Masthead Logo

NYLS Journal of International and Comparative Law

Volume 3
Issue 1 *Volume 3, Number 1, 1981*

Article 9

1981

Dames & Moore v. Regan

Louis D. Montressor

COMMENT

Dames & Moore v. Regan

A seemingly interminable national ordeal ended when the Americans held hostage in Iran were released on January 20, 1981.[1] Implementation of the terms of the agreements between Iran and the United States,[2] the mechanism through which the "Iranian Hostage Crisis" was resolved, has however, prompted much litigation.[3]

In *Dames & Moore v. Regan*,[4] the Supreme Court reviewed the agreements, and the executive orders and treasury regulations issued in compliance with them, to determine their constitutionality. Specifically, the Court addressed the question of whether executive authority was exceeded when the President: 1) ordered the nullification of attachments of Iranian assets obtained by United States nationals; 2) ordered the transfer of blocked Iranian assets; and, 3) ordered the suspension of all United States nationals' claims against the Iranian government.[5] In addition, the contention that issuance of these orders constituted a taking under the fifth amendment's Just Compensation Clause was evaluated.[6]

The "Iranian Hostage Crisis" arose when diplomatic personnel stationed in the United States Embassy in Tehran were seized by Iranian militants on November 4, 1979.[7] Ten days later, President Carter responded by invoking the International Emergency Economic Powers Act (IEEPA).[8] He issued an order in which he declared the existence of

---

1. N.Y. Times, Jan. 21, 1981, § 1, at 1, col. 2.

2. Declaration of the Government of the Democratic and Popular Republic of Algeria, *reprinted in* 81 DEP'T ST. BULL 1 (1981) [hereinafter cited as Agreement I], and Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, *id.* at 3 [hereinafter cited as Agreement II].

3. *See, e.g.*, Marschalk Co. v. Iran Nat'l Airlines Corp., 518 F. Supp. 69 (S.D.N.Y. 1981), *rev'd*, 657 F.2d 3 (2d Cir. 1981). The court observed that, by September 1980, 96 suits had been filed in that district alone. *Id.* at 74.

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

5. *Id.* at 660.

6. *Id.* at 674 n.6, 688-89.

7. N.Y. Times, Nov. 5, 1979, § 1, at 1, col. 6.

8. International Emergency Economic Powers Act, § 201, 50 U.S.C. § 1701-1706 (Supp. II 1978). The President is authorized to take certain actions when the national security, foreign policy or economy of the United States is faced with an unusual or extraordinary external threat. *Id.* § 1701(a).

a national emergency[9] and blocked all assets of the Iranian government located in the United States.[10] Pursuant to that order, the Secretary of the Treasury promulgated regulations that rendered null and void any transfer of property in which Iran had an interest.[11] Subsequently, the Secretary granted a general license permitting judicial proceedings against the blocked assets,[12] including prejudgment attachments.[13] The license was revocable at any time.[14]

After the general license was granted, the petitioner Dames & Moore filed a suit in the United States District Court for the Central District of California,[15] against the Government of Iran and others,[16] to recover money owed to it for services performed under a contract. The court issued orders enabling the petitioners to attach certain property of the defendants to secure a possible future judgment.[17]

On January 19, 1981, the Executive entered into two agreements with the Government of Iran effectuating the release of the embassy personnel.[18] The agreements provided: 1) that all litigation between the government of one nation and nationals of the other and all prejudgment attachments obtained in such litigation be terminated;[19] 2) that the United States transfer to Iran all blocked assets held by American banks;[20] and, 3) that any claims not settled by the parties within six months from the effective date of the agreements, *i.e.* July 19, 1981, be settled through binding arbitration to be conducted by an

---

9. *See id.* § 1701(b), which dictates that the President must declare the existence of a national emergency before he may invoke this statute.

10. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979). The President's order:

> blocked all property and interests in property of the Government of Iran, its . . . controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.

Id.

11. 31 C.F.R. § 535.203(a) (1980).

12. 31 C.F.R. § 535.504(a) (1980). *Id.* § 535.203(c) had previously permitted a transfer after the effective date of the blocking order only if a special license was obtained from the Treasury Department. *Id.*

13. 31 C.F.R. § 535.418 (1980). This section clarified the meaning of "judicial proceedings" in § 535.504(a), indicating that prejudgment attachments were included. Section 535.418 also reinforced the fact that transfer of blocked assets without specific license was prohibited. *Id.*

14. 31 C.F.R. § 535.805 (1980).

15. Dames & Moore v. Atomic Energy Organization of Iran, No. 79-04918 (C.D.Cal. filed Dec. 19, 1979), *cited in* Dames & Moore v. Regan, 453 U.S. at 664 n.4 (1981).

16. *See* Dames & Moore, 453 U.S. at 663-64, where the Court listed the other defendants: The Atomic Energy Organization of Iran and a number of Iranian banks.

17. *Id.*

18. Agreement I and Agreement II, *supra* note 2.

19. Agreement I, *supra* note 2, General Principles (B), at 2.

20. *Id.* points 2 & 3.

Iran-United States Claims Tribunal.[21] A portion of the transferred assets was to be deposited in a security account to fund the Claims Tribunal.[22]

To implement the agreements, several executive orders were issued the same day,[23] among other things, nullifying all attachments obtained by United States nationals[24] subsequent to the issuance of the November 14, 1979 blocking order[25] and directing the transfer of all Iranian assets held by American banks,[26] non-banking institutions[27] and persons subject to United States jurisdiction.[28] A short time later, another executive order was issued,[29] suspending the legal effect in the United States courts of all nationals' claims against Iran[30] that could be entertained by the Claims Tribunal under the terms of the agreements.[31]

Before the claims suspension order was issued, Dames & Moore had moved for summary judgment in the pending contract action.[32] The district court granted that motion and awarded damages to the petitioner.[33] The petitioner then attempted to execute the judgment in a Washington state court.[34] The district court, however, stayed both the execution of its judgment pending appeal by the defendants and any further proceedings in the action in light of the claims suspension

---

21. Agreement II, *supra* note 2, arts. I & II, at 3.

22. Agreement I, *supra* note 2, points 2 & 3. An initial amount of one billion dollars was to be deposited in an account in a mutually agreeable "Central Bank" which would serve as escrow agent. As awards were distributed by the Claims Tribunal, the account was to be replenished by the Government of Iran. *Id.* point 7.

23. Exec. Order No. 12,276, 46 Fed. Reg. 7913-14 (1981) (establishing escrow accounts), Exec. Order Nos. 12,277-81, 46 Fed. Reg. 7915-24 (1981) (directing transfers of Iranian Government assets), Exec. Order No. 12,282, 46 Fed. Reg. 7925 (1981) (revoking prohibitions against dealing with Iran), Exec. Order No. 12,283, 46 Fed. Reg. 7927 (1981) (prohibiting prosecution of legal claims by the hostages against Iran), Exec. Order No. 12,284, 46 Fed. Reg. 7929-30 (1981) (restricting transfers of the former Shah of Iran's property), and Exec. Order No. 12,285, 46 Fed. Reg. 7931-32 (1981) (establishing the President's Commission on Hostage Compensation).

