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# Iranian Hostage Agreement Cases: The Evolving Presidential Claims Settlement Power, The

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# COMMENTS

# THE IRANIAN HOSTAGE AGREEMENT CASES: THE EVOLVING PRESIDENTIAL CLAIMS SETTLEMENT POWER

*by Deborah Godich Hardwick*

ON November 14, 1979, Iranian militants seized the American Embassy in Tehran.[1] Demanding that the United States return the Shah and his wealth to Iran, the militants held fifty-two American citizens hostage for 444 days. On January 18, 1981, after a series of complex negotiations, the United States and Iran agreed to terms.[2] Then, on January 19, 1981, Deputy Secretary of State Warren Christopher executed, on behalf of the President, the corresponding executive agreements that secured the hostages' release. The United States agreed, among other things, to terminate American claims against Iran in return for the establishment of a claims tribunal vested with a binding arbitration power,[3] and to return Iranian assets held in the United States.[4]

Although no express constitutional provision supports the President's power to enter executive agreements, such as the Iranian Hostage Agreement, without the advice and consent of the Senate, the President's agreement power traditionally has been accepted in practice. In addition, the total legal authority of the President's foreign relations power supports a Presidential power to settle the international claims of nonconsenting American citizens by executive agreement. The President's authority to settle claims, however, is limited by the fifth amendment prohibition against the taking of private property for public purposes without just

1. For a more detailed summary of the facts of the hostage crisis and the executive agreements arising from it, see notes 131-51 *infra* and accompanying text.

2. Two declarations by the Government of Algeria, which had mediated the negotiations, reflect the points of agreement between the United States and Iran that secured the hostages' release. Declaration of Algeria, Jan. 18-19, 1981, United States-Iran, 81 DEP'T STATE BULL. No. 2047, at 1 (1981); Declaration of Algeria Concerning the Settlement of Claims by the United States of America and Iran, Jan. 18-19, 1981, United States-Iran, *id.* at 3 [hereinafter cited as Agreement I and Agreement II respectively, and referred to collectively as the Iranian Hostage Agreement].

3. Agreement I, *supra* note 2, ¶ B.

4. *Id.* points II-III.

compensation.[5] Although the courts never have invalidated a claims settlement agreement on fifth amendment grounds, by suspending and submitting to arbitration claims already before United States courts, the Iranian Hostage Agreement stretches the outer limits of the President's authority to settle claims by executive agreement without the claimants' consent.[6]

This Comment traces the President's role in international affairs and the Presidential power to enter into executive agreements from the earliest days of the nation to the present. Particular emphasis is placed on the evolution of the President's power to settle claims of United States citizens by executive agreement. In addition, this Comment examines several recent cases arising out of the Iranian Hostage Agreement, and the impact of *Dames & Moore v. Regan*,[7] the Supreme Court's initial response to the Iranian Hostage Agreement, on prior law.

## I. THE PRESIDENT'S ROLE IN INTERNATIONAL AFFAIRS

### *A. The Constitutional Foreign Relations Power*

The aggregation of powers expressly delegated to the President by the Constitution constitutes the foreign relations power.[8] The constitutional provisions assigning powers relevant to foreign relations solely to the exercise of the President are the executive power clause,[9] the commander in chief clause,[10] the power to receive ambassadors clause,[11] and the clause requiring the President to faithfully execute the laws of the United States.[12] These provisions impliedly vest in the President the power to serve as spokesman for the United States in international matters.[13] On their face these constitutional sections do not reveal the strength and

5. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

6. The claims settled by the President in the Iranian Hostage Agreement affect approximately 400 suits involving claims totalling three to four billion dollars. Norton & Collins, *Reflections on the Iranian Hostage Settlement*, 67 A.B.A.J. 428, 432 (1981). Only 15% of the estimated 2,500 potential claims have been filed. *Id.* Some nonfiling claimants hope for out-of-court settlements, while others are avoiding litigation to enhance the prospect of obtaining future Iranian business. *Id.*; *see* Cutler, *Negotiating the Iranian Settlement*, 67 A.B.A.J. 996, 1000 (1981); Swan, *Reflections on Dames & Moore v. Regan and the Miami Conference*, 13 LAW. AMERICAS i, i (1981).

