as amended by order of June 8, the District Court stayed execution of its judgment pending appeal by the Government of Iran and the Atomic Energy Organization. The District Court also ordered that all prejudgment attachments obtained against the Iranian defendants be vacated and that further proceedings against the bank defendants be stayed in light of the Executive Orders discussed above. App. to Pet. for Cert., at 106-107.

On April 28, 1981, petitioner filed this action in the District Court for declaratory and injunctive relief against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the Executive Orders and Treasury Department regulations implementing the Agreement with Iran. In its complaint, petitioner alleged that the actions of the President and the Secretary of the Treasury implementing the Agreement with Iran were beyond their statutory and constitutional powers and, in any event, were unconstitutional to the extent they adversely affect petitioner's final judgment against the Government of Iran and the Atomic Energy Organization, its execution of that judgment in the State of Washington, its prejudgment attachments, and its ability to continue to litigate against the Iranian banks. *Id.*, at 1-12. On May 28, 1981, the District Court denied petitioner's motion for a preliminary injunction and dismissed petitioner's complaint for failure to state a claim upon which

relief could be granted. *Id.*, at 106-107. Prior to the District Court's ruling, the United States Courts of Appeals for the First and the District of Columbia Circuits upheld the President's authority to issue the Executive Orders and regulations challenged by petitioner. See *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, — F. 2d — (CA1 1981); *American Int'l Group, Inc. v. Islamic Republic of Iran*, — U. S. App. D. C. —, — F. 2d — (1981).

On June 3, 1981, petitioner filed a notice of appeal from the District Court's order, and the appeal was docketed in the United States Court of Appeals for the Ninth Circuit. On June 4, the Treasury Department amended its regulations to mandate "the transfer of bank deposits and certain other financial assets of Iran in the United States to the Federal Reserve Bank of New York by noon, June 19." App. to Pet. for Cert., at 151-152. The District Court, however, entered an injunction pending appeal prohibiting the United States from requiring the transfer of Iranian property that is subject to "any writ of attachment, garnishment, judgment, levy, or other judicial lien" issued by any court in favor of petitioner. *Id.*, at 168. Arguing that this is a case of "imperative public importance," petitioner then sought a writ of certiorari before judgment. Pet. for Cert., at 10. See 28 U. S. C. § 2101 (e); this Court's Rule 18 (1980). Because the issues presented here are of great significance and demand prompt resolution, we granted the petition for the writ, adopted an expedited briefing schedule, and set the case for oral argument on June 24, 1981. — U. S. — (1981).

II

The parties and the lower courts confronted with the instant questions have all agreed that much relevant analysis is contained in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952). Justice Black's opinion for the Court in that case, involving the validity of President Truman's effort to seize the country's steel mills in the wake of a nationwide

strike, recognized that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Id.*, at 585. Justice Jackson's concurring opinion elaborated in a general way the consequences of different types of interaction between the two democratic branches in assessing presidential authority to act in any given case. When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Id.*, at 637. When the President acts in the absence of congressional authorization he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.*, at 637. In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation of powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including "congressional inertia, indifference or quiescence." *Ibid.* Finally, when the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." *Id.*, at 637-638.

Although we have in the past and do today find Justice Jackson's classification of executive actions into three general categories analytically useful, we should be mindful of Justice Holmes' admonition, quoted by Justice Frankfurter in *Youngstown*, 343 U. S., at 597 (concurring opinion), that "The great ordinances of the Constitution do not establish and divide fields of black and white." *Springer v. Philippine Islands*, 277 U. S. 189, 209 (1928) (dissenting opinion).

Justice Jackson himself recognized that his three categories represented "a somewhat over-simplified grouping," 343 U. S., at 635, and it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeon-holes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.

III

In nullifying post-November 14, 1979, attachments and directing those persons holding blocked Iranian funds and securities to transfer them to the Federal Reserve Bank of New York for ultimate transfer to Iran, President Carter cited five sources of express or inherent power. The Government, however, has principally relied on § 1702 of the IEEPA as authorization for these actions. Section 1702 (a)(1) provides in part:

"At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

"(A) investigate, regulate, or prohibit—

"(i) any transactions in foreign exchange,

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

"(iii) the importing or exporting of currency or securities, and

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, impor-

tation 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."

The Government contends that the acts of "nullifying" the attachments and ordering the "transfer" of the frozen assets are specifically authorized by the plain language of the above statute. The two Courts of Appeals that have considered the issue agreed with this contention. In *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, supra*, the Court of Appeals for the First Circuit explained:

"The President relied on his IEEPA powers in November 1979, when he 'blocked' all Iranian assets in this country, and again in January 1981, when he 'nullified' interests acquired in blocked property, and ordered that property's transfer. The President's actions, in this regard, are in keeping with the language of IEEPA; initially he 'prevent[ed] and prohibit[ed]' 'transfers' of Iranian assets; later he 'direct[ed] and compel[led]' the 'transfer' and 'withdrawal' of the assets, 'nullify[ing]' certain 'rights' and 'privileges' acquired in them.

"Main argues that IEEPA does not supply the President with power to override judicial remedies, such as attachments and injunctions, or to extinguish 'interests' in foreign assets held by United States citizens. But we can find no such limitation in IEEPA's terms. The language of IEEPA is sweeping and unqualified. It provides broadly that the President may void or nullify the 'exercising [by any person of] any right, power or privilege with respect to . . . any property in which any foreign country has any interest. . . .' 50 U. S. C. § 1702 (a)(1)(B)." — F. 2d, at — (emphasis in original).

In *American Int'l Group, Inc. v. Islamic Republic of Iran*, *supra*, the Court of Appeals for the District of Columbia Circuit employed a similar rationale in sustaining President Carter's action:

"The Presidential revocation of the license he issued permitting prejudgment restraints upon Iranian assets is an action that falls within the plain language of the IEEPA. In vacating the attachments, he acted to 'nullify [and] void . . . any . . . exercising any right, power, or privilege with respect to . . . any property in which any foreign country . . . has any interest . . . by any person . . . subject to the jurisdiction of the United States.'" — F. 2d, at — (footnote omitted).

Petitioner contends that we should ignore the plain language of this statute because an examination of its legislative history as well as the history of § 5 (b) of the Trading With the Enemy Act (hereinafter "TWEA"), 50 U. S. C. App. § 5 (b), from which the pertinent language of § 1702 is directly drawn, reveals that the statute was not intended to give the President such extensive power over the assets of a foreign state during times of national emergency. According to petitioner, once the President instituted the November 14, 1979, blocking order, § 1702 authorized him "only to continue the freeze or to discontinue controls." Brief for Petitioner, at 32.

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) of the TWEA requires such a result. To the contrary, we think both the legislative history and cases interpreting the TWEA fully sustain the broad authority of the Executive when acting under this congressional grant of power. See, e. g., *Orvis v. Brownell*, 345 U. S. 183 (1953).⁵ Although Congress in-

⁵ Petitioner argues that under the TWEA the President was given two powers: (1) the power temporarily to freeze or block the transfer of for-

tended 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. We likewise note that by the time petitioner instituted this action, the President had already entered the freeze order. Petitioner proceeded against the blocked assets only after the Treasury Department had issued revocable licenses authorizing such proceedings and attachments. The Treasury regulations provided that "unless licensed" any attachment is null and void, 31 CFR § 535.203 (e), and all licenses "may be amended, modified, or revoked at any time." 31 CFR

sign-owned assets; and (2) the power summarily to seize and permanently vest title to foreign-owned assets. It is contended that only the "vesting" provisions of the TWEA gave the President the power *permanently* to dispose of assets and when Congress enacted the IEEPA in 1977 it purposefully did not grant the President this power. According to petitioner, the nullification of the attachments and the transfer of the assets will permanently dispose of the assets and would not even be permissible under the TWEA. We disagree. Although it is true the IEEPA does not give the President the power to "vest" or to take title to the assets, it does not follow that the President is not authorized under both the IEEPA and the TWEA to otherwise permanently dispose of the assets in the manner done here. Petitioner errs in assuming that the only power granted by the language used in both § 1702 and § 5(b) of the TWEA is the power temporarily to freeze assets. As noted above, the plain language of the statute defies such a holding. Section 1702 authorizes the President to "direct and compel" the "transfer, withdrawal, transportation, . . . or exportation of . . . any property in which any foreign country . . . has any interest. . . ."

We likewise reject the contention that *Orvis v. Brownell*, 345 U. S. 183 (1953), and *Zittman v. McGrath*, 341 U. S. 446 (1951), grant petitioner the right to retain its attachments on the Iranian assets. To the contrary, we think *Orvis* supports the proposition that an American claimant may not use an attachment that is subject to a revocable 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 § 1702 respecting the frozen assets. An attachment so obtained is in every sense subordinate to the President's power under the IEEPA.

§ 535.805. As such, the attachments obtained by petitioner were specifically made subordinate to further actions which the President might take under the IEEPA. Petitioner was on notice of the contingent nature of its interest in the frozen assets.

This Court has previously recognized that the congressional purpose in authorizing blocking orders is "to put control of foreign assets in the hands of the President. . . ." *Propper v. Clark*, 337 U. S. 472, 493 (1949). Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country. Accordingly, it is difficult to accept petitioner's argument because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this "bargaining chip" through attachments, garnishments or similar encumbrances on property. Neither the purpose the statute was enacted to serve nor its plain language supports such a result.⁶

⁶ Although petitioner concedes that the President could have forbidden attachments, it nevertheless argues that once he allowed them the President permitted claimants to acquire property interests in their attachments. Petitioner further argues that only the licenses to obtain the attachments were made revocable, not the attachments themselves. It is urged that the January 19, 1981, order revoking all licenses only affected petitioner's right to obtain future attachments. We disagree. As noted above, the regulations specifically provided that any attachment is null and void "unless licensed," and all licenses may be revoked at any time. Moreover, common sense defies petitioner's reading of the regulations. The President could hardly have intended petitioner and other similarly situated claimants to have the power to take control of the frozen assets out of his hands.