24. Exec. Order No. 12,277, 46 Fed. Reg. 7915-16 (1981).

25. *See supra* note 10, for the relevant text of the blocking order.

26. Exec. Order No. 12,277-79, 46 Fed. Reg. 7915-20 (1981).

27. Exec. Order No. 12,280, 46 Fed. Reg. 7921-22 (1981).

28. Exec. Order No. 12,281, 46 Fed. Reg. 7923-24 (1981).

29. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981). Ronald Reagan, who by this time had been sworn in as President, issued the order on February 24, 1981. *Id.*

30. Agreement II, *supra* note 2, art. VII(3), at 4, defines Iran as "the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof." *Id.*

31. *See* Agreement II, *supra* note 1, art. 11, at 3.

32. 453 U.S. at 666. Dames & Moore made this motion for summary judgment on January 27, 1981. *Id.*

33. *Id.* Damages were for $3,436,694.30 plus interest. *Id.* at 664.

34. *Id.* at 666.

order; moreover, it ordered the vacation of the prejudgment attachments previously obtained.[35]

Dames & Moore instituted a separate action in the district court in response to the aforementioned executive orders.[36] The petitioner sought declaratory and injunctive relief to prevent enforcement of those orders, alleging that the President had exceeded his statutory and constitutional powers when he issued them.[37] The court denied the petitioner's motion for a preliminary injunction and dismissed its complaint for failure to state a claim upon which relief could be granted.[38]

The United States Court of Appeals for the Ninth Circuit docketed Dames & Moore's appeal on June 3, 1981. The Supreme Court then granted Dames & Moore's petition for a writ of certiorari before judgment[39] "because the lower courts had reached conflicting conclusions on the validity of the President's action"[40] and because the agreements obligated the United States to transfer the blocked assets by July 19, 1981[41] in order not to be in breach of the agreements.[42]

Abstract constitutional boundaries delimiting the exercise of executive power simply do not exist. Instead, as Justice Jackson observed in *Youngstown Sheet & Tube Co. v. Sawyer*,[43] "[w]hile the Constitution diffuses power to better secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. . . . Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[44] Employing an admittedly "somewhat over-simplified grouping" of situations, Justice Jackson devised a framework for analyzing the impact of executive-legislative interaction on the constitutionality of executive assertions of power.[45] He articulated three situations in which such questions may arise: 1) "[w]hen the President acts pursuant to an express or implied authorization of Congress";[46] 2) "[w]hen the President acts in absence of either a congressional grant or denial of authority";[47] and, 3) "[w]hen the President takes measures incompatible with the

35. *Id.* at 667. The Court order was issued on May 28, 1981. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 668. *See* 28 U.S.C. § 2101(e) (1976), which authorizes a petitioner to make such an application at any time before the court of appeals renders judgment.
40. 453 U.S. at 660.
41. *Id.* at 665.
42. *Id.* at 660.
43. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
44. *Id.* at 635.
45. *Id.*
46. *Id.*
47. *Id.* at 637.

expressed or implied will of Congress."[48]

In the first situation, the President's authority is at its zenith, supported by "all that [the President] possesses in his own right plus all that Congress can delegate."[49] In the second situation, the President can only rely on his independent powers, though there may be a "zone of twilight in which he and Congress may have concurrent authority, or in which [the distribution of authority] is uncertain."[50] In the third situation, the President's power is at its nadir, supported by "his own constitutional powers minus any constitutional powers of Congress over the matter."[51]

In *Youngstown*, President Truman issued an order directing the Secretary of Commerce to take possession of and to operate most of the country's steel mills in response to a union workers' strike which occurred while the United States was engaged in the Korean conflict in 1952.[52] The Court found no congressional authorization to issue the executive order; in fact, congressional *refusal* to authorize the President to dispose of labor strikes in this fashion was found.[53] Nor did the Court find inherent executive power to issue the order.[54] Justice Black, writing for the majority, rejected the Executive's contention that the President's article II Commander in Chief powers,[55] in the "theater of war" context, extended to taking possession of private property in the United States to settle a domestic labor dispute.[56] Thus, the seizure

---

48. *Id.*

49. *Id.* at 635. Justice Jackson, while noting that if the President's action is held unconstitutional, then the federal government as a whole would lack power to take action, posited that such presidential action pursuant to an act of Congress is supported by a strong presumption of constitutionality and that one who challenges such action carries a heavy burden of persuasion. *Id.* at 636-37.

50. *Id.* at 637. Congressional acquiescence was considered to allow, possibly even invite, assertions of independent executive power. *Id.*

51. *Id.* In order to sustain such actions by the President, the Court would have to find that Congress was not able to act on the matter. In this situation, the Court would have to carefully scrutinize the action, as it would endanger the equilibrium of our constitutional system. *Id.* at 637-38.

52. *Id.* at 582-83.

53. *Id.* at 586. The majority found that Congress refused to permit governmental seizures in emergencies as such action would interefere with the collective bargaining process. *Id.* Justice Frankfurter in his concurrence found that Congress consciously withheld authority for governmental seizures by the President so as to require the President to go to Congress for emergency legislation if such was needed. *Id.* at 602.

54. *Id.* at 587.

55. U.S. CONST. art. II, § 2, cl. 1.

56. 343 U.S. at 587. Implicit in the concurrence of Justice Jackson is the notion that the President's inherent powers are much more circumscribed by congressional powers in the domestic realm than in the foreign affairs realm, *id.* at 644-46, in which the President is "the sole organ of the federal government." United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936). *See infra* note 48 and accompanying text.

order was held to be an unconstitutional exercise of executive power.[57]

The challenged executive action in *United States v. Curtiss-Wright Export Corp.*[58] offers a contrast to the type of action taken in *Youngstown*. Unlike *Youngstown*, *Curtiss-Wright* dealt with an executive order that prohibited certain international commercial transactions.[59] The specific issue in *Curtiss-Wright* was whether Congress abdicated its essential functions by enacting a law that delegated to the President the power to order, at his discretion, the prohibition of weapons sales by United States nationals to countries involved in the Chaco conflict.[60] The Court upheld the constitutionality of Congress's delegation of power.[61]

The Court's analysis focused on the nature of executive and legislative power and the extent of interaction between these branches in the realm of foreign affairs. Highlighting the fact that "the President alone has the power to speak or listen as a representative of the nation," the Court stressed that participation by the legislative branch in the exercise of foreign affairs power is significantly limited.[62] Moreover, "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[63] The modest nature and extent of Congress' foreign affairs powers underscored the fact that, though Congress may itself authorize the Executive to take action as it did in *Curtiss-Wright*, the Executive possessed inherent power to take independent action as the "sole organ" of the federal government in foreign affairs.[64]