7. 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981).

8. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 45 (1972).

9. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1.

10. "The President shall be Commander in Chief of the Army and Navy of the United States." *Id.* art. II, § 2, cl. 1.

11. The President "shall receive Ambassadors and other public Ministers." *Id.* art. II, § 3, cl. 1. The power to receive ambassadors is the only presidential constitutional power that expressly includes the authority to deal with foreign nations. *See* L. HENKIN, *supra* note 8, at 40-41.

12. The President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3, cl. 1.

13. A. LÉVITT, THE PRESIDENT AND THE INTERNATIONAL AFFAIRS OF THE UNITED STATES 21 (1954).

breadth of the President's power.[14] In reality, the circumstances and necessities of international relations and general patterns of diplomatic practices have facilitated the President's acquisition of an expansive foreign relations power.[15] Practical considerations require the control of foreign affairs by the President, rather than Congress. The President is ready to act at any given time and is able to do so more swiftly than Congress.[16] Additionally, the President has easier access to foreign affairs information and is better able to keep sensitive negotiations and decisions secret.[17] Moreover, the legislative and judicial branches' continued recognition of the President's control of international affairs,[18] coupled with the President's monopoly of the federal foreign affairs mechanism, has solidified his position as the nation's principal spokesman and authority in matters of foreign policy.[19] The Supreme Court itself recognized "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[20]

An examination of Presidential practice during times of crisis demonstrates the expansive quality of the foreign relations power. In such times the President's capacity to control foreign affairs becomes broader, and this expansion has never been labelled a violation of the separation of powers.[21] For example, during times of war, Presidents historically have held greater authority to act than that held during times of peace. When

14. L. HENKIN, *supra* note 8, at 41.

15. *Id.* at 37. The total foreign relations power of the nation is vested in the federal government rather than in the states, because "foreign affairs are national affairs." *Id.* at 15. The foreign relations power, therefore, is distributed among the branches of the federal government. *Id.* at 33-34.

16. Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 349 (1955).

17. *Id.*

18. *See id.* at 346; L. HENKIN, *supra* note 8, at 38, 208. Henkin reports that the Supreme Court never has invalidated a Presidential act related to foreign affairs on grounds that the authority of the federal government had been overreached. *Id.* at 208.

19. L. HENKIN, *supra* note 8, at 45-47. The Constitution provides that the President with the consent of the Senate shall appoint "Ambassadors, other public Ministers and Consuls . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. CONST. art. II, § 2, cl. 2. Individuals appointed to foreign relations positions by the President are responsible to the President and receive direction from him as to what will or will not be communicated to other nations. L. HENKIN, *supra* note 8, at 46.

20. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). In *Curtiss-Wright* the Supreme Court upheld the conviction of individuals selling guns to Bolivia in violation of a Presidential embargo proclamation. In rejecting the defendant's claims that the embargo was an unconstitutional exercise of Presidential power, Justice Sutherland in a dictum advocated an expansive view of the President's foreign relations powers. He asserted that the power derived from the external sovereignty transferred to the nation upon its separation from Great Britain. *Id.* at 316. Accordingly, Justice Sutherland reasoned that the foreign relations power of the federal government did not depend on affirmative grants of the Constitution. *Id.* at 318. Critics charge that this dictum in the *Curtiss-Wright* opinion invites a Presidential abuse of power in the foreign relations area. *See, e.g.*, Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26-31 (1972); Comment, *Executive Agreements, The Treaty-Making Clause, and Strict Construction*, 8 LOY. L.A.L. REV. 587, 602-09 (1975).