Our construction of petitioner's attachments as being "revocable," "contingent," and "in every sense subordinate to the President's power under the IEEPA," in effect answers petitioner's claim that even if the President had the authority to nullify the attachments and transfer the assets,

Because the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown*, 343 U. S., at 637 (Jackson, J., concurring). Under the circumstances of this case, we cannot say that petitioner has sustained that heavy burden. A contrary ruling would mean that the Federal Government as a whole lacked the power exercised by the President, see *id.*, at 636-637, and that we are not prepared to say.

deletion

IV

Although we have concluded that the IEEPA constitutes specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets, there remains the question of the President's authority to suspend claims pending in American courts. Such claims have, of course, an existence apart from the attachments which accompanied them. In terminating these claims through Executive Order No. 12294, the President purported to act under authority of both the IEEPA and 22 U. S. C. § 1732, the so-called "Hostage Act." App. to Pet. for Cert., at 52.

the exercise of such would constitute an unconstitutional taking of property in violation of the Fifth Amendment absent just compensation. We conclude that because of the President's authority to prevent or condition attachments, and because of the orders he issued to this effect, petitioner did not acquire any "property" interest in its attachments of the sort that would support a constitutional claim for compensation.

¹ Judge Mikva, in his separate opinion in *American Int'l Group, Inc. v. Islamic Republic of Iran*, — U. S. App. D. C. —, —, — F. 2d —, — (1981), argued that the moniker "Hostage Act" was newly-coined for purposes of this litigation. Suffice it to say that we focus on the language of 22 U. S. C. § 1732, not any short-hand description of it. See Shakespeare, *Romeo and Juliet*, II, ii, 43 ("What's in a name?").

We conclude that although the IEEPA authorized the nullification of the attachments, it cannot be read to authorize the suspension of the claims. The claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property. An *in personam* lawsuit, although it might eventually be reduced to judgment and that judgment might be executed upon, is an effort to establish liability and fix damages and does not focus on any particular property within the jurisdiction. The terms of the IEEPA therefore do not authorize the President to suspend claims in American courts. This is the view of all the courts which have considered the question. *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, — F. 2d, at —; *American Int'l Group, Inc. v. Islamic Republic of Iran*, — F. 2d, at —, n. 15; *The Marschalk Co., Inc. v. Iran National Airlines*, — F. Supp. —, — (SDNY 1981); *Electronic Data Systems v. Social Security Organization of Iran*, — F. Supp. —, — (ND Tex. 1981).

The Hostage Act, passed in 1868, provides:

"Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress." 22 U. S. C. § 1732.

We are reluctant to conclude that this provision constitutes specific authorization to the President to suspend claims in American courts. Although the broad language of the Hostage Act suggests it may cover this case, there are several difficulties with such a view. The legislative history indicates that the Act was passed in response to a situation unlike the recent Iranian crisis. Congress in 1868 was concerned with the activity of certain countries refusing to recognize the citizenship of naturalized Americans traveling abroad, and repatriating such citizens against their will. See, *e. g.*, Cong. Globe 4331, 40th Cong., 2d Sess. (1868) (Sen Fessenden); *id.*, at 4354 (Sen. Conness); see also 22 U. S. C. § 1731. These countries were not interested in returning the citizens in exchange for any sort of ransom. This also explains the reference in the Act to imprisonment "in violation of the rights of American citizenship." Although the Iranian hostage-taking violated international law and common decency, the hostages were not seized out of any refusal to recognize their American citizenship—they were seized precisely *because of* their American citizenship. The legislative history is also somewhat ambiguous on the question whether Congress contemplated presidential action such as that involved here or rather simply reprisals directed against the offending foreign country and *its* citizens. See, *e. g.*, Cong. Globe 4205, 40th Cong., 2d Sess. (1868); *American Int'l Group, Inc. v. Islamic Republic of Iran*, *supra*, at — (opinion of Mikva, J.).

Concluding that neither the IEEPA nor the Hostage Act constitutes specific authorization of the President's action suspending claims, however, is not to say that these statutory provisions are entirely irrelevant to the question of the validity of the President's action. We think both statutes highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case. As noted above in Part III, *supra*, at 12-13, the IEEPA delegates broad authority to the President to act in times of national emergency

with respect to property of a foreign country. The Hostage Act similarly indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns. As Senator Williams, draftsman of the language eventually enacted as the Hostage Act, put it:

"If you propose any remedy at all, you must invest the executive with some discretion, so that he may apply the remedy to a case as it may arise. As to England or France he might adopt one policy to relieve a citizen imprisoned by either one of those countries; as to the Barbary powers, he might adopt another policy; as to the islands of the ocean another. With different countries that have different systems of government he might adopt different means." Cong. Globe 4359, 40th Cong., 2d Sess. (1868).

Proponents of the bill recognized that it placed "a loose discretion" in the President's hands, *id.*, at 4238 (Sen. Stewart), but argued that "[s]omething must be intrusted to the Executive" and that "[t]he President ought to have the power to do what the exigencies of the case require to rescue [a] citizen from imprisonment." *Id.*, at 4233, 4357 (Sen. Williams). An original version of the Act, which authorized the President to suspend trade with a foreign country and even arrest citizens of that country in the United States in retaliation, was rejected because "there may be a great variety of cases arising where other and different means would be equally effective and where the end desired could be accomplished without resorting to such dangerous and violent measures." *Id.*, at 4233 (Sen. Williams).

Although we have declined to conclude that the IEEPA or the Hostage Act directly authorizes the President's suspension of claims for the reasons noted, we cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least

with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such 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. *Haig v. Agee*, — U. S. —, — (1981). On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility," *Youngstown*, 343 U. S., at 637 (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President. It is to that history which we now turn.

Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. *United States v. Pink*, 315 U. S. 203, 225 (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. As one treatise writer puts it, international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory." L. Henkin, *Foreign Affairs and the Constitution* 262 (1972). Consistent with that principle, the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement with-

missive

out the advice and consent of the Senate.⁸ Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump sum payments or the establishment of arbitration procedures. To be sure, many of these settlements were encouraged by the United States claimants themselves, since a claimant's only hope of obtaining any payment at all might lie in having his government negotiate a diplomatic settlement on his behalf. But it is also undisputed that the "United States has sometimes disposed of the claims of citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." Henkin, *supra*, at 263. Accord, The Restatement (Second) of the Foreign Relations Law of the United States § 213 (1965) (President "may waive or settle a claim against a foreign state . . . even without the consent of the [injured] national"). It is clear that the practice of settling claims continues today. Since 1952, the President has entered into at least 10 binding settlements with foreign nations, including an \$80 million settlement with the People's Republic of China.⁹

⁸ At least since the case of the "Wilmington Packet" in 1799, Presidents have exercised the power to settle claims of United States nationals by executive agreement. See Lillich, The Gravel Amendment to the Trade Reform Act of 1974, 69 Am. J. Int'l L. 837, 844 (1975). In fact, during the period of 1817-1917, "no fewer than eighty executive agreements were entered into by the United States looking to the liquidation of claims of its citizens." McClure, International Executive Agreements 53 (1941). See also 14 M. Whiteman, Digest of International Law 247 (1970).

⁹ Those agreements are 30 U. S. T. 1957 (1979) (People's Republic of China); 27 U. S. T. 3993 (1976) (Peru); 27 U. S. T. 4214 (1976) (Egypt); 25 U. S. T. 227 (1974) (Peru); 24 U. S. T. 522 (1973) (Hungary); 20 U. S. T. 2654 (1969) (Japan); 16 U. S. T. 1 (1965) (Yugoslavia); 14 U. S. T. 969 (1963) (Bulgaria); 11 U. S. T. 1953 (1960) (Poland); 11 U. S. T. 317 (1960) (Rumania).

Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress' enactment of the International Claims Settlement Act of 1949, 22 U. S. C. § 1621 *et seq.*, as amended (1980). The Act had two purposes: (1) to allocate to United States nationals funds received in the course of an executive claims settlement with Yugoslavia, and (2) to provide a procedure whereby funds resulting from future settlements could be distributed. To achieve these ends Congress created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds, 22 U. S. C. § 1623 (a). By creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements. Indeed, the legislative history of the Act observed that the United States was seeking settlements with countries other than Yugoslavia and stated that the bill "contemplates that settlements of a similar nature are to be made in the future." H. R. Rep. No. 81-770, 81st Cong., 1st Sess., 4, 8 (1949).

Over the years Congress has frequently amended the International Claims Settlement Act to provide for particular problems arising out of settlement agreements, thus demonstrating Congress' continuing acceptance of the President's claim settlement authority. With respect to the Executive Agreement with the People's Republic of China, for example, Congress established an allocation formula for distribution of the funds received pursuant to the Agreement. 22 U. S. C. § 1627. As with legislation involving other executive agreements, Congress did not question the fact of the settlement or the power of the President to have concluded it. In 1976, Congress authorized the Foreign Claims Settlement Commission to adjudicate the merits of claims by United States na-

tionals against East Germany, prior to any settlement with East Germany, so that the Executive would "be in a better position to negotiate an adequate settlement . . . of these claims." S. Rep. No. 94-1188, 94th Cong., 1st Sess., 2 (1976); 22 U. S. C. § 1644b. Similarly, Congress recently amended the International Claims Settlement Act to facilitate the settlement of claims against Vietnam. 22 U. S. C. § 1645; § 1645a (5). The House Report stated that the purpose of the legislation was to establish an official inventory of losses of private United States property in Vietnam so that recovery could be achieved "through direct Government-to-Government negotiation of private property claims." H. R. Rep. No. 96-915, 96th Cong., 2d Sess., 2-3 (1980). Finally, the legislative history of the IEEPA further reveals that Congress has accepted the authority of the Executive to enter into settlement agreements. Though the IEEPA was enacted to provide for some limitation on the President's emergency powers, Congress stressed that "nothing in this Act is intended to interfere with the authority of the President to [block assets], or to impede the settlement of claims of United States citizens against foreign countries." S. Rep. No. 95-466, 95th Cong., 2d Sess., 6 (1977); 50 U. S. C. § 1706 (a)(1).¹⁰

¹⁰ Indeed, Congress has consistently failed to object to this long-standing practice of claim settlement by executive agreement, even when it has had an opportunity to do so. In 1972, Congress entertained legislation relating to congressional oversight of such agreements. But Congress took only limited action, requiring that the text of significant executive agreements be transmitted to Congress. 1 U. S. C. § 112b. In *Haig v. Agee*, — U. S. — (1981), we noted that "Despite the longstanding and officially promulgated view that the Executive has the power to withhold passports for reasons of national security, Congress in 1978, 'though it once again enacted legislation relating to passports, left completely untouched the broad rule-making authority granted in the earlier Act.'" *Id.*, at 20, quoting *Zemel v. Rusk*, 381 U. S. 1, 12 (1965). Likewise in

In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate. In *United States v. Pink*, 315 U. S. 203 (1942), for example, the Court upheld the validity of the Litvinov Assignment, which was part of an Executive Agreement whereby the Soviet Union assigned to the United States amounts owed to it by American nationals so that outstanding claims of other American nationals could be paid. The Court explained that the resolution of such claims was integrally connected with normalizing United States' relations with a foreign state.

"Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President. . . . No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of his power and responsibilities . . . is to be drastically revised." *Id.*, at 229-230.

Similarly, Judge Learned Hand recognized:

"The constitutional power of the President extends to the settlement of mutual claims between a foreign gov-

this case, Congress, though legislating in the area, has left "untouched" the authority of the President to enter into settlement agreements.

The legislative history of 1 U. S. C. § 112b further reveals that Congress has accepted the President's authority to settle claims. During the hearings on the bill, Senator Case, the sponsor of the Act, stated with respect to executive claim settlements that:

"I think it is a most interesting [area] in which we have accepted the right of the President, one individual, acting through his diplomatic force, to adjudicate and settle claims of American nationals against foreign countries. But it is a fact."

Transmittal of Executive Agreements to Congress: Hearings before the Senate Committee on Foreign Relations, 92d Cong., 1st Sess., 74 (1971).

ernment and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies. The continued mutual amity between this nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations." *Ozanic v. United States*, 188 F. 2d 228, 231 (CA2 1951).

Petitioner raises two arguments in opposition to the proposition that Congress has acquiesced in this longstanding practice of claims settlement by executive agreement. First, it suggests that all pre-1952 settlement claims, and corresponding court cases such as *Pink*, should be discounted because of the evolution of the doctrine of sovereign immunity. Petitioner observes that prior to 1952 the United States adhered to the doctrine of absolute sovereign immunity, so that absent action by the Executive there simply would be no remedy for an United States national against a foreign government. When the United States in 1952 adopted a more restrictive notion of sovereign immunity, by means of the so-called "Tate" letter, it is petitioner's view that United States nationals no longer needed Executive aid to settle claims and that, as a result, the President's authority to settle such claims in some sense "disappeared." Though petitioner's argument is not wholly without merit, it is refuted by the fact that since 1952 there have been at least 10 claims settlements by executive agreement. Thus, even if the pre-1952 cases should be disregarded, congressional acquiescence in settlement agreements since that time supports the President's power to act here.

Petitioner next asserts that Congress divested the President of the authority to settle claims when it enacted the Foreign

Sovereign Immunities Act of 1976 (hereinafter "FSIA"), 28 U. S. C. §§ 1330, 1602 *et seq.* The FSIA granted personal and subject matter jurisdiction in the federal district courts over commercial suits brought by claimants against those foreign states which have waived immunity, 28 U. S. C. § 1330. Prior to the enactment of the FSIA, a foreign government's immunity to suit was determined by the Executive Branch on a case-by-case basis. According to petitioner, the principal purpose of the FSIA was to depoliticize these commercial lawsuits by taking them out of the arena of foreign affairs—where the Executive Branch is subject to the pressures of foreign states seeking to avoid liability through a grant of immunity—and by placing them within the exclusive jurisdiction of the courts. Petitioner thus insists that the President, by suspending its claims, has circumscribed the jurisdiction of the United States courts in violation of Art. III of the Constitution.

We disagree. In the first place, we do not believe that the President has attempted to divest the federal courts of jurisdiction. Executive Order No. 12294 purports only to "suspend" the claims, not divest the federal court of "jurisdiction." As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will "revive" and become judicially enforceable in United States courts. This case, in short, illustrates the difference between modifying federal court jurisdiction and directing the courts to apply a different rule of law. See *United States v. Schooner Peggy*, 5 U. S. 1, 103 (1801). The President has exercised the power, acquiesced in by Congress, to settle claims and, as such, has simply effected a change in the substantive law governing the lawsuit. Indeed, the very example of sovereign immunity belies petitioner's argument. No one would suggest that a determination of sovereign immunity divests the federal courts of "jurisdiction." Yet, petitioner's argument, if accepted, would have required courts prior to the enactment

of the FSIA to reject as an encroachment on their jurisdiction the President's determination of a foreign state's sovereign immunity.

Petitioner also reads the FSIA much too broadly. The principal purpose of the FSIA was to codify contemporary concepts concerning the scope of sovereign immunity and withdraw from the President the authority to make binding determinations of the sovereign immunity to be accorded foreign states. See *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, — F. 2d, at —; *American Int'l Group, Inc. v. Islamic Republic of Iran*, — F. 2d, at —. The FSIA was thus designed to remove one particular barrier to suit, namely sovereign immunity, and cannot be fairly read as prohibiting the President from settling claims of United States nationals against foreign governments. It is telling that the Congress which enacted the FSIA considered but rejected several proposals designed to limit the power of the President to enter into executive agreements, including claims settlement agreements.¹¹ It is quite unlikely that the same Congress that rejected proposals to limit the President's authority to conclude executive agreements sought to accomplish that very purpose *sub silentio* through the FSIA. And, as noted above, just 1 year after enacting the FSIA, Congress enacted the IEEPA, where the legislative history stressed that nothing in the IEEPA was to impede the settlement of claims of United States citizens. It would be surprising for Congress to express this support for settlement

¹¹ The rejected legislation would typically have required congressional approval of executive agreements before they would be considered effective. See Congressional Oversight of Executive Agreements: Hearings on S. 632 and S. 1251 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 243-261, 302-311 (1975); Congressional Review of International Agreements: Hearings before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations, 94th Cong., 2d Sess., 167, 246 (1976).

agreements had it intended the FSIA to eliminate the President's authority to make such agreements.

In light of all of the foregoing—the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims pursuant to Executive Order No. 12294. As Justice Frankfurter pointed out in *Youngstown*, 343 U. S. at 610-611, “a systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned . . . may be treated as a gloss on ‘Executive Power’ vested in the President by § 1 of Art. II.” Past practice does not, by itself, create power, but “long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] has been [taken] in pursuance of its consent. . . .” *United States v. Midwest Oil Co.*, 236 U. S. 459, 469 (1915). See *Haig v. Agee*, — U. S., at —, —. Such practice is present here and such a presumption is also appropriate. In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.

Our conclusion is buttressed by the fact that the means chosen by the President to settle the claims of American nationals provided an alternate forum, the Claims Tribunal, which is capable of providing meaningful relief. The Solicitor General also suggests that the provision of the Claims Tribunal will actually *enhance* the opportunity for claimants to recover their claims, in that the Agreement removes a number of jurisdictional and procedural impediments faced by claimants in United States courts. Brief for United States, at 13-14. Although being overly sanguine about the chances of United States claimants before the Claims Tribunal would require a degree of naïveté which should not be demanded

even of judges, the Solicitor Generals' point cannot be discounted. Moreover, it is important to remember that we have already held that the President has the *statutory* authority to nullify attachments and to transfer the assets out of the country. The President's power to do so does not depend on his provision of a forum whereby claimants can recover on those claims. The fact that the President has provided such a forum here means that the claimants are receiving something in return for the suspension of their claims, namely, access to an international tribunal before which they may well recover something on their claims. Because there does appear to be a real "settlement" here, this case is more easily analogized to the more traditional claim settlement cases of the past.

Just as importantly, Congress has not disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself,¹² Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement. Quite the contrary, the relevant Senate Committee has stated that the establishment of the Tribunal is "of vital importance to the United States." S. Rep. No. 97-71, 97th Cong., 1st Sess., 5 (1981).¹³ We are thus

¹² See Hearings on the Iranian Agreements before the Senate Committee on Foreign Relations, 97th Cong., 1st Sess. (1981); Hearings on the Iranian Assets Settlement before the Senate Committee on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess. (1981); Hearings on the Algerian Declarations before the House Committee on Foreign Affairs, 97th Cong., 1st Sess. (1981).

¹³ Contrast congressional reaction to the Iranian Agreements with congressional reaction to a 1973 Executive Agreement with Czechoslovakia. There the President sought to settle over \$105 million in claims against Czechoslovakia for \$20.5 million. Congress quickly demonstrated its displeasure by enacting legislation requiring that the Agreement be renegotiated. See Lillich, *supra*, at 839-840. Though Congress has shown itself capable of objecting to executive agreements, it has rarely done so and has not done so in this case.

clearly not confronted with a situation in which Congress has in some way resisted the exercise of presidential authority.

Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. As the Court of Appeals for the First Circuit stressed, "the sheer magnitude of such a power, considered against the background of the diversity and complexity of modern international trade, cautions against any broader construction of authority than is necessary." *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, — F. 2d, at —. But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

V

We do not think it appropriate at the present time to address petitioner's contention that the suspension of claims, if authorized, would constitute a taking of property in violation of the Fifth Amendment to the United States Constitution in the absence of just compensation.¹⁴ Both petitioner and the Government concede that the question whether the suspension of the claims constitutes a taking is not ripe for review. Brief for Petitioner, at 34, n. 32; Brief for United States, at 65. Accord, *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, *supra*, at —; *American Int'l Group, Inc. v. Islamic Republic of Iran*, — F. 2d, at —. However, this contention, and the possibility that the Presi-

¹⁴ Though we conclude that the President has settled petitioner's claims against Iran, we do not suggest that the settlement has terminated petitioner's possible taking claim against the United States. We express no views on petitioner's claims that it has suffered a taking.

dent's actions may effect a taking of petitioner's property, makes ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims under the Tucker Act, 28 U. S. C. § 1491, in such an event. That the fact and extent of the taking in this case is yet speculative is inconsequential because "there must be at the time of taking 'a reasonable, certain and adequate provision for obtaining compensation.'" *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 124-125 (1974), quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 659 (1890); *Cities Service Co. v. McGrath*, 342 U. S. 330, 335-336 (1952); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U. S. 59, 94, n. 39 (1978).

It has been contended that the "treaty exception" to the jurisdiction of the Court of Claims, 28 U. S. C. § 1502, might preclude the Court of Claims from exercising jurisdiction over any takings claim the petitioner might bring. At oral argument, however, the Government conceded that § 1502 would not act as a bar to petitioner's action in the Court of Claims. Tr. of Oral Arg., at 39-42, 47. We agree. See *United States v. Weld*, 127 U. S. 51 (1888); *United States v. Old Settlers*, 148 U. S. 427 (1893); *Hughes Aircraft Co. v. United States*, 534 F. 2d 889 (Ct. Cl. 1976). Accordingly, to the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act.

The judgment of the District Court is accordingly affirmed, and the mandate shall issue forthwith.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

File

From: Mr. Justice Powell

Circulated: JUL 1 1981

Recirculated: _____

No. 80-2127 Iran National Airlines v. The Marschalk Co.

JUSTICE POWELL, with whom Justice Marshall and Justice Stevens join, dissenting.

I would dismiss the certificate, citing Dames & Moore v. Regan, ___ U.S. ___ (1981), announced today. The Court's opinion in that case provides the only answers that this Court should give to the questions certified to us by the Court of Appeals for the Second Circuit. Having rendered an opinion on the subject of those questions, we should not answer them in monosyllables nor attempt a syllabus of a portion of the Court's opinion. We recently have dismissed certification of questions where the Court has addressed the subject of the questions in a full opinion. Foley v. Carter, ___ U.S. ___ (1981). See also United States v. Will, ___ U.S. ___ (1981).

6-30-81

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-2078

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JUL 1 1981

Dames & Moore, Petitioner, } On Writ of Certiorari to the
v. } United States Court of
Donald T. Regan, Secretary of } Appeals for the Ninth
the Treasury, et al. } Circuit.

[June —, 1981]

JUSTICE POWELL, concurring and dissenting in part.

I join the Court's opinion except its decision that the nullification of the attachments did not effect a taking of property interests giving rise to claims for just compensation. *Ante*, at —, n. 6. The nullification of attachments presents a separate question from whether the suspension and proposed settlement of claims against Iran may constitute a taking. I would leave both "taking" claims open for resolution on a case-by-case basis in actions before the Court of Claims. The facts of the hundreds of claims pending against Iran are not known to this Court and may differ from the facts in this case. I therefore dissent from the Court's decision with respect to attachments. The decision may well be erroneous,¹ and it certainly is premature.

¹Even though the Executive Orders purported to make attachments conditional, there is a substantial question whether the Orders themselves may have effected a taking by making conditional the attachments that claimants against Iran otherwise could have obtained without condition. Moreover, because it is settled that an attachment entitling a creditor to resort to specific property for the satisfaction of a claim is a property right compensable under the Fifth Amendment, *Armstrong v. United States*, 364 U. S. 40 (1960), *Louisville Bank v. Radford*, 295 U. S. 555 (1935), there is a question whether the revocability of the license under which petitioner obtained its attachment suffices to render revocable the attachment itself. See *Marshall Co. v. Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM) (June 11, 1981).

I agree with the Court's opinion with respect to the suspension and settlement of claims against Iran and its instrumentalities. The opinion makes clear that some claims may not be adjudicated by the Claims Tribunal, and that others may not be paid in full. The Court holds that parties whose valid claims are not adjudicated or not fully paid may bring a "taking" claim against the United States in the Court of Claims, the jurisdiction of which this Court acknowledges. The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as "bargaining chips" claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts.² The extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution.

² As the Court held in *Armstrong v. United States*, 364 U. S. 40, 49 (1960):

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The Court unanimously reaffirmed this understanding of the Just Compensation Clause in the recent case of *Agins v. City of Tiburon*, 447 U. S. 225, 260-261 (1960).

6-30-81

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-2078

To: The Chief Justice
Mr. Justice Brennan
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Mr. Justice Marshall
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Mr. Justice Stevens

Also Mr. Justice Powell

Circulated: ~~ALL~~ 1 1981

Dames & Moore, Petitioner, } On Writ of Certiorari to the
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the Treasury, et al. } Circuit.

Reconsidered: _____

file

[June —, 1981]

JUSTICE POWELL, concurring and dissenting in part.

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I agree with the Court's opinion with respect to the suspension and settlement of claims against Iran and its instrumentalities. The opinion makes clear that some claims may not be adjudicated by the Claims Tribunal, and that others may not be paid in full. The Court holds that parties whose valid claims are not adjudicated or not fully paid may bring a "taking" claim against the United States in the Court of Claims, the jurisdiction of which this Court acknowledges. The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as "bargaining chips" claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts.² The extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution.

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The Court unanimously reaffirmed this understanding of the Just Compensation Clause in the recent case of *Agins v. City of Tiburon*, 447 U. S. 225, 260-261 (1980).

STYLISTIC CHANGES THROUGHOUT

P6, 7, 14-16, 20, 21, 28, 30-31

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

1st PRINTED DRAFT

Circulated: _____

JUL 1 1981

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SUPREME COURT OF THE UNITED STATES

No. 80-2078

Dames & Moore, Petitioner, } On Writ of Certiorari to the
v. } United States Court of
Donald T. Regan, Secretary of } Appeals for the Ninth
the Treasury, et al. } Circuit.

[June —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The questions presented by this case touch fundamentally upon the manner in which our Republic is to be governed. Throughout the nearly two centuries of our Nation's existence under the Constitution, this subject has generated considerable debate. We have had the benefit of commentators such as John Jay, Alexander Hamilton, and James Madison writing in *The Federalist Papers* at the Nation's very inception, the benefit of astute foreign observers of our system such as Alexis deTocqueville and James Bryce writing during the first century of the Nation's existence, and the benefit of many other treatises as well as more than 400 volumes of reports of decisions of this Court. As these writings reveal it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed. Indeed, as Justice Jackson noted, "[a] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 634 (1952) (concurring opinion).

Our decision today will not dramatically alter this situation, for the Framers "did not make the judiciary the overseer of our government." *Id.*, at 594 (Frankfurter, J., concur-

Received

LJP

*I've joined
except as
noted
in my
separate
opinion.*

ring). We are confined to a resolution of the dispute presented to us. That dispute involves various Executive Orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States, directed that these assets be transferred to Iran, and suspended claims against Iran that may be presented to an International Claims Tribunal. This action was taken in an effort to comply with an Executive Agreement between the United States and Iran. We granted certiorari before judgment in this case, and set an expedited briefing and argument schedule, because lower courts had reached conflicting conclusions on the validity of the President's actions and, as the Solicitor General informed us, unless the Government acted by July 19, 1981, Iran could consider the United States to be in breach of the Executive Agreement.

But before turning to the facts and law which we believe determine the result in this case, we stress that the expeditious treatment of the issues involved by all of the courts which have considered the President's actions makes us acutely aware of the necessity to rest decision on the narrowest possible ground capable of deciding the case. *Ashwander v. TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). This does not mean that reasoned analysis may give way to judicial fiat. It does mean that the statement of Justice Jackson—that we decide difficult cases presented to us by virtue of our commissions, not our competence—is especially true here. We attempt to lay down no general “guide-lines” covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case.

Perhaps it is because it is so difficult to reconcile the foregoing definition of Art. III judicial power with the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive, without either challenge or interference by the Judiciary, that the decisions of the

Court in this area have been rare, episodic, and afford little precedential value for subsequent cases. The tensions present in any exercise of executive power under the tri-partite system of Federal Government established by the Constitution have been reflected in opinions by Members of this Court more than once. The Court stated in *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 319-320 (1926):

"[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."

And yet 16 years later, Justice Jackson in his concurring opinion in *Youngstown, supra*, which both parties agree brings together as much combination of analysis and common sense as there is in this area, 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." 343 U. S., at 641.

As we now turn to the factual and legal issues in this case, we freely confess that we are obviously deciding only one more episode in the never-ending tension between the President exercising the executive authority in a world that pre-

sents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances.

I

On November 4, 1979, the American Embassy in Tehran was seized and our diplomatic personnel were captured and held hostage. In response to that crisis, President Carter, acting pursuant to the International Emergency Economic Powers Act, 50 U. S. C. §§ 1701-1706 (Supp. II 1978) (hereinafter "IEEPA"), declared a national emergency on November 14, 1979,¹ and blocked the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States. . . ." Executive Order No. 12170, 44 Fed. Reg. 65279.² President Carter authorized the Secretary of the Treasury to promulgate regulations carrying out the blocking order. On November 15, 1979, the Treasury Department's Office of Foreign Assets Control issued a regulation providing that "[u]nless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment,

¹Title 50 U. S. C. § 1701 (a) (Supp. II 1978) states that the President's authority under the Act "may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or in substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." Petitioner does not challenge President Carter's declaration of a national emergency.