Premised on the *Curtiss-Wright* Court's formulation of the nature and extent of executive and legislative power in the realm of foreign affairs, the Court, in *United States v. Pink*,[65] established the principle that the Executive has the inherent power to settle claims between United States nationals and a foreign state. Prior to instituting this action, the Executive had entered the Litvinov Assignment.[66] The agreement called for recognition of the Union of Soviet Socialist Republics (USSR) as the *de jure* government of Russia and assignment of Russian claims against United States' nationals in return for the re-

57. 343 U.S. at 589.
58. 299 U.S. 304 (1936).
59. *Id.* at 312-13.
60. *Id.* at 314-15.
61. *Id.* at 329.
62. *Id.* at 319.
63. *Id.* at 320.
64. *Id.*
65. 315 U.S. 203 (1942).
66. *Id.* at 211.

lease by the United States of its nationals' claims against the USSR.[67] The Executive commenced the action to recover the assets of a nationalized Russian company that were held by a New York State official following liquidation of the company.[68] The Court held that under the Constitution, a state law that negates the effect of federal nationalization decrees on property located in New York cannot override the enforcement by the United States of its claim to the nationalized property under the Litvinov Assignment.[69]

Justice Douglas, writing for the majority, refuted the claim that the President lacked the power to enter into such agreements in the first place. He posited that "[p]ower to remove such obstacles to full recognition [of a foreign sovereign] 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.' "[70]

Judge Learned Hand expanded the *Pink* Court's holding in *Ozanic v. United States*.[71] This case involved decrees in admiralty arising from a collision between a Yugoslav corporation-owned vessel and a United States-owned tanker.[72] Some time after the collision, the Yugoslav government nationalized the corporation.[73] Subsequently, the Yugoslav government, as part of a settlement agreement between it and the United States, agreed to release certain claims it had against the United States arising from maritime collisions, including the claim at issue.[74]

In holding that the assignee of the Yugoslav corporation's claim could not recover from the United States, Judge Hand stated that

> Although the agreement . . . did not . . . profess to repeal the consent of the United States to be sued which the Public Vessels Act had granted, we regard [the agreement] as overriding that consent, and asserting the immunity of the United States from suit upon any claims whose release was part of the consideration of the United States for the release of its . . . claims against the Yugoslav Government. 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 incident to recognition of that government; and it

67. *Id.* at 212-13.
68. *Id.* at 210.
69. *Id.* at 221-26.
70. *Id.* at 229 (citations omitted).
71. 188 F.2d 228 (2d Cir. 1951).
72. *Id.* at 229.
73. *Id.*
74. *Id.* at 229-30.

> would be unreasonable to circumscribe it to such controversies. The continued mutual amity between [the United States] 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 . . . .[75]

In addition to possessing inherent foreign affairs powers to settle claims, the Executive has been delegated certain powers by Congress, via the IEEPA,[76] that may be exercised during a declared national emergency in response to an external threat.[77] The IEEPA had not been invoked prior to the Iranian Hostage Crisis. The IEEPA's pertinent language, however, was drawn from its predecessor statute, the Trading With the Enemy Act (TWEA).[78] A trilogy of cases have provided relevant analysis of the scope of executive power as authorized by Congress in the TWEA.

Propper v. Clark[79] involved the issuance of an executive order that both froze Austrian assets and prohibited transfers of Austrian credits located in the United States.[80] The issue was whether the freezing order barred a subsequent unlicensed judicial transfer of a debt owed to an Austrian corporation to a state court-appointed receiver of the corporation.[81] The transfer was held to violate the executive order.[82] The Court denied that federal interference with state court control of property resulted from this holding, asserting that Congress intended to put foreign assets in the President's control "so that there might be a unified national policy in the administration of the [TWEA]."[83]

The transferability of frozen assets was again questioned in *Zittman v. McGrath*.[84] In *Zittman*, the Executive had issued an order, pursuant to the TWEA, freezing German assets located in the United States.[85] The petitioners then obtained an unlicensed prejudgment attachment which was levied on a German debtor's bank accounts in the United States.[86] The Court held that the attachment did not accomplish a transfer of possession for purposes of the order and was, there-

---

75. *Id.* at 231.
76. 50 U.S.C. §§ 1701-1706 (Supp. II. 1978).
77. *Id.* §1701.
78. 50 U.S.C. App. §§ 1-44 (1976). Unlike the IEEPA, the TWEA also authorized the President to vest title to frozen assets in the Executive. *Id.* § 5(b).
79. 337 U.S. 472 (1949).
80. *Id.* at 475.
81. *Id.* at 476.
82. *Id.* at 486.
83. *Id.* at 492-93.
84. 341 U.S. 446 (1951).
85. *Id.* at 448.
86. *Id.* at 447.

fore, valid.[87] It emphasized, however, that though the petitioner had a lien to secure a future judgment, federal control over the assets was not impaired, since the petitioners could not secure payment from the attached assets without a license from the Executive, the alien property custodian.[88]

The Court, in *Orvis v. Brownell*,[89] answered a question left open in *Zittman*; *viz.*, whether a creditor who had obtained an unlicensed attachment against Japanese assets subsequent to the issuance of a freezing order,[90] also acquired an interest in the attached assets that would support a claim against the Executive, as a lien property custodian, under the TWEA.[91] Prior to the suit, the Executive refused to issue to the petitioners a license authorizing them to execute a judgment against the attached assets.[92] The creditor argued that the sole purpose of the TWEA was to prevent transfers of assets to occupied countries.[93] The Court agreed that Congress did intend to prevent such transfers; nonetheless, Congress employed language that extended the authorization much further.[94] Justice Jackson, writing for the majority, held that an unlicensed attachment obtained after the issuance of a freeze order did not create an interest that supported a claim against the Executive.[95] He clarified *Zittman* as merely upholding a general consent by the Executive, permitting state attachment procedures so that creditors would have an opportunty to settle their accounts with enemy debtors.[96]

If the power to issue executive orders such as those challenged in *Dames & Moore v. Regan*[97] is established, an unconstitutional taking under the fifth amendment Just Compensation Clause may occur. The Just Compensation Clause states that "private property [shall not] be taken for public use, without just compensation."[98] One facet of the analysis of a taking claim is determining whether the claimant possesses a property right in what is being taken.[99] Precedents suggest that a creditor's lien is a compensable property right.

---

87. *Id.* at 462-63. The Court refused to consider a General Ruling, issued by the Executive three to five months after the attachments in question were obtained, which specifically designated an attachment levy as a prohibited "transfer." *Id.* at 452.
88. *Id.* at 464.
89. 345 U.S. 183 (1953).
90. *Id.* at 185.
91. *Id.* at 184.
92. *Id.* at 185.
93. *Id.* at 187.
94. *Id.* at 187-88.
95. *Id.* at 188.
96. *Id.* at 187.
97. 453 U.S. 654 (1981).
98. U.S.CONST. amend. V.
99. L.H. TRIBE, AMERICAN CONSTITUTIONAL LAW 459-60 (1978).