21. Mathews, *supra* note 16, at 346. *See generally* Thomas & Thomas, *Presidential War-Making Power: A Political Question?*, 35 SW. L.J. 879 (1981).

peace has been restored, this expanded power has been countered by an assertion of legislative authority.[22] Thus, in terms of its total legal authority, the President's foreign relations power is best considered an inherently flexible aggregation of express and implied powers.[23]

In addition to the foreign relations powers expressly and impliedly assigned to the President, the President shares an enumerated constitutional treaty power with the Congress. The President has the power to make treaties "by and with the Advice and Consent of the Senate."[24] A treaty is "a formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves."[25] By its very nature, the treaty is a significant instrument in the implementation of foreign policy.[26]

The President serves three functions in the treaty-making process. First, because the President is the exclusive communicator with foreign nations, he ultimately determines when treaty negotiations will take place and controls their course.[27] Secondly, the final act of treaty-making, ratification, is performed by the President.[28] The advice and consent of two-thirds of the Senate present, however, is a condition precedent to ratification.[29] The Senate's involvement in the treaty-making process reflects an inherent regard for the separation of powers doctrine, satisfies the need for a foreign affairs public forum, and provides additional expertise in the field of foreign policy.[30] One school of thought stresses that both advice, meaning opinions given before commitments are made or documents are prepared, and consent of two-thirds of the Senate present are required before the President can make a treaty.[31] Conversely, the advice and consent provision has been described as nothing more than a veto or amendment

22. Mathews, *supra* note 16, at 346 n.4 (citing D. CHEEVER & H. HAVILAND, AMERICAN FOREIGN POLICY AND THE SEPARATION OF POWERS 6 (1952)).

23. L. HENKIN, *supra* note 8, at 45.

24. U.S. CONST. art. II, § 2, cl. 2. References to treaties elsewhere in the Constitution highlight the significance of the treaty-making power. The Constitution expressly withholds the treaty-making power from the states by stating that "[n]o State shall enter into any Treaty." *Id.* art. I, § 10, cl. 1. The federal judiciary power extends to "all Cases . . . arising under . . . Treaties made, or which shall be made." *Id.* art. III, § 2, cl. 1. Finally, the Supremacy Clause provides that "all Treaties made, or which shall be made . . . shall be the supreme Law of the Land." *Id.* art. VI, cl. 2.

25. Leary, *International Executive Agreements: A Guide to the Legal Issues and Research Sources*, 72 LAW. LIB. J. 1, 2 (1979) (quoting *The Harvard Research in International Law*, art. 1, 29 AM. J. INT'L L. SUPP. 686 (1935)). Leary cautions that that the word treaty has a narrower meaning in the United States than in the rest of the world, because it is used only in reference to those international agreements made with the advice and consent of two-thirds of the Senate present. *Id.*

26. The need for centralized government control over treaty enforcement was a vital force behind the convening of the Constitutional Convention and the Convention's efforts to form a stronger union. S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 51 (2d ed. 1916).

27. *Id.* at 93. As a practical matter the Congress is powerless in the area of negotiations. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

28. S. CRANDALL, *supra* note 26, at 94.

29. U.S. CONST. art. II, § 2, cl. 2.

30. Berger, *supra* note 20, at 55-58.

31. A. LÉVITT, *supra* note 13, at 16-17.

power.[32] Thirdly, the President makes treaty proclamations, public announcements of treaty terms, and executes ratification.[33] Thus, the treaty power, along with the independent Presidential powers, endows the President with broad foreign relations authority.

### *B. The Executive Agreement Power*

Executive agreements provide the President with an alternative to treaties for implementing foreign policy decisions. Executive agreements are defined as "all international agreements which become binding on the United States in other ways—through the action of the President alone or through the action of the President together with Congress."[34] The Constitution's only mention of international agreements is in reference to the states, which are prohibited from entering into such agreements without the consent of Congress.[35] Thus, the state agreement power, not the executive agreement power, is distinguished from the nation's treaty-making authority in the Constitution.[36] Notwithstanding this lack of express constitutional authorization for executive agreements, Presidents have executed thousands of agreements throughout American history.[37] Historical documentation of the Constitutional Convention[38] and judicial dicta[39] support the validity of executive agreements. The practice of several framers of the Constitution who subsequently became President suggests that

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32. Mathews, *supra* note 16, at 349.

33. S. CRANDALL, *supra* note 26, at 94-95.

34. W. BISHOP, INTERNATIONAL LAW 93 (3d ed. 1971). For a comprehensive definition of executive agreements based on the powers, rights, and duties of the President, see A. LÉVITT, *supra* note 13, at 45.