²Title 50 U. S. C. § 1702 (a)(1)(B) (Supp. II 1978) empowers 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 foreign country or a national thereof has any interest. . . ."

or other judicial process is null and void with respect to any property in which on or since [November 14, 1979] there existed an interest of Iran." 31 CFR § 535.203 (e) (1980). The regulations also made clear that any licenses or authorizations granted could be "amended, modified, or revoked at any time." 31 CFR § 535.805 (1980).³

On November 26, 1979, the President granted a general license authorizing certain judicial proceedings against Iran but which did not allow the "entry of any judgment or of any decree or order of similar or analogous effect. . . ." 31 CFR § 535.504 (a) (1980). On December 19, 1979, a clarifying regulation was issued stating that "the general authorization for judicial proceedings contained in § 535.504 (a) includes pre-judgment attachment." 31 CFR § 535.418 (1980).

On December 19, 1979, petitioner Dames & Moore 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, and a number of Iranian banks. In its complaint, petitioner alleged that its wholly owned subsidiary, Dames & Moore International, S. R. L., was a party to a written contract with the Atomic Energy Organization, and that the subsidiary's entire interest in the contract had been assigned to petitioner. Under the contract, the subsidiary was to conduct site studies for a proposed nuclear power plant in Iran. As provided in the terms of the contract, the Atomic Energy Organization terminated the agreement for its own convenience on June 30, 1979. Petitioner contended, however, that it was owed \$3,436,694.30 plus interest for services performed under the contract prior to the date of termination.⁴ The District Court issued orders

³ 31 CFR § 535.805 (1980) provides in full: "The provision of this part and any rulings, licenses, instructions, orders, or forms issued thereunder may be amended, modified, or revoked at any time."

⁴ The contract stated that any dispute incapable of resolution by agreement of the parties would be submitted to conciliation and that, if either party was unwilling to accept the results of conciliation, "the matter shall

of attachment directed against property of the defendants, and the property of certain Iranian banks was then attached to secure any judgment that might be entered against them.

On January 20, 1981, the Americans held hostage were released by Iran pursuant to an Agreement entered into the day before and embodied in two Declarations of the Democratic and Popular Republic of Algeria. Declaration of the Government of the Democratic and Popular Republic of Algeria (App. to Pet. for Cert., at 21-29), and Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (App. to Pet. for Cert., at 30-35). The Agreement stated that "it is the purpose of [the United States and Iran] . . . to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration." App. to Pet. for Cert., at 21-22. In furtherance of this goal, the Agreement called for the establishment of an Iran-United States Claims Tribunal which would arbitrate any claims not settled within 6 months. Awards of the Claims Tribunal are to be "final and binding" and "enforceable . . . in the courts of any nation in accordance with its law." *Id.*, at 32. Under the Agreement, the United States is obligated:

"to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify

be decided finally by resort to the courts of Iran." Pet. for Cert., at 7, n. 2. In its complaint, which was based on breach of contract and related theories, petitioner alleged that it had sought a meeting with the Atomic Energy Organization for purposes of settling matters relating to the contract but that the Organization "has continually postponed [the] meeting and obviously does not intend that it take place." Complaint in *Dames & Moore v. Atomic Energy Organization of Iran*, No. 79-04918 LEW (Px) (CD Cal.), at ¶ 27.

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." *Id.*, at 21-22.

In addition, the United States must "act to bring about the transfer" by July 19, 1981, of all Iranian assets held in this country by American banks. *Id.*, at 24-25. One billion dollars of these assets will be deposited in a security account in the Bank of England, to the account of the Algerian Central Bank, and used to satisfy awards rendered against Iran by the Claims Tribunal. *Ibid.*

On January 19, 1981, President Carter issued a series of Executive Orders implementing the terms of the Agreement. Executive Order Nos. 12276-12285, 46 Fed. Reg. 7913-7932. These orders revoked all licenses permitting the exercise of "any right, power, or privilege" with regard to Iranian funds, securities, or deposits; "nullified" all non-Iranian interests in such assets acquired subsequent to the blocking order of November 14, 1979; and required those banks holding Iranian assets to transfer them "to the Federal Reserve Bank of New York, to be held or transferred as directed by the Secretary of the Treasury." Executive Order No. 12279, 46 Fed. Reg. 7919.

On February 24, 1981, President Reagan issued an Executive Order in which he "ratified" the January 19th Executive Orders. Executive Order No. 12294, 46 Fed. Reg. 14111. Moreover, he "suspended" all "claims which may be presented to the . . . Tribunal" and provided that such claims "shall have no legal effect in any action now pending in any court of the United States." *Ibid.* The suspension of any particular claim terminates if the Claims Tribunal determines that it has no jurisdiction over that claim; claims are discharged for all purposes when the Claims Tribunal either awards some recovery and that amount is paid, or determines that no recovery is due. *Ibid.*

Meanwhile, on January 27, 1981, petitioner moved for summary judgment in the District Court against the Government of Iran and the Atomic Energy Organization, but not against the Iranian banks. The District Court granted petitioner's motion and awarded petitioner the amount claimed under the contract plus interest. Thereafter, petitioner attempted to execute the judgment by obtaining writs of garnishment and execution in state court in the State of Washington, and a sheriff's sale of Iranian property in Washington was noticed to satisfy the judgment. However, by order of May 28, 1981, as amended by order of June 8, the District Court stayed execution of its judgment pending appeal by the Government of Iran and the Atomic Energy Organization. The District Court also ordered that all prejudgment attachments obtained against the Iranian defendants be vacated and that further proceedings against the bank defendants be stayed in light of the Executive Orders discussed above. App. to Pet. for Cert., at 106-107.

On April 28, 1981, petitioner filed this action in the District Court for declaratory and injunctive relief against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the Executive Orders and Treasury Department regulations implementing the Agreement with Iran. In its complaint, petitioner alleged that the actions of the President and the Secretary of the Treasury implementing the Agreement with Iran were beyond their statutory and constitutional powers and, in any event, were unconstitutional to the extent they adversely affect petitioner's final judgment against the Government of Iran and the Atomic Energy Organization, its execution of that judgment in the State of Washington, its prejudgment attachments, and its ability to continue to litigate against the Iranian banks. *Id.*, at 1-12. On May 28, 1981, the District Court denied petitioner's motion for a preliminary injunction and dismissed petitioner's complaint for failure to state a claim upon which

relief could be granted. *Id.*, at 106-107. Prior to the District Court's ruling, the United States Courts of Appeals for the First and the District of Columbia Circuits upheld the President's authority to issue the Executive Orders and regulations challenged by petitioner. See *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, — F. 2d — (CA1 1981); *American Int'l Group, Inc. v. Islamic Republic of Iran*, — U. S. App. D. C. —, — F. 2d — (1981).

On June 3, 1981, petitioner filed a notice of appeal from the District Court's order, and the appeal was docketed in the United States Court of Appeals for the Ninth Circuit. On June 4, the Treasury Department amended its regulations to mandate "the transfer of bank deposits and certain other financial assets of Iran in the United States to the Federal Reserve Bank of New York by noon, June 19." App. to Pet. for Cert., at 151-152. The District Court, however, entered an injunction pending appeal prohibiting the United States from requiring the transfer of Iranian property that is subject to "any writ of attachment, garnishment, judgment, levy, or other judicial lien" issued by any court in favor of petitioner. *Id.*, at 168. Arguing that this is a case of "imperative public importance," petitioner then sought a writ of certiorari before judgment. Pet. for Cert., at 10. See 28 U. S. C. § 2101 (e); this Court's Rule 18 (1980). Because the issues presented here are of great significance and demand prompt resolution, we granted the petition for the writ, adopted an expedited briefing schedule, and set the case for oral argument on June 24, 1981. — U. S. — (1981).

II

The parties and the lower courts confronted with the instant questions have all agreed that much relevant analysis is contained in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952). Justice Black's opinion for the Court in that case, involving the validity of President Truman's effort to seize the country's steel mills in the wake of a nationwide

strike, recognized that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Id.*, at 585. Justice Jackson's concurring opinion elaborated in a general way the consequences of different types of interaction between the two democratic branches in assessing presidential authority to act in any given case. When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Id.*, at 637. When the President acts in the absence of congressional authorization he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.*, at 637. In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation of powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including "congressional inertia, indifference or quiescence." *Ibid.* Finally, when the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." *Id.*, at 637-638.

Although we have in the past and do today find Justice Jackson's classification of executive actions into three general categories analytically useful, we should be mindful of Justice Holmes' admonition, quoted by Justice Frankfurter in *Youngstown*, 343 U. S., at 597 (concurring opinion), that "The great ordinances of the Constitution do not establish and divide fields of black and white." *Springer v. Philippine Islands*, 277 U. S. 189, 209 (1928) (dissenting opinion).

Justice Jackson himself recognized that his three categories represented "a somewhat over-simplified grouping," 343 U. S., at 635, and it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeon-holes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.

III

In nullifying post-November 14, 1979, attachments and directing those persons holding blocked Iranian funds and securities to transfer them to the Federal Reserve Bank of New York for ultimate transfer to Iran, President Carter cited five sources of express or inherent power. The Government, however, has principally relied on § 1702 of the IEEPA as authorization for these actions. Section 1702 (a)(1) provides in part:

"At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

"(A) investigate, regulate, or prohibit—

"(i) any transactions in foreign exchange,

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

"(iii) the importing or exporting of currency or securities, and

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, impor-

tation 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."

The Government contends that the acts of "nullifying" the attachments and ordering the "transfer" of the frozen assets are specifically authorized by the plain language of the above statute. The two Courts of Appeals that have considered the issue agreed with this contention. In *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, *supra*, the Court of Appeals for the First Circuit explained:

"The President relied on his IEEPA powers in November 1979, when he 'blocked' all Iranian assets in this country, and again in January 1981, when he 'nullified' interests acquired in blocked property, and ordered that property's transfer. The President's actions, in this regard, are in keeping with the language of IEEPA; initially he 'prevent[ed] and prohibit[ed]' 'transfers' of Iranian assets; later he 'direct[ed] and compel[led]' the 'transfer' and 'withdrawal' of the assets, 'nullify[ing]' certain 'rights' and 'privileges' acquired in them.