In *Armstrong v. United States*,[100] the petitioner had furnished construction materials to a third party that had entered a shipbuilding contract with the United States Government.[101] Under state law, the petitioner possessed statutory liens on the vessel and any materials not yet part of the vessel until paid.[102] When the third party defaulted on the Government's contract, the latter exercised a termination clause in their contract that required the third party to transfer title and deliver to the Government all completed and uncompleted work.[103]

The Court held that there was a compensable taking of the liens that the petitioner possessed.[104] It reasoned that:

> [t]he total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment "taking" and is not a mere "consequential incidence" of a valid regulatory measure. Before the liens were destroyed, the lienholders had compensable property. Immediately afterwards, they had none. . . . It was because the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done.[105]

The Just Compensation Clause "was designed to bar [the] 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."[106]

Similarly, in *Louisville Joint Stock Land Bank v. Radford*, [107] the Court ruled that a mortgage lien was a compensable property right.[108] Under Kentucky state law, the mortgagee-bank had a property right to retain its lien on the mortgaged property until the indebtedness that the lien secured is paid.[109] After the mortgagor had defaulted, a referee-in-bankruptcy ordered, pursuant to the Frazier-Lemke Act,[110] that enforcement of the mortgage lien be stayed for five years and that the mortgagor be allowed to retain possession.[111] The Court held that the Act was unconstitutional, remarking that "[i]f the public interest re-

100. 364 U.S. 40 (1960).
101. *Id.* at 41.
102. *Id.*
103. *Id.*
104. *Id.* at 48.
105. *Id.*
106. *Id.* at 49.
107. 295 U.S. 555 (1935).
108. *Id.* at 594-95.
109. *Id.* at 594.
110. Frazier-Lemke Act, ch. 869, § 75(s), 48 Stat. 1289 (1930) (amended 1948).
111. 295 U.S. at 577.

quires . . . the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."[112]

Even if the fact and extent of a taking claim is uncertain, a claimant is entitled to a reasonable, certain and adequate provision for compensation at the time the "taking" occurs.[113] This requirement is satisfied if a claimant has available a remedy in the Court of Claims.[114] Section 1491 of the Tucker Act,[115] which sets out the jurisdiction of the Court of Claims, confers on that court jurisdiction over claims founded on, *inter alia*, the Constitution, an act of Congress or an executive regulation.[116]

The Court, in *Cities Service Co. v. McGrath*,[117] held that a taking claim that resulted from an exercise of executive power pursuant to the TWEA could be brought against the United States.[118] An executive order had been issued which vested title and possession of two debentures in the Executive.[119] The petitioners had held title to the debentures prior to the vesting.[120] Pointing to the possiblity that a foreign court might hold it liable to a holder in due course for the value of the debentures at some future time, the petitioners asserted that enforcement of the vesting order constituted a taking.[121] The Court agreed that the petitioners might suffer a double recovery.[122] Nonetheless, the petitioners were not entitled to injunctive relief, since a remedy was available against the United States.[123]

Though a claimant may otherwise be able to pursue his taking claim in the Court of Claims, the claim may be barred by the "treaty exception" to the Tucker Act.[124] This exception prevents the court from entertaining a claim that is dependent on a treaty or grows di-

---

112. *Id.* at 602.

113. *See, e.g.*, Cities Service Co. v. McGrath, 342 U.S. 330, 335-36 (1952) (no unconstitutional taking found, since petitioner has a cause of action against the United States, and can recoup its double liability, in the event a judgment is entered against it in the court of a foreign country at any time in the future).

114. *See* Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974).

115. 28 U.S.C. §§ 1491-1507 (1976 & Supp. III 1979).

116. *Id.* § 1491.

117. 342 U.S. 330 (1952).

118. *Id.* at 335.

119. *Id.* at 331 & n.3.

120. *Id.* at 331.

121. *Id.* at 335.

122. *Id.* at 335-36.

123. *Id.* at 334-35.

124. 28 U.S.C. § 1502 (1976).

rectly out of it.[125]

The scope of the treaty exception was first enunciated in *United States v. Weld*.[126] *Weld* involved a claim in the Court of Claims against the United States for the unpaid balance of a judgment obtained by the plaintiffs in a court specially constituted to adjudicate certain United States citizens' claims against the British Government.[127] Judgments awarded by the special court were funded by Great Britain in accordance with a treaty[128] between it and the United States.[129] The Court affirmed the Court of Claims decision that the latter had jurisdiction over the claim, holding that the plaintiff's claim did not directly and proximately grow out of the treaty.[130] Rather, the claim was created by a subsequent congressional act vesting authority in the special court to initially determine such claims.[131]

United States v. Old Settlers[132] narrowed the already limited scope of the treaty exception. The Court construed the "claim arising from or growing out of a treaty" test to mean a claim involving rights given or protected by a treaty.[133] This rule was circumvented in *Old Settlers*, though, because Congress had passed legislation authorizing the Court of Claims to settle claims growing out of the treaty between the petitoners' tribe and the United States Government.[134]

Courts faced with Iranian assets litigation have attempted to resolve both scope of executive power and taking questions raised by the implementation of the Iranian Agreements. The two decisions that most graphically demonstrate the conflicting conclusions of the lower courts and which prompted the Supreme Court to grant Dames & Moore a writ of certiorari, are *Charles T. Main International, Inc. v. Khuzestan Water & Power Authority*[135] and *Marschalk Co. v. Iran National Airlines Corp.*[136]

Main and *Marshchalk* are factually identical in relevant part.[137]

---

125. *Id.*

126. 127 U.S. 51 (1888).

127. *Id.*

128. Treaty of Washington, May 8, 1871, United States-Great Britain, 17 Stat. 863, T.S. No. 133.

129. 127 U.S. at 53.

130. *Id.* at 57.

131. *Id.* at 56-57.

132. 148 U.S. 427 (1893).

133. *Id.* at 468-69.

134. *Id.* at 468.

135. 651 F.2d 800 (1st Cir. 1981).

136. 518 F. Supp. 69 (S.D.N.Y. 1981), *rev'd*, 657 F.2d 3 (2d Cir. 1981). The *Marschalk* case is analyzed solely to present and contrast the differing views of the lower courts and the parties involved in Iranian assets litigation.

137. *Main*, 651 F.2d at 803-05; *Marschalk*, 518 F. Supp. at 76-77. The *Marschalk* court pointed out that, unlike other Iranian assets litigation cases involving commercial

After President Carter issued the order blocking Iranian assets and authorized revocable prejudgment attachments, the petitioners sued the Government of Iran and others in federal court to recover money owed for services performed under contract.[138] Prejudgment attachments were approved by the trial court.[139] After the negotiations for the hostages' release culminated in the Iranian Agreements, the petitioners claimed 1) that the President exceeded his constitutional powers, and 2) that the terms of the agreements, executive orders and regulations effected a fifth amendment taking.[140]

Both courts borrowed Justice Jackson's framework to structure their analyses of the executive power issues.[141] But the conclusions that the courts drew from their analyses diverged greatly.