35. U.S. CONST. art. I, § 10, cl. 3: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign power . . . ." *See* Weinfield, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?*, 3 U. CHI. L. REV. 453 (1936). Records of the Constitutional Convention do not indicate the intended meaning of agreement or compact. *Id.* at 457. Weinfield, therefore, asserts that agreement or compact carried a definite meaning for the Constitution's framers as a technical term taken from the field of international law. *Id.* At the time the Constitution was written, these words referred to agreements or compacts regulating and settling boundary lines. *Id.* at 464.

36. A. LÉVITT, *supra* note 13, at 10; *see* note 24 *supra* and accompanying text. The Supreme Court has recognized the contextual distinction between the federal treaty power and the state agreement power. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 552-53 (1840) (while states can make agreements with consent of Congress, they can never make treaties).

37. L. HENKIN, *supra* note 8, at 173.

38. For detailed reviews of the proceedings, see Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527 (1974); Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States*, 35 ILL. L. REV. 365, 365-71 (1940); Rovine, *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397, 409-11 (1977).

39. United States v. Belmont, 301 U.S. 324, 330 (1937) (international agreement is not always treaty requiring Senate participation); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (power to make international agreements that are not treaties in a "constitutional sense" is "inherently inseparable from the conception of nationality"); *see* Levitan, *supra* note 38, at 371-72 (judicial dictum affirms that the Constitution's framers contemplated use of international agreements other than treaties); Rovine, *supra* note 38, at 415 (while legal right of the President to enter executive agreements is well-settled, scope of Presidential power to conclude such agreements is not).

the making of executive agreements is not incompatible with the treaty-making provision.[40] Few courts have addressed directly, however, the question of the origin of the President's power to enter into executive agreements.[41] Thus, the validity of executive agreements must be determined by examining both constitutional theory and practice.[42] Scholars have classified executive agreements primarily according to the constitutional authority invoked in their making.[43] The categories include congressional-executive agreements, treaty authorized agreements, and pure or sole executive agreements.

Eighty-six per cent of all executive agreements are made pursuant to existing statutes or are ratified by subsequently enacted statutory authority.[44] These congressional-executive agreements are supported by the reasoning that the agreements themselves are constitutional because the authorizing statute is constitutional.[45] The use of congressional-executive agreements can be traced to George Washington. With the approval of Congress, Washington authorized the Postmaster General of the United States to conclude international agreements with foreign nations for the

40. For example, Presidents John Quincy Adams and James Madison both concluded executive agreements based on either statutory or constitutional authority. *See* notes 54-56 *infra* and accompanying text. *See also* Rovine, *supra* note 38, at 409-11.

41. The leading Supreme Court cases on executive agreements are Reid v. Covert, 354 U.S. 1 (1957); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953); Consumer's Union of U.S., Inc. v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973); Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955), *cert. denied*, 359 U.S. 943 (1959). *See* Leary, *supra* note 25, at 5-6 n.48; Comment, *Self-Executing Executive Agreements: A Separation of Powers Problem*, 24 BUFFALO L. REV. 137, 157 (1974). *See also* Mathews, *supra* note 16, at 346 (little case law exists on the subject of executive agreements, because problems arising from executive agreements ordinarily do not reach the courts).

42. Leary, *supra* note 25, at 3.

43. *See* S. CRANDALL, *supra* note 26, at 102-40; L. HENKIN, *supra* note 8, at 173-84; A. LÉVITT, *supra* note 13, at 46-47; J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 188 (1978); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 119-121 (1965) [hereinafter cited as RESTATEMENT (SECOND)]; Leary, *supra* note 25, at 3-6.