"Main argues that IEEPA does not supply the President with power to override judicial remedies, such as attachments and injunctions, or to extinguish 'interests' in foreign assets held by United States citizens. But we can find no such limitation in IEEPA's terms. The language of IEEPA is sweeping and unqualified. It provides broadly that the President may void or nullify the 'exercising [by any person of] any right, power or privilege with respect to . . . any property in which any foreign country has any interest. . . .' 50 U. S. C. § 1702 (a)(1)(B)." — F. 2d, at — (emphasis in original).

In *American Int'l Group, Inc. v. Islamic Republic of Iran*, *supra*, the Court of Appeals for the District of Columbia Circuit employed a similar rationale in sustaining President Carter's action:

"The Presidential revocation of the license he issued permitting prejudgment restraints upon Iranian assets is an action that falls within the plain language of the IEEPA. In vacating the attachments, he acted to 'nullify [and] void . . . any . . . exercising any right, power, or privilege with respect to . . . any property in which any foreign country . . . has any interest . . . by any person . . . subject to the jurisdiction of the United States.'"
— F. 2d, at — (footnote omitted).

Petitioner contends that we should ignore the plain language of this statute because an examination of its legislative history as well as the history of § 5 (b) of the Trading With the Enemy Act (hereinafter "TWEA"), 50 U. S. C. App. § 5 (b), from which the pertinent language of § 1702 is directly drawn, reveals that the statute was not intended to give the President such extensive power over the assets of a foreign state during times of national emergency. According to petitioner, once the President instituted the November 14, 1979, blocking order, § 1702 authorized him "only to continue the freeze or to discontinue controls." Brief for Petitioner, at 32.

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) of the TWEA requires such a result. To the contrary, we think both the legislative history and cases interpreting the TWEA fully sustain the broad authority of the Executive when acting under this congressional grant of power. See, e. g., *Orvis v. Brownell*, 345 U. S. 183 (1953).⁵ Although Congress in-

⁵ Petitioner argues that under the TWEA the President was given two powers: (1) the power temporarily to freeze or block the transfer of for-

tended 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. We likewise note that by the time petitioner instituted this action, the President had already entered the freeze order. Petitioner proceeded against the blocked assets only after the Treasury Department had issued revocable licenses authorizing such proceedings and attachments. The Treasury regulations provided that "unless licensed" any attachment is null and void, 31 CFR § 535.203 (e), and all licenses "may be amended, modified, or revoked at any time." 31 CFR

sign-owned assets; and (2) the power summarily to seize and permanently vest title to foreign-owned assets. It is contended that only the "vesting" provisions of the TWEA gave the President the power *permanently* to dispose of assets and when Congress enacted the IEEPA in 1977 it purposefully did not grant the President this power. According to petitioner, the nullification of the attachments and the transfer of the assets will permanently dispose of the assets and would not even be permissible under the TWEA. We disagree. Although it is true the IEEPA does not give the President the power to "vest" or to take title to the assets, it does not follow that the President is not authorized under both the IEEPA and the TWEA to otherwise permanently dispose of the assets in the manner done here. Petitioner errs in assuming that the only power granted by the language used in both § 1702 and § 5(b) of the TWEA is the power temporarily to freeze assets. As noted above, the plain language of the statute defies such a holding. Section 1702 authorizes the President to "direct and compel" the "transfer, withdrawal, transportation, . . . or exportation of . . . any property in which any foreign country . . . has any interest. . . ."

We likewise reject the contention that *Orvis v. Brownell*, 345 U. S. 183 (1953), and *Zittman v. McGrath*, 341 U. S. 446 (1951), grant petitioner the right to retain its attachments on the Iranian assets. To the contrary, we think *Orvis* supports the proposition that an American claimant may not use an attachment that is subject to a revocable 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 § 1702 respecting the frozen assets. An attachment so obtained is in every sense subordinate to the President's power under the IEEPA.

§ 535.805. As such, the attachments obtained by petitioner were specifically made subordinate to further actions which the President might take under the IEEPA. Petitioner was on notice of the contingent nature of its interest in the frozen assets.

This Court has previously recognized that the congressional purpose in authorizing blocking orders is "to put control of foreign assets in the hands of the President. . . ." *Propper v. Clark*, 337 U. S. 472, 493 (1949). Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country. Accordingly, it is difficult to accept petitioner's argument because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this "bargaining chip" through attachments, garnishments or similar encumbrances on property. Neither the purpose the statute was enacted to serve nor its plain language supports such a result.⁶

⁶ Although petitioner concedes that the President could have forbidden attachments, it nevertheless argues that once he allowed them the President permitted claimants to acquire property interests in their attachments. Petitioner further argues that only the licenses to obtain the attachments were made revocable, not the attachments themselves. It is urged that the January 19, 1981, order revoking all licenses only affected petitioner's right to obtain future attachments. We disagree. As noted above, the regulations specifically provided that any attachment is null and void "unless licensed," and all licenses may be revoked at any time. Moreover, common sense defies petitioner's reading of the regulations. The President could hardly have intended petitioner and other similarly situated claimants to have the power to take control of the frozen assets out of his hands.

Our construction of petitioner's attachments as being "revocable," "contingent," and "in every sense subordinate to the President's power under the IEEPA," in effect answers petitioner's claim that even if the President had the authority to nullify the attachments and transfer the assets,

Because the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown*, 343 U. S., at 637 (Jackson, J., concurring). Under the circumstances of this case, we cannot say that petitioner has sustained that heavy burden. A contrary ruling would mean that the Federal Government as a whole lacked the power exercised by the President, see *id.*, at 636-637, and that we are not prepared to say.

Deletion

IV

Although we have concluded that the IEEPA constitutes specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets, there remains the question of the President's authority to suspend claims pending in American courts. Such claims have, of course, an existence apart from the attachments which accompanied them. In terminating these claims through Executive Order No. 12294, the President purported to act under authority of both the IEEPA and 22 U. S. C. § 1732, the so-called "Hostage Act." ⁷ App. to Pet. for Cert., at 52.

the exercise of such would constitute an unconstitutional taking of property in violation of the Fifth Amendment absent just compensation. We conclude that because of the President's authority to prevent or condition attachments, and because of the orders he issued to this effect, petitioner did not acquire any "property" interest in its attachments of the sort that would support a constitutional claim for compensation.

⁷ Judge Mikva, in his separate opinion in *American Int'l Group, Inc. v. Islamic Republic of Iran*, — U. S. App. D. C. —, —, — F. 2d —, — (1981), argued that the moniker "Hostage Act" was newly-coined for purposes of this litigation. Suffice it to say that we focus on the language of 22 U. S. C. § 1732, not any short-hand description of it. See Shakespeare, *Romeo and Juliet*, II, ii, 43 ("What's in a name?").

We conclude that although the IEEPA authorized the nullification of the attachments, it cannot be read to authorize the suspension of the claims. The claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property. An *in personam* lawsuit, although it might eventually be reduced to judgment and that judgment might be executed upon, is an effort to establish liability and fix damages and does not focus on any particular property within the jurisdiction. The terms of the IEEPA therefore do not authorize the President to suspend claims in American courts. This is the view of all the courts which have considered the question. *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, — F. 2d, at —; *American Int'l Group, Inc. v. Islamic Republic of Iran*, — F. 2d, at —, n. 15; *The Marschalk Co., Inc. v. Iran National Airlines*, — F. Supp. —, — (SDNY 1981); *Electronic Data Systems v. Social Security Organization of Iran*, — F. Supp. —, — (ND Tex. 1981).

The Hostage Act, passed in 1868, provides:

"Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress." 22 U. S. C. § 1732.

We are reluctant to conclude that this provision constitutes specific authorization to the President to suspend claims in American courts. Although the broad language of the Hostage Act suggests it may cover this case, there are several difficulties with such a view. The legislative history indicates that the Act was passed in response to a situation unlike the recent Iranian crisis. Congress in 1868 was concerned with the activity of certain countries refusing to recognize the citizenship of naturalized Americans traveling abroad, and repatriating such citizens against their will. See, *e. g.*, Cong. Globe 4331, 40th Cong., 2d Sess. (1868) (Sen Fessenden); *id.*, at 4354 (Sen. Conness); see also 22 U. S. C. § 1731. These countries were not interested in returning the citizens in exchange for any sort of ransom. This also explains the reference in the Act to imprisonment "in violation of the rights of American citizenship." Although the Iranian hostage-taking violated international law and common decency, the hostages were not seized out of any refusal to recognize their American citizenship—they were seized precisely *because of* their American citizenship. The legislative history is also somewhat ambiguous on the question whether Congress contemplated presidential action such as that involved here or rather simply reprisals directed against the offending foreign country and its citizens. See, *e. g.*, Cong. Globe 4205, 40th Cong., 2d Sess. (1868); *American Int'l Group, Inc. v. Islamic Republic of Iran*, *supra*, at — (opinion of Mikva, J.).

Concluding that neither the IEEPA nor the Hostage Act constitutes specific authorization of the President's action suspending claims, however, is not to say that these statutory provisions are entirely irrelevant to the question of the validity of the President's action. We think both statutes highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case. As noted above in Part III, *supra*, at 12-13, the IEEPA delegates broad authority to the President to act in times of national emergency

with respect to property of a foreign country. The Hostage Act similarly indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns. As Senator Williams, draftsman of the language eventually enacted as the Hostage Act, put it:

"If you propose any remedy at all, you must invest the executive with some discretion, so that he may apply the remedy to a case as it may arise. As to England or France he might adopt one policy to relieve a citizen imprisoned by either one of those countries; as to the Barbary powers, he might adopt another policy; as to the islands of the ocean another. With different countries that have different systems of government he might adopt different means." Cong. Globe 4359, 40th Cong., 2d Sess. (1868).