The *Main* court rejected the claimant's arguments. The court held: a) that Congress, via the IEEPA, had expressly authorized the President to nullify the attachments and to transfer the blocked assets;[142] and b) that the President possessed the inherent power to suspend United States nationals' claims against the Government of Iran and its governmental entities.[143] It further held: a) that nullification of the petitioner's attachments did not constitute a fifth amendment taking;[144] and b) that the question of whether the President's action settling petitioner's claim constituted a taking was not ripe for review.[145]

The court began its analysis by focusing on the language of the IEEPA.[146] It found that the President properly "'direct[ed] and com-

---

transactions that occurred outside the United States, this case involved a transaction that occurred wholly within the borders of the United States. Nevertheless, the court admitted that the issues involved in the case were the same. *Id.* at 73.

138. *Main*, 651 F.2d at 803-05; *Marschalk*, 518 F. Supp. at 77.

139. *Main*, 651 F.2d at 803-04; *Marschalk*, 518 F. Supp. at 77.

140. *Main*, 651 F.2d at 805. The plaintiffs in *Main* instituted a separate action against the United States Government, seeking declaratory and injunctive relief. *Id. Marschalk*, 518 F. Supp. at 77. The United States intervened in the *Marschalk* contract action. *Id.*

141. *Main*, 651 F.2d at 805-06; *Marschalk*, 518 F. Supp. at 77-78.

142. *Main*, 651 F.2d at 808-09.

143. *Id.* at 810.

144. *Id.* at 808-09.

145. *Id.* at 814-15.

146. IEEPA, *supra*, note 8, § 1701(a)(1) authorizes the President to:

> (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

pel[led]' the 'transfer' . . . of Iranian assets, 'nullify[ing]' certain 'rights' and 'privileges' acquired in them."[147] This interpretation, the court felt, was reinforced by *Orvis*,[148] which construed the TWEA as making a presidential blocking order impervious to judicial attachment.[149] The *Main* court did not, however, read the IEEPA as authorizing the suspension of United States nationals' claims against Iran.[150]

Turning to an examination of the Executive's inherent power to suspend claims, the court found that, though the President's actions may be within the zone of twilight in which he and Congress have concurrent authority, the Executive had the inherent power to do so.[151] The court noted that the practice of settling claims by United States nationals against the government of another nation through executive agreements is well-established.[152] The court recognized, moreover, that under *United States v. Pink*,[153] the Executive's power to settle claims was incidental to its general powers in foreign affairs, a realm in which the President normally has broad discretion to take action.[154]

The petitioner's taking claims were quickly dismantled. The court found that no compensable property right had been created when the attachment was obtained.[155] It characterized the petitioner's attachment as *"ab initio* subordinate to the President's IEEPA powers" because the attachment was obtained after the blocking order went into effect.[156] The petitioner was able to obtain the attachment only because the regulations promulgated pursuant to the blocking order authorized revocable prejudgment attachments; these regulations simultaneously prohibited the petitioner from levying on the assets in any manner to satisfy its claim.[157] The court found that the question of whether the claims settlement agreement constituted a taking was not

---

any right, power, or privilege with respect to, or transactions involving any property in which any foreign country or national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.

147. 651 F.2d at 806.

148. 345 U.S. 183 (1953).

149. *Id.* at 188.

150. 651 F.2d at 807-08.

151. The court rejected the claimants' argument that the President was prohibited from settling claims by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976) [hereinafter cited as FSIA]. The court interpreted the FSIA as addressing commercial claims in general and not as reflecting adversely on the President's claims settlement powers during specific international emergencies. 651 F.2d at 813.

152. 651 F.2d at 810-11.

153. 315 U.S. 203 (1942).

154. 651 F.2d at 811-12.

155. *Id.* at 807.

156. *Id.* at 808.

157. *Id.* at 808-09.

ripe for review because the petitioner was provided with an as yet unexhausted alternative method of satisfying its claim, *viz.*, submission of the claim to the Claims Tribunal.[158] Until that method was exhausted, petitioner's claim would be considered speculative.[159]

In contrast to the *Main* court's response, the *Marschalk*[160] court agreed with its plaintiff's contentions *in toto*. The court held a) that the Executive possessed neither the power to suspend the plaintiff's contract claim[161] nor the power to nullify its attachment,[162] and b) that such actions by the Executive contravened the fifth amendment Just Compensation Clause.[163]

The court, in addressing the claims suspension issue, characterized the President's action as an effort to alter the jurisdiction of the courts.[164] It found that Congress, in enacting the FSIA,[165] had expressly prohibited the suspension of United States nationals' claims against a foreign state.[166] The FSIA ended the State Department practice of filing case-by-case "suggestions of immunity" to which courts would normally defer in commercial suits against a foreign state, instead placing responsibility for determining immunity solely in the hands of the courts.[167] An examination of the FSIA's legislative history revealed that Congress had refused to adopt provisions permitting the President to determine the jurisdiction of the courts in times of international emergency.[168] In light of its reading of the FSIA, the court concluded that the Executive did not possess inherent authority to suspend the plaintiff's claim.[169]

Turning to the nullification of attachments issue, the court found that the plaintiff obtained a valid legal attachment, the nullification of which was not authorized by the IEEPA.[170] It acknowledged that a lit-

158. *Id.* at 814-15.
159. *Id.*
160. 518 F. Supp. at 69.
161. *Id.* at 93-94.
162. *Id.* at 95-98.
163. *Id.* at 98-100.
164. *Id.* at 82.
165. 28 U.S.C. §§ 1602-1611 (1976).
166. 518 F. Supp. at 82-83.
167. *Id.* at 81.
168. *Id.* at 82.
169. *Id.* at 91-92.
170. *Id.* at 97. The court disavowed the assertion that Orvis v. Brownell stood for the proposition that the TWEA permitted the President to nullify attachment liens in foreign property obtained by United States nationals. Rather, it read *Orvis* as holding that an unauthorized attachment, which was obtained after the freezing order went into effect, did not amount to a property interest which the Executive would have to recognize. Such a transfer was not prohibited in *Marschalk*, since a general license was granted permitting pre-judgment attachments. *Id.* at 96-97.

eral reading of IEEPA would support the nullification order.[171] The legislative history of the pertinent section of the IEEPA revealed, however, that Congress intended to grant authority to the Executive only "to control or freeze property transactions where a foreign interest is involved."[172] In addition, the IEEPA's predecessor statute, the TWEA, revealed that its purpose was "to define, regulate, and punish trading with the enemy," and not to authorize an exercise of executive power to nullify what the court characterized as a citizen's court-conferred rights in foreign property.[173]