44. Rovine, *supra* note 38, at 410. RESTATEMENT (SECOND), *supra* note 43, § 120, Comment a, illustration 1, provides the following example of an executive agreement made pursuant to existing statutory authority:

> An act of Congress provides that when the President finds that existing duties or import restrictions of the United States or any foreign country are unduly burdening or restricting the foreign trade of the United States, he may enter into trade agreements with foreign governments and proclaim such modifications of existing duties and other import restrictions as may be necessary to carry out any such foreign trade agreement, provided that reductions or increases of any duty rate shall not exceed 50 per cent of any existing rate. Acting pursuant to that statute, the United States makes an international agreeement in the form of an executive agreement with state A under which they reciprocally reduce import duties in the amount of 30 per cent of the existing rates on an extensive schedule of manufactured goods. This agreement is constitutional, since the Congress in enacting the statute acted pursuant to its power under Article I, Section 8, of the Constitution, "to regulate Commerce with foreign Nations." *See* Trade Agreements Extension Act of 1958, 72 Stat. 673, 19 U.S.C. § 1351 (1958). *Cf.* Star-Kist Foods, Inc. v. United States, 275 F.2d 472 (C.C. P.A. (Customs) 1959).

45. Rovine, *supra* note 38, at 410.

receipt and delivery of mail.[46] Congressional-executive agreements also have been enacted in the areas of navigation and commerce, international copyright, trade-marks, and territory acquisition.[47]

The second category of executive agreements relates to agreements authorized by existing treaties.[48] Little controversy has arisen over the constitutionality of agreements authorized by treaties, because the Senate's consent to the treaty encompasses the executive agreement itself.[49] Boundary delimitations, rights of transit across foreign territory, and administrative arrangements frequently are covered by this type of executive agreement.[50]

Only two to three per cent of all executive agreements are classified as pure or sole Presidential agreements.[51] A pure executive agreement is made pursuant to the President's express, independent constitutional powers.[52] Because the Constitution does not explicitly authorize these agreements,[53] several issues arise concerning their validity.

The first issue concerns the lack of Senate consent to the agreements. From the nation's earliest years, Presidents have entered into executive agreements without first seeking senatorial consent. The earliest pure executive agreements[54] include John Quincy Adams's claims settlement with the Netherlands in 1799[55] and James Madison's prisoner of war exchange with Great Britain in 1813.[56] In 1817 President James Monroe concluded the Rush-Bagot Agreement limiting British and American armaments on the Great Lakes.[57] President Monroe submitted the British-American cor-

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46. *Id.*

47. For a comprehensive listing and details of historical congressional-executive agreements, see S. CRANDALL, *supra* note 26, at 121-40.

48. RESTATEMENT (SECOND), *supra* note 43, § 119, illustration 1, provides the following example of an executive agreement made pursuant to an existing treaty:

> The United States and state A make a security treaty providing, among other things, that the two states may make administrative agreements governing the disposition of United States forces in A. Pursuant to that provision, the President of the United States makes an executive agreement defining jurisdiction over United States forces in A. The executive agreement is constitutional. *Cf.* Wilson v. Girard, 354 U.S. 524 (1957).

49. Leary, *supra* note 25, at 5.

50. *Id.*

51. Rovine, *supra* note 38, at 412. RESTATEMENT (SECOND), *supra* note 43, § 121, illustration 1, provides the following example of an executive agreement made pursuant to the President's independent constitutional authority: "The President makes an agreement with state A permitting armed forces of the latter to traverse territory of the United States. The agreement is valid under the President's powers as chief executive and commander-in-chief."

52. Rovine, *supra* note 38, at 412.

53. *See* text accompanying note 37 *supra*.

54. For a discussion of early executive agreements, see Rovine, *supra* note 38, at 410-11.

55. *See* notes 96-98 *infra* and accompanying text.

56. For the text, relevant documents, and history of the prisoner exchange agreement, see 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 557-73 (H. Miller ed. 1931). The agreement provided for the care and transfer of both civilian and military prisoners of war. *Id.*

57. For the text, relevant documents, and history of the Rush-Bagot Agreement, see *id.* at 645-57. *See also* S. CRANDALL, *supra* note 26, at 102-03.

respondence pertinent to the agreement to the Senate one year after the agreement's conclusion and implementation, apparently as a prudent afterthought.[58] Historical records, however, indicate that President Monroe actually considered submission to the Senate unnecessary and merely requested that the Senate consider whether the agreement should be treated as a valid exercise of the President's independent constitutional powers or as a treaty requiring Senate consent.[59] The Senate subsequently approved the arrangement by resolution.[60]