Proponents of the bill recognized that it placed "a loose discretion" in the President's hands, *id.*, at 4238 (Sen. Stewart), but argued that "[s]omething must be intrusted to the Executive" and that "[t]he President ought to have the power to do what the exigencies of the case require to rescue [a] citizen from imprisonment." *Id.*, at 4233, 4357 (Sen. Williams). An original version of the Act, which authorized the President to suspend trade with a foreign country and even arrest citizens of that country in the United States in retaliation, was rejected because "there may be a great variety of cases arising where other and different means would be equally effective and where the end desired could be accomplished without resorting to such dangerous and violent measures," *Id.*, at 4233 (Sen. Williams).

Although we have declined to conclude that the IEEPA or the Hostage Act directly authorizes the President's suspension of claims for the reasons noted, we cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least

with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such 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. *Haig v. Agee*, — U. S. —, — (1981). On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility," *Youngstown*, 343 U. S., at 637 (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President. It is to that history which we now turn.

Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. *United States v. Pink*, 315 U. S. 203, 225 (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. As one treatise writer puts it, international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory." L. Henkin, *Foreign Affairs and the Constitution* 262 (1972). Consistent with that principle, the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement with-

omission

out the advice and consent of the Senate.⁸ Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump sum payments or the establishment of arbitration procedures. To be sure, many of these settlements were encouraged by the United States claimants themselves, since a claimant's only hope of obtaining any payment at all might lie in having his government negotiate a diplomatic settlement on his behalf. But it is also undisputed that the "United States has sometimes disposed of the claims of citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." Henkin, *supra*, at 263. Accord, The Restatement (Second) of the Foreign Relations Law of the United States § 213 (1965) (President "may waive or settle a claim against a foreign state . . . even without the consent of the [injured] national"). It is clear that the practice of settling claims continues today. Since 1952, the President has entered into at least 10 binding settlements with foreign nations, including an \$80 million settlement with the People's Republic of China.⁹

⁸ At least since the case of the "Wilmington Packet" in 1799, Presidents have exercised the power to settle claims of United States nationals by executive agreement. See Lillich, The Gravel Amendment to the Trade Reform Act of 1974, 69 Am. J. Int'l L. 837, 844 (1975). In fact, during the period of 1817-1917, "no fewer than eighty executive agreements were entered into by the United States looking to the liquidation of claims of its citizens." McClure, International Executive Agreements 53 (1941). See also 14 M. Whiteman, Digest of International Law 247 (1970).

⁹ Those agreements are 30 U. S. T. 1957 (1979) (People's Republic of China); 27 U. S. T. 3993 (1976) (Peru); 27 U. S. T. 4214 (1976) (Egypt); 25 U. S. T. 227 (1974) (Peru); 24 U. S. T. 522 (1973) (Hungary); 20 U. S. T. 2654 (1969) (Japan); 16 U. S. T. 1 (1965) (Yugoslavia); 14 U. S. T. 969 (1963) (Bulgaria); 11 U. S. T. 1953 (1960) (Poland); 11 U. S. T. 317 (1960) (Rumania).

Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress' enactment of the International Claims Settlement Act of 1949, 22 U. S. C. § 1621 *et seq.*, as amended (1980). The Act had two purposes: (1) to allocate to United States nationals funds received in the course of an executive claims settlement with Yugoslavia, and (2) to provide a procedure whereby funds resulting from future settlements could be distributed. To achieve these ends Congress created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds. 22 U. S. C. § 1623 (a). By creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements. Indeed, the legislative history of the Act observed that the United States was seeking settlements with countries other than Yugoslavia and stated that the bill "contemplates that settlements of a similar nature are to be made in the future." H. R. Rep. No. 81-770, 81st Cong., 1st Sess., 4, 8 (1949).

Over the years Congress has frequently amended the International Claims Settlement Act to provide for particular problems arising out of settlement agreements, thus demonstrating Congress' continuing acceptance of the President's claim settlement authority. With respect to the Executive Agreement with the People's Republic of China, for example, Congress established an allocation formula for distribution of the funds received pursuant to the Agreement. 22 U. S. C. § 1627. As with legislation involving other executive agreements, Congress did not question the fact of the settlement or the power of the President to have concluded it. In 1976, Congress authorized the Foreign Claims Settlement Commission to adjudicate the merits of claims by United States na-

tionals against East Germany, prior to any settlement with East Germany, so that the Executive would "be in a better position to negotiate an adequate settlement . . . of these claims." S. Rep. No. 94-1188, 94th Cong., 1st Sess., 2 (1976); 22 U. S. C. § 1644b. Similarly, Congress recently amended the International Claims Settlement Act to facilitate the settlement of claims against Vietnam. 22 U. S. C. § 1645; § 1645a (5). The House Report stated that the purpose of the legislation was to establish an official inventory of losses of private United States property in Vietnam so that recovery could be achieved "through direct Government-to-Government negotiation of private property claims." H. R. Rep. No. 96-915, 96th Cong., 2d Sess., 2-3 (1980). Finally, the legislative history of the IEEPA further reveals that Congress has accepted the authority of the Executive to enter into settlement agreements. Though the IEEPA was enacted to provide for some limitation on the President's emergency powers, Congress stressed that "nothing in this Act is intended to interfere with the authority of the President to [block assets], or to impede the settlement of claims of United States citizens against foreign countries." S. Rep. No. 95-466, 95th Cong., 2d Sess., 6 (1977); 50 U. S. C. § 1706 (a)(1).¹⁰

¹⁰ Indeed, Congress has consistently failed to object to this long-standing practice of claim settlement by executive agreement, even when it has had an opportunity to do so. In 1972, Congress entertained legislation relating to congressional oversight of such agreements. But Congress took only limited action, requiring that the text of significant executive agreements be transmitted to Congress. 1 U. S. C. § 112b. In *Haig v. Agee*, — U. S. — (1981), we noted that "Despite the longstanding and officially promulgated view that the Executive has the power to withhold passports for reasons of national security, Congress in 1978, 'though it once again enacted legislation relating to passports, left completely untouched the broad rule-making authority granted in the earlier Act.'" *Id.*, at 20, quoting *Zemel v. Rusk*, 381 U. S. 1, 12 (1965). Likewise in

In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate. In *United States v. Pink*, 315 U. S. 203 (1942), for example, the Court upheld the validity of the Litvinov Assignment, which was part of an Executive Agreement whereby the Soviet Union assigned to the United States amounts owed to it by American nationals so that outstanding claims of other American nationals could be paid. The Court explained that the resolution of such claims was integrally connected with normalizing United States' relations with a foreign state.

"Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President. . . . No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of his power and responsibilities . . . is to be drastically revised." *Id.*, at 229-230.

Similarly, Judge Learned Hand recognized:

"The constitutional power of the President extends to the settlement of mutual claims between a foreign gov-

this case, Congress, though legislating in the area, has left "untouched" the authority of the President to enter into settlement agreements.

The legislative history of 1 U. S. C. § 112b further reveals that Congress has accepted the President's authority to settle claims. During the hearings on the bill, Senator Case, the sponsor of the Act, stated with respect to executive claim settlements that:

"I think it is a most interesting [area] in which we have accepted the right of the President, one individual, acting through his diplomatic force, to adjudicate and settle claims of American nationals against foreign countries. But it is a fact."

Transmittal of Executive Agreements to Congress: Hearings before the Senate Committee on Foreign Relations, 92d Cong., 1st Sess., 74 (1971).

ernment and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies. The continued mutual amity between this nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations." *Ozanic v. United States*, 188 F. 2d 228, 231 (CA2 1951).

Petitioner raises two arguments in opposition to the proposition that Congress has acquiesced in this longstanding practice of claims settlement by executive agreement. First, it suggests that all pre-1952 settlement claims, and corresponding court cases such as *Pink*, should be discounted because of the evolution of the doctrine of sovereign immunity. Petitioner observes that prior to 1952 the United States adhered to the doctrine of absolute sovereign immunity, so that absent action by the Executive there simply would be no remedy for an United States national against a foreign government. When the United States in 1952 adopted a more restrictive notion of sovereign immunity, by means of the so-called "Tate" letter, it is petitioner's view that United States nationals no longer needed Executive aid to settle claims and that, as a result, the President's authority to settle such claims in some sense "disappeared." Though petitioner's argument is not wholly without merit, it is refuted by the fact that since 1952 there have been at least 10 claims settlements by executive agreement. Thus, even if the pre-1952 cases should be disregarded, congressional acquiescence in settlement agreements since that time supports the President's power to act here.

Petitioner next asserts that Congress divested the President of the authority to settle claims when it enacted the Foreign

Sovereign Immunities Act of 1976 (hereinafter "FSIA"), 28 U. S. C. §§ 1330, 1602 *et seq.* The FSIA granted personal and subject matter jurisdiction in the federal district courts over commercial suits brought by claimants against those foreign states which have waived immunity. 28 U. S. C. § 1330. Prior to the enactment of the FSIA, a foreign government's immunity to suit was determined by the Executive Branch on a case-by-case basis. According to petitioner, the principal purpose of the FSIA was to depoliticize these commercial lawsuits by taking them out of the arena of foreign affairs—where the Executive Branch is subject to the pressures of foreign states seeking to avoid liability through a grant of immunity—and by placing them within the exclusive jurisdiction of the courts. Petitioner thus insists that the President, by suspending its claims, has circumscribed the jurisdiction of the United States courts in violation of Art. III of the Constitution.