Despite having held that the President exceeded his constitutional powers by suspending the plaintiff's claim and nullifying its attachment, the court reached out to decide the plaintiff's taking claims. After stating the general principle that a contract claim is a compensable property right,[174] it concluded that settlement of the plaintiff's claim by relegating it to the Claims Tribunal constituted a taking.[175] A taking was established because the plaintiff would have to pursue the claim in a foreign country, forcing the petitioner to expend additional time and money, because the Tribunal would be "overly political" and would not offer due process guarantees, including the right to an appeal. Furthermore, only a twenty percent recovery of the plaintiff's claim was ensured in that forum.[176]

The plaintiff's attachment was also found to be a compensable property right under *Armstrong v. United States*[177] and *Louisville Joint Stock Land Bank v. Redford*.[178] These cases were interpreted as holding that a materialman's lien and a mortgage lien were compensable property rights.[179] Since this right was completely abrogated, the court concluded that a taking had occurred.[180]

Lastly, the question of whether a remedy was available to the plaintiff to adjudicate its taking claim was considered. The terms of the agreements, orders and regulations did not provide such a rem-

---

171. *Id.* at 95.

172. S. REP. No. 466, 95th Cong., 1st Sess. 5 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4540, 4543.

173. Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917).

174. *See, e.g.*, Lynch v. United States, 292 U.S. 571, 579. (1933).

175. 518 F. Supp. at 93-94.

176. *Id.*

177. 364 U.S. 40 (1960).

178. 295 U.S. 555 (1935).

179. 518 F. Supp. at 98.

180. *Id.* at 100. In the eyes of the court, the revocability of the authorization permitting attachments merely meant that, after a revocation had been effected, no property interest may thereafter be obtained. Having a large sum in attorney's fees and in posting a bond to obtain the attachment, the court felt that the plaintiff had a reasonable expectation that the attachment would not thereafter be nullified. *Id.* at 99-100.

edy.[181] Nor did the court find that the Tucker Act afforded the plaintiff a forum. The court reasoned that the executive agreement was equivalent to a treaty for purposes of this inquiry, and the treaty exception to the Tucker Act precludes the bringing of a taking claim based on the terms of a treaty.[182] Therefore, irrespective of the existence *vel non* of executive power to otherwise take such actions, the agreements, orders and regulations were invalid insofar as they contravened the fifth amendment's Just Compensation Clause.[183]

Writing for the majority[184] in *Dames & Moore v. Regan*,[185] Justice Rehnquist resolved the conflicting lower court conclusions by upholding the constitutionality of the actions taken by the Executive Branch.[186] The Court held: a) that Congress expressly authorized the nullification of attachments and transfer of assets;[187] b) that the petitioner's attachment was not a compensable property right;[188] c) that Congress implicitly authorized the suspension of claims;[189] and d) that the petitioner's contention that the suspension of its contract claim constituted a taking was not ripe for review.[190]

After invoking the analytical framework for determining executive power devised by Justice Jackson, the Court began its analysis by focusing on the IEEPA.[191] Express congressional authorization to nullify attachments and transfer the blocked assets was found in the language of section 1702(a)(1), which authorized the President to "'direct and compel' the 'transfer' and 'withdrawal' of the assets, 'nullify[ing]' certain 'rights' and 'privileges' acquired in them."[192]

The legislative history of the IEEPA and the TWEA buttressed the Court's construction of the aforementioned section. Though Justice Rehnquist acknowledged that by replacing the TWEA with the IEEPA Congress imposed certain limitations on the President's peacetime emergency powers, he asserted that those limitations did not affect the President's authority to take the actions in question.[193] Having

---

181. *Id.* at 94.

182. *Id.* at 100.

183. *Id.* at 100-01.

184. The Court's decision in respect to executive power was unanimous. Seven Justices joined the section of Justice Rehnquist's decision with the taking issues.

185. 453 U.S. 654 (1981).

186. *Id.* at 659-90.

187. *Id.* at 674.

188. *Id.* at 674 n.6.

189. *Id.* at 686-88. Justice Rehnquist writes that Congress has not passed legislation expressing disapproval of the President's action, thereby not resisting the exercise of Presidential authority. *Id.* at 687-88.

190. *Id.* at 688-89.

191. 50 U.S.C. §§ 1701-1706 (Supp. III 1979).

192. 453 U.S. at 670-71 (quoting *Main*, 651 F.2d at 806).

193. *See Dames & Moore*, 453 U.S. at 673. The Court stated that Congress, in limit-

removed those limitations as a consideration, he was free to refer back to *Propper v. Clark*,[194] a case interpreting the TWEA, to find that "the congressional purpose in authorizing blocking orders [was] 'to put control of foreign assets in the hands of the President . . .' "[195] Justice Rehnquist postulated that blocking orders permitted the President to use the blocked assets as a bargaining chip when dealing with a hostile country and concluded that Congress could not have intended that an individual be allowed to restrict the bargaining chip on the basis of attachments obtained under a revocable authorization after the blocking order was entered.[196] *Orvis v. Brownell*[197] supported the Court's conclusion because *Orvis* prohibited the use of the type of attachment in question "to limit in any way the actions the *President* may take under section 1702 respecting blocked assets."[198]

Dismissing the petitioner's claim that nullification of its attachment constituted a taking, the Court found that that no compensable property right had been created.[199] The petitioner argued that the order revoking all authorizations for obtaining attachments merely prevented the petitioner from obtaining future ones and left intact its attachments already obtained under the Treasury regulations.[200] According to the Court, the fact that any attachment was null and void "unless licensed" and that all licenses were revocable at any time refuted the petitioner's construction of the regulations.[201] Common sense also dictated that the President could not have intended that those who obtained attachments after the blocking order went into effect would have the power to wrest control of the blocked assets from the President's hands.[202]

Turning to the question of the President's authority to suspend

---

ing the President's emergency power in peacetime, did not intend to affect the President's authority to take the action taken here. *Id.*

194. 337 U.S. 472 (1949).

195. *Id.* at 493.

196. *See Dames & Moore*, 453 U.S. at 673-74.

197. 345 U.S. 183 (1953).