In addition to Presidential practice, the validity of these agreements is supported by the fact that the Supreme Court has never declared a pure executive agreement unconstitutional for lack of Senate consent.[61] Legal scholars widely advocate the recognition of the pure executive agreement as a constitutionally permissible exercise of the President's total foreign relations power.[62] Furthermore, the practices of international law suggest that pure executive agreements are valid. Because the President is the nation's voice in foreign affairs and is considered the representative authority of the United States under international law, all Presidential acts are subject to international cognizance. As a result, foreign nations may not question the authority of the President to speak and act for the United States.[63] Consequently, if the United States repudiated an international executive agreement relied on by a foreign nation, then the United States would be committing an international wrong.[64]

The second important issue that arises concerning pure executive agreements is the scope of the President's power. The goal of a cohesive foreign policy is to represent the interests of the United States uniformly and to recognize the nation's responsibility to present foreign policies on which other countries can rely, while preserving democratic participation in the formulation of American foreign policy.[65] To achieve this goal, the federal government must be able to act swiftly, informatively, and often secretively. While Congress is well-equipped to deal with domestic affairs,[66] its

58. S. CRANDALL, *supra* note 26, at 103.

59. *Id.* at 102.

60. *Id.*

61. L. HENKIN, *supra* note 8, at 179. For a discussion of significant cases upholding executive agreements made without the consent of the Senate, see notes 106-14 *infra* and accompanying text.

62. *See generally* Levitan, *supra* note 38; Mathews, *supra* note 16; Rovine, *supra* note 38. RESTATEMENT (SECOND), *supra* note 43, § 121 provides: "An international agreement made by the United States as an executive agreement without reference to a treaty or act of Congress may . . . deal with any matter that under the Constitution falls within the independent powers of the President." For a discussion of the President's constitutional foreign relations power, see notes 8-23 *supra* and accompanying text.

63. Levitan, *supra* note 38, at 392.

64. *Id.* at 394; *see* United States v. Belmont, 301 U.S. 324, 331 (1937) (quoting James Madison as saying that to allow state law to counteract a treaty "would bring on the Union the just charge of national perfidy").

65. Mathews, *supra* note 16, at 345.

66. *Id.* at 374. Friction among the three branches of government and within the Congress over domestic issues slows the decision-making process and facilitates compromise. Thus, domestic policy makers are responsive to the nation as a whole. *Id.*

deliberative and frequently cumbersome decision-making process is ill-suited to the exigencies of an effective foreign policy mechanism. The President, on the other hand, is better able to deal with foreign policy by avoiding the friction and delay inherent in most congressional action.[67]

Although the President's executive agreement power must be broad enough to meet these needs, it is not absolute. The scope of the President's agreement power, as with any other federal government power, is inherently limited by the Constitution[68] and the separation of powers doctrine.[69] Furthermore, the practical limitations of public opinion, political forces, and the President's dependency on a good working relationship with Congress act to mitigate potentially excessive exercises of the executive agreement power.[70]

Commentators have determined the scope of the President's agreement power through a case-by-case delineation method, taking into account the exigencies of modern international relations and the inherent limitations on executive agreements.[71] The case delineation method leaves the President free to exercise his foreign relations power according to the extent to which current events justify it.[72] In times of crisis the need for swift action may require a broader Presidential agreement power to further the best interests or even the survival of the nation.[73] During less critical times the need for a broad scope of Presidential power is balanced by the desirability of employing the treaty-making power to solidify the goals of the nation in the international area by having both Presidential and congressional approval in foreign policy implementation.[74]

The arguments favoring a broad Presidential agreement power have not

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67. *Id.* at 374-75.

68. Reid v. Covert, 354 U.S. 1, 16 (1957). RESTATEMENT (SECOND), *supra* note 43, § 117(1)(b) provides that the United States can make international agreements if "the agreement does not contravene any of the limitations of the Constitution applicable to all powers of the United States." Direct reference to the Bill of Rights as a limitation on international agreements is made in the comment to § 117. *Id.* Comment d. Executive agreements are within the scope of § 117. *Id.* § 121. For the text of § 121, see note 61 *supra*. *See also* Mathews, *supra* note 16, at 377; Comment, *supra* note 41, at 141.