We disagree. In the first place, we do not believe that the President has attempted to divest the federal courts of jurisdiction. Executive Order No. 12294 purports only to "suspend" the claims, not divest the federal court of "jurisdiction." As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will "revive" and become judicially enforceable in United States courts. This case, in short, illustrates the difference between modifying federal court jurisdiction and directing the courts to apply a different rule of law. See *United States v. Schooner Peggy*, 5 U. S. 1, 103 (1801). The President has exercised the power, acquiesced in by Congress, to settle claims and, as such, has simply effected a change in the substantive law governing the lawsuit. Indeed, the very example of sovereign immunity belies petitioner's argument. No one would suggest that a determination of sovereign immunity divests the federal courts of "jurisdiction." Yet, petitioner's argument, if accepted, would have required courts prior to the enactment

of the FSIA to reject as an encroachment on their jurisdiction the President's determination of a foreign state's sovereign immunity.

Petitioner also reads the FSIA much too broadly. The principal purpose of the FSIA was to codify contemporary concepts concerning the scope of sovereign immunity and withdraw from the President the authority to make binding determinations of the sovereign immunity to be accorded foreign states. See *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, — F. 2d, at —; *American Int'l Group, Inc. v. Islamic Republic of Iran*, — F. 2d, at —. The FSIA was thus designed to remove one particular barrier to suit, namely sovereign immunity, and cannot be fairly read as prohibiting the President from settling claims of United States nationals against foreign governments. It is telling that the Congress which enacted the FSIA considered but rejected several proposals designed to limit the power of the President to enter into executive agreements, including claims settlement agreements.¹¹ It is quite unlikely that the same Congress that rejected proposals to limit the President's authority to conclude executive agreements sought to accomplish that very purpose *sub silentio* through the FSIA. And, as noted above, just 1 year after enacting the FSIA, Congress enacted the IEEPA, where the legislative history stressed that nothing in the IEEPA was to impede the settlement of claims of United States citizens. It would be surprising for Congress to express this support for settlement

¹¹ The rejected legislation would typically have required congressional approval of executive agreements before they would be considered effective. See Congressional Oversight of Executive Agreements: Hearings on S. 632 and S. 1251 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 243-261, 302-311 (1975); Congressional Review of International Agreements: Hearings before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations, 94th Cong., 2d Sess., 167, 246 (1976).

agreements had it intended the FSIA to eliminate the President's authority to make such agreements.

In light of all of the foregoing—the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims pursuant to Executive Order No. 12294. As Justice Frankfurter pointed out in *Youngstown*, 343 U. S. at 610-611, “a systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned . . . may be treated as a gloss on ‘Executive Power’ vested in the President by § 1 of Art. II.” Past practice does not, by itself, create power, but “long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] has been [taken] in pursuance of its consent. . . .” *United States v. Midwest Oil Co.*, 236 U. S. 459, 469 (1915). See *Haig v. Agee*, — U. S., at —, —. Such practice is present here and such a presumption is also appropriate. In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.

Our conclusion is buttressed by the fact that the means chosen by the President to settle the claims of American nationals provided an alternate forum, the Claims Tribunal, which is capable of providing meaningful relief. The Solicitor General also suggests that the provision of the Claims Tribunal will actually *enhance* the opportunity for claimants to recover their claims, in that the Agreement removes a number of jurisdictional and procedural impediments faced by claimants in United States courts. Brief for United States, at 13-14. Although being overly sanguine about the chances of United States claimants before the Claims Tribunal would require a degree of naïveté which should not be demanded

even of judges, the Solicitor Generals' point cannot be discounted. Moreover, it is important to remember that we have already held that the President has the *statutory* authority to nullify attachments and to transfer the assets out of the country. The President's power to do so does not depend on his provision of a forum whereby claimants can recover on those claims. The fact that the President has provided such a forum here means that the claimants are receiving something in return for the suspension of their claims, namely, access to an international tribunal before which they may well recover something on their claims. Because there does appear to be a real "settlement" here, this case is more easily analogized to the more traditional claim settlement cases of the past.

Just as importantly, Congress has not disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself,¹² Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement. Quite the contrary, the relevant Senate Committee has stated that the establishment of the Tribunal is "of vital importance to the United States." S. Rep. No. 97-71, 97th Cong., 1st Sess., 5 (1981).¹³ We are thus

¹² See Hearings on the Iranian Agreements before the Senate Committee on Foreign Relations, 97th Cong., 1st Sess. (1981); Hearings on the Iranian Assets Settlement before the Senate Committee on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess. (1981); Hearings on the Algerian Declarations before the House Committee on Foreign Affairs, 97th Cong., 1st Sess. (1981).

¹³ Contrast congressional reaction to the Iranian Agreements with congressional reaction to a 1973 Executive Agreement with Czechoslovakia. There the President sought to settle over \$105 million in claims against Czechoslovakia for \$20.5 million. Congress quickly demonstrated its displeasure by enacting legislation requiring that the Agreement be renegotiated. See Lillich, *supra*, at 839-840. Though Congress has shown itself capable of objecting to executive agreements, it has rarely done so and has not done so in this case.

clearly not confronted with a situation in which Congress has in some way resisted the exercise of presidential authority.

Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. As the Court of Appeals for the First Circuit stressed, "the sheer magnitude of such a power, considered against the background of the diversity and complexity of modern international trade, cautions against any broader construction of authority than is necessary." *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, — F. 2d, at —. But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

V

We do not think it appropriate at the present time to address petitioner's contention that the suspension of claims, if authorized, would constitute a taking of property in violation of the Fifth Amendment to the United States Constitution in the absence of just compensation.¹⁴ Both petitioner and the Government concede that the question whether the suspension of the claims constitutes a taking is not ripe for review. Brief for Petitioner, at 34, n. 32; Brief for United States, at 65. Accord, *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, *supra*, at —; *American Int'l Group, Inc. v. Islamic Republic of Iran*, — F. 2d, at —. However, this contention, and the possibility that the Presi-

¹⁴ Though we conclude that the President has settled petitioner's claims against Iran, we do not suggest that the settlement has terminated petitioner's possible taking claim against the United States. We express no views on petitioner's claims that it has suffered a taking.

dent's actions may effect a taking of petitioner's property, makes ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims under the Tucker Act, 28 U. S. C. § 1491, in such an event. That the fact and extent of the taking in this case is yet speculative is inconsequential because "there must be at the time of taking 'a reasonable, certain and adequate provision for obtaining compensation.'" *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 124-125 (1974), quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 659 (1890); *Cities Service Co. v. McGrath*, 342 U. S. 330, 335-336 (1952); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U. S. 59, 94, n. 39 (1978).

It has been contended that the "treaty exception" to the jurisdiction of the Court of Claims, 28 U. S. C. § 1502, might preclude the Court of Claims from exercising jurisdiction over any takings claim the petitioner might bring. At oral argument, however, the Government conceded that § 1502 would not act as a bar to petitioner's action in the Court of Claims. Tr. of Oral Arg., at 39-42, 47. We agree. See *United States v. Weld*, 127 U. S. 51 (1888); *United States v. Old Settlers*, 148 U. S. 427 (1893); *Hughes Aircraft Co. v. United States*, 534 F. 2d 889 (Ct. Cl. 1976). Accordingly, to the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act.

The judgment of the District Court is accordingly affirmed, and the mandate shall issue forthwith.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JUL 1 1981

Recirculated: _____

No. 80-2127 Iran National Airlines v. The Marschalk Co.

JUSTICE POWELL, with whom Justice Marshall and Justice Stevens join, dissenting.

I would dismiss the certificate, citing Dames & Moore v. Regan, ___ U.S. ___ (1981), announced today. The Court's opinion in that case provides the only answers that this Court should give to the questions certified to us by the Court of Appeals for the Second Circuit. Having rendered an opinion on the subject of those questions, we should not answer them in monosyllables nor attempt a syllabus of a portion of the Court's opinion. We recently have dismissed certification of questions where the Court has addressed the subject of the questions in a full opinion. Foley v. Carter, ___ U.S. ___ (1981). See also United States v. Will, ___ U.S. ___ (1981).

July 2, 1981

No. 80-2078 Dames & Moore v. Regan

Dear Bill:

I join in thanking and congratulating you - and your Chambers - on a super accomplishment, both in time and quality.

Sincerely,

Mr. Justice Rehnquist

LFP/lab

CHAMBERS OF
JUSTICE BYRON R. WHITE

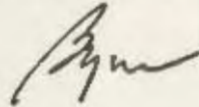
July 2, 1981

Re: 80-2078 - Dames & Moore v. Regan

Dear Bill,

Your printed circulation incorporating various changes is satisfactory to me.

Sincerely yours,



Justice Rehnquist

Copies to the Conference

cpm

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 2, 1981

RE: No. 80-2078 Dames & Moore v. Regan

Dear Bill:

Congratulations again upon a truly splendid
job. I'm happy to join.

Sincerely,

Bill

Justice Rehnquist

cc: The Conference

Bill

*- and your
Chambers -*

*I join in thanking
and congratulating you
on a super accomplishment,
~~and with great quality.~~
, both ~~in time~~ in time and
quality.*

Sincerely

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

July 2, 1981

Re: No. 80-2078, Dames & Moore v. Regan

Dear Bill,

I am glad to join your opinion for
the Court.

Sincerely yours,

P.S.
✓

Justice Rehnquist

Copies to the Conference

against Iran & its
~~I gave the~~ instrument holder,

The Court's opinion makes clear
that some ^{valid} claimers may not be
adjudicated at all by the Arbitral
Tribunal and other valid claimers
may not be paid in full. I join
the Court's opinion on the understanding
that any ~~such~~ ^{valid} claimer may not so
adjudicated or not fully paid may
be asserted ^{vs the U.S.} ~~in~~ the Ct of Clm (as ~~the~~
Court the powers of which the Court
acknowledges), and will be ~~paid~~ ^{paid}
if ~~the~~ the claimant can establish

a relatively few

recognized as a taking under the 5th
for a public purpose to the extent
a valid claim has not been paid in
full. The valid claims of persons,
subject to the powers of our courts, may
not be used as "bargaining chips"
to further foreign policy goals on
behalf of the nation, without providing
just compensation*. The extraordinary
powers of the Pres. & Congress upon which
our decision today rests cannot
displace the Bill of Rights.

[illegible]