198. *Dames & Moore*, 453 U.S. at 672 n.5. The Court stated this proposition after rejecting petitoner's argument that it was the "vesting" provisions of the TWEA that gave the President the power to dispose permanently of assets, and that when Congress enacted the IEEPA it intentionally omitted granting that power. Instead, the Court found that section 1702 clearly authorized the President to "direct and compel" the "transfer, withdrawal, transportation, . . . or exportation of . . . property in which any foreign country . . . has an interest . . . ." *Id.*

199. *See Dames & Moore*, 453 U.S. at 674 n.6. Petitioner was unsuccessful in his attempt to persuade the Court that only the licenses and not the attachments themselves were revocable. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

claims pending in American courts, the Court rejected both the IEEPA and the Hostage Act as sources of specific congressional authorization.[203] The IEEPA was not applicable because claims of American citizens against Iran were not in themselves efforts to exercise any rights with respect to Iranian property.[204] Such a claim was merely an effort to establish liability and to fix damages.[205] Likewise, congressional authorization could not be found in the Hostage Act.[206] Though it contained broad language, its legislative history revealed that Congress wanted to afford protection to naturalized United States citizens who, while travelling abroad, were repatriated against their will by certain countries that refused to recognize their citizenship.[207]

Neverthless, the Court concluded that Congress had indirectly authorized the President's action.[208] Justice Rehnquist evaluated the "general tenor" of legislation in the area of international claims settlement to determine whether Congress had invited independent executive action.[209] He utilized both the IEEPA and the Hostage Act as indicia of congressional acceptance of a broad executive authority in the present circumstances.[210] The "sweeping and unqualified" language of the IEEPA authorized the President to take broad actions against foreign property during a national emergency.[211] Similarly, the legislative history of the Hostage Act, in which statements such as "[t]he President ought to have the power to do what the exigencies of the case require to rescue a citizen from imprisonment,"[212] appear indicated a

---

203. *See Dames & Moore*, 453 U.S. at 677. The Court added a caveat to this conculsion stating that the statutes are not wholly irrelevant in deciding whether or not Presidential action in this area is valid. *Id.*

204. *See Dames & Moore*, 453 U.S. at 675. The American claims were not even in and of themselves transactions involving Iranian property. *Id.*

205. *See Dames & Moore*, 453 U.S. at 675. All courts that have addressed this issue have reached the same conclusion. *Id.*

206. *Id.* at 676-77.

207. *Id. See also* 22 U.S.C. § 1732 (1868), which provides that it is the President's duty to demand that any government that is unjustly depriving a United States citizen of his liberty state the reasons for such deprivation. If such incarceration appears in violation of the rights of a United States citizen, the President shall demand the release of such citizen. In the event that the demanded release is refused or delayed, the President is granted such power as may be necessary and proper to effectuate the release. *Id.*

208. *See Dames & Moore*, 453 U.S. at 688. Where the settlement of a claim is considered necessary to the resolution of a major foreign policy dispute to which the United States is a party, the Court concluded that Congress acquiesces in the President's action and it cannot be said that the President is without the power to settle the claim. *Id.*

209. *See Dames & Moore*, 453 U.S. at 678. The Court noted that it would not be possible for Congress to anticipate and legislate every possible action that might be required of the President in every possible situation. *Id.*

210. *Id.* at 677.

211. *Id.*

212. *See* Cong. Globe, 40th Cong., 2d Sess. 4357 (1868). Senator Williams, who

congressional desire to rest broad discretion in the President to respond to hostile acts of foreign states.[213]

Prior instances of congressional acquiescence in the type of action taken by the President fortified the validity of his actions. The Court observed that a longstanding practice of settling claims of United States nationals against foreign countries by executive agreement had been established,[214] and that the Executive had sometimes disposed of such claims without the nationals' consent.[215] Justice Rehnquist stressed that, not only did Congress acquiesce, but it also implicitly approved this executive practice.[216] Such approval, according to Justice Rehnquist, was affirmatively demonstrated by the enactment of the International Claims Settlement Act (ICSA) of 1949.[217] He posited that the ICSA was enacted to provide a procedure whereby funds received from an executive claims settlement with Yugoslavia could be distributed to United States nationals, and that its legislative history revealed that Congress contemplated similar settlements in the future.[218] Moreover, Congress often amended the ICSA to solve particular problems that arose from subsequent settlement agreements entered

---

drafted the language that is embodied in the Hostage Act, stated that, in providing a remedy, it is necessary to allow the President some discretion in order for him to apply such remedy to the specific dispute as it arises. The means adopted must be tailored to each country with its own system of government. *Id.*

213. *See Dames & Moore*, 453 U.S. at 677.

214. *Id.* at 680. The Court cited ten instances of claim settlement via executive agreement: Settlement of Claims, May 11, 1979, United States-China, 30 U.S.T. 1957, T.I.A.S. No. 9306; Agreement Concerning Expropriated Assets of Marcona Mining Company, Sept. 22, 1976, United States-Peru, 27 U.S.T. 3993, T.I.A.S. No. 8417; Agreement Respecting Claims of United States Nationals, May 1, 1976, United States-Egypt, 27 U.S.T. 4214, T.I.A.S. No. 8446; Agreement Respecting Settlement of Certain Claims, Feb. 19, 1974, United States-Peru, 25 U.S.T. 227, T.I.A.S. No. 7792; Agreement Concerning Settlement of Claims, Mar. 6, 1973, United States-Hungary, 24 U.S.T. 522, T.I.A.S. No. 7569; Agreement Concerning the Trust Territory of the Pacific Islands, April 18, 1969, United States-Japan, 20 U.S.T. 2654, T.I.A.S. No. 6724; Agreement Regarding Claims of United States Nationals, Nov. 5, 1964, United States-Yugoslavia, 16 U.S.T. 1, T.I.A.S. No. 5750; Agreement Regarding Claims of United States Nationals, July 16, 1960, United States-Poland, 11 U.S.T. 1953, T.I.A.S. No. 4545; Agreement Relating to Financial Questions, Mar. 30, 1960, 11 U.S.T. 317, T.I.A.S. No. 4451; Agreement Regarding Claims of United States Nationals and Related Financial Matters, July 2, 1963, United States-Bulgaria, 14 U.S.T. 969, T.I.A.S. No. 5387. *Id.* at 680 n.9.

215. 453 U.S. at 680. The Court cited RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1965), which states that the "President 'may waive or settle a claim against a foreign state . . . even without the consent of the [injured] national.'" 453 U.S. at 680.

216. 453 U.S. at 681.

217. 22 U.S.C. §§ 1621-1644(m) (1979), *amended by* Act of Mar. 14, 1980, Pub. L. No. 96-209, 94 Stat. 96 (1980).