69. Comment, *supra* note 36, at 141; *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). In *Youngstown* the Court held invalid President Truman's executive order directing the Secretary of Commerce to seize the nation's steel mills during a nationwide strike. *Id.* at 589. Justice Black ruled for the Court that the President's power, if any, to order the steel mill seizure must derive from either the Constitution or an act of Congress. *Id.* at 585. Justice Jackson's concurring opinion, however, examined the broader issue of Presidential authority to act in any given situation. Justice Jackson stated that the President may act pursuant to congressional authorization, he may act in the absence of congressional authorization, or he may act in contravention of congressional will. *Id.* at 637. According to Justice Jackson, Presidential authority is at its strongest when Congress authorizes the President's actions, and Presidential authority is at its weakest when Congress prohibits the President's actions. *Id.*

70. Mathews, *supra* note 16, at 377.

71. *Id.* at 375; *see* text accompanying note 205 *infra*. *See generally* L. HENKIN, *supra* note 8, at 179; Rovine, *supra* note 38, at 417-21.

72. Mathews, *supra* note 16, at 375.

73. *Id.*

74. *See id.* ("the extent of the President's power in foreign affairs must vary with the context of events in which it must be exercised").

gone unchallenged. Strict constructionists of the Constitution challenge the notion that the Constitution itself is the source of the power.[75] Citing the Constitution's inclusion of the treaty-making power and its omission of the agreement power, one strict constructionist argues that the founding fathers, who distrusted executive power, intended to withhold from the President the power to negotiate and enter into international agreements by himself.[76] This critic further argues that the original states jealously guarded their power to participate equally in making treaties through their representatives in the Senate.[77] The strict constructionist asserts that deciding the validity of executive agreements by case delineation allows the President unilaterally to revise the Constitution by his own actions. Thus, if the President is allowed to circumvent congressional participation in the treaty process frequently enough, he effectively amends the Constitution and transfers power from the legislative to the executive domain.[78]

Other critics accept the validity of the President's agreement power, but assert that the power is too often exercised when a treaty would be more appropriate.[79] These critics point to the large and ever increasing number of executive agreements that have been executed since 1946 as an abrogation of the treaty-making power.[80] Reasons other than an executive abuse of discretion for the increased number of agreements are advanced in support of a broad executive agreement power. The increase in the number of world nations, the increased participation of the United States in world affairs, the increase in the variety of agreement subject matter, and the inclusion of executive agency arrangements in the executive agreement definition offer alternative explanations for the increased use of executive agreements.[81]

The amount and severity of criticism of executive agreements generally depends on the political climate.[82] The quantum of respect and esteem that the public holds for the President and the level of trust existing between the executive and legislative branches also affect the amount of criticism directed towards executive agreements.[83] When the public doubts the

75. *See generally* Berger, *supra* note 20; Comment, *supra* note 20. Strict constructionists rely heavily on, and find their strongest argument against the executive agreement power in, the records of the Constitutional Convention. *E.g.*, Berger, *supra* note 20, at 10-12. *But see* L. HENKIN, *supra* note 8, at 421 n.5 (argument that Constitution only permits international agreements by treaty is dead).

76. Berger, *supra* note 20, at 41.

77. *Id.*

78. *Id.* at 49-50.

79. *See, e.g.*, Rovine, *supra* note 38, at 398-99 (noting criticism by members of Congress).

80. During its first 50 years the nation entered into 60 treaties and 27 published executive agreements. Leary, *supra* note 25, at 3. By 1940, new treaties totalled 800, and new executive agreements totalled 1200. *Id.* Between 1940-1955, new treaties numbered 139, while new published executive agreements totalled 1950. *Id.* Between 1946-1973, new treaties totalled 368, and the number of new international agreements other than treaties stood at 5,590. *Id.*

81. Rovine, *supra* note 