218. 453 U.S. at 680-81.

into by the President.[219] More recent approval was found in the legislative history of the IEEPA,[220] which indicated to Justice Rehnquist that Congress had intended not to infringe in any way on the President's authority to block assets, or to impede settlement of United States nationals' claims against foreign countries.[221]

Aside from indirect congressional approval, the Court recognized inherent power in the Executive to enter claims settlement agreements, relying on *United States v. Pink*[222] and *Ozanic v. United States*.[223] Justice Rehnquist construed *Pink* as upholding the validity of an executive agreement "whereby the Soviet Union assigned to the United States amounts owed to [the USSR] by American nationals so that outstanding claims of other nationals could be paid."[224] Underlying the *Pink* decision, he felt, was the principle that the power to remove claims of United States nationals as obstacles to full recognition of a foreign state is a "modest implied power of the President."[225] Such power of the President was expanded beyond the scope of *Pink* by the *Ozanic* court. Justice Rehnquist felt it would be unreasonable to circumscribe the President's power to situations involving the recognition of a foreign state, since "[t]he continued mutual amity between this nation and other powers again and again depends upon a satisfactory compromise of mutual claims . . . ."[226]

The Court devoted its remaining analysis of the claims settlement issue to refuting the petitioner's two main arguments opposing a finding that Congress implicitly approved the longstanding executive practice described by the Court. Justice Rehnquist circumvented the petitioner's argument that all pre-1952 claims settlements and case law should be disregarded because the United States abandoned the doctrine of absolute sovereign immunity in 1952 and that therefore United States nationals no longer needed executive assistance to sell their claims.[227] He acknowledged the possible merit of the petitioner's argument, but assumed that even if the petitioner was correct, the ten or more settlement agreements entered into after 1952 resurrect the con-

---

219. *Id.* at 681. The Court specifically examined settlements between the United States and China, East Germany and Vietnam. *Id.*

220. *Supra* note 7. For the legislative history of the Act, see S. REP. No. 466, 95th Cong., 2d Sess. 6 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4540, 4544.

221. 453 U.S. at 681-82.

222. 315 U.S. 203 (1942).

223. 188 F.2d 228 (2d Cir. 1951).

224. 453 U.S. at 682-83. The Court notes the similarity of Judge Learned Hand's opinion in *Ozanic* to the holding in *Pink*. *Id.*

225. *Id.* at 683 (quoting 315 U.S. at 229-30).

226. *Ozanic*, 188 F.2d at 231.

227. 453 U.S. at 683-84.

gressional acquiescence in the executive practice.[228]

Justice Rehnquist also refused to accept the petitioner's argument that Congress divested the Executive of the power to settle claims when the FSIA[229] was enacted.[230] The petitioner urged that, since the FSIA's principle purpose was to depoliticize immunity decisions in commercial suits against foreign governments by placing those decisions solely in the hands of the courts, the President had circumscribed the jurisdiction of the United States courts in violation of article III of the Constitution when he suspended the petitioner's claim.[231]

The Court responded by declaring that the Executive did not attempt to divest the courts of jurisdiction and that the petitioner read the FSIA much too broadly.[232] By way of analogy, Justice Rehnquist explained that, just as a determination of sovereign immunity does not divest the federal court of jurisdiction, suspension of claims does not do so.[233] Rather, the President's order "effected a change in the substantive law governing the lawsuit."[234] Here, apparently, the rule of law was that claims that could be brought before the Claims Tribunal had no legal effect in United States courts until the Claims Tribunal determined that the claim was not within its jurisdiction.[235]

The Court viewed the petitioner's reading of the FSIA as much too broad because it was "designed to remove one particular barrier to suit, namely soveriegn immunity," and because Congress had "rejected several proposals designed to limit the power of the President to enter . . . claims settlement agreements."[236] Moreover, the same Congress that enacted the FSIA also enacted the IEEPA, the legislative history of which "stressed that nothing in the IEEPA was to impede the settlement of claims of United States citizens."[237]

---

228. *Id.* Justice Rehnquist also noted that even if these pre-1952 cases should be disregarded, congressional acquiescence since 1952 is supportive as evidence of the President's power in the instant case. *Id.* at 684.

229. FSIA, *supra* note 103.

230. 453 U.S. at 684.

231. *Id.*

232. *Id.* at 685.

233. *Id.* The Court viewed the suspension of claims as illustrative of the difference between modifying federal court jurisdiction and directing the courts to apply a different rule of law. *Id.*

234. *Id.*

235. *Id.* While Justice Rehnquist did not articulate what the rule of law was that was changed, it appears that claims that could be brought before the Claims Tribunal had no legal effect in the United States courts until the Claims Tribunal determined that the claim was not within its jurisdiction.

236. *Id. See, e.g., Congressional Oversight of Executive Agreements: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Committee on the Judiciary*, 94th Cong., 1st Sess. 243-61, 302-11 (1975).

237. 453 U.S. at 686.

Having found that the claims settlement agreement was a constitutional exercise of executive power, the Court paused to state that the petitioner's taking claim in this regard was not ripe for review.[238] Nonetheless, the possibility that a taking might be effected by the President's actions forced the Court to determine whether the petitioner had available a remedy under the Tucker Act.[239] This determination was necessary because "there must be at the time of taking a reasonable, certain and adequate provision for obtaining compensation."[240] The only bar to bringing suit in the Court of Claims would be section 1502, the "treaty exception."[241] Justice Rehnquist held, without explanation, that the exception was not a bar, though the Court did indicate that the Government conceded the point.[242]

Justice Powell, concurring and dissenting in part,[243] disagreed with the majority's decision that the petitioner's attachment was not a compensable property right.[244] He questioned whether "the orders themselves may have effected a taking by making conditional the attachments that claimants against Iran otherwise could have obtained without condition."[245] He also questioned whether "the revocability of the license under which the petitioner obtained its attachments suffices to render revocable the attachments themselves,"[246] since, under *Armstrong v. United States*[247] and *Louisville Joint Stock Land Bank v. Redford*,[248] "it [was] 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."[249] Justice Powell would have left the taking claim "open for resolution on a case-by-case basis in actions before the Court of Claims."[250]

The key to Justice Rehnquist's decision upholding the constitutionality of the nullification of the attachments and the suspension of claims by the Executive appears to be the finding of congressional au-

238. *Id.* at 688-89.
239. *Id.* at 689. *See* 28 U.S.C. §§ 1491-1507 (Supp. III 1979).
240. Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 641, 659 (1890).
241. *See supra* note 86 and accompanying text.
242. 453 U.S. at 689.
243. *Id.* at 690-91. Justice Stevens also concurred. Though he joined in the remaining portions of the opinion, he would not have addressed the question of whether the petitioners would be able to bring a taking claim in the Court of Claims, based on the suspension of the petitioner's claim. He believed that the possibility that a taking would occur was too remote. *Id.* at 690.
244. *Id.* at 690 n.1.
245. *Id.*
246. *Id.*
247. 364 U.S. 40 (1960).
248. 295 U.S. 555 (1935).
249. 453 U.S. at 690 n.1.
250. *Id.* at 690.

thorization.[251] Whenever the Court perceives that the other two branches of the federal government have acted in concert, or at least that Congress has acquiesced in the Executive's actions, the Court is reluctant to interfere, especially when the Executive is acting in the realm of foreign affairs. Though Justice Rehnquist belabored the point that the opinion was written solely to answer the specific questions presented,[252] it will provide guidelines in the future when the President enters into an agreement to resolve disputes with other states.

Louis D. Montresor

251. *See, e.g., id.* at 680, where the Court indicated that "[c]rucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement." *Id.*

252. *See* 453 U.S. at 659-60, 688-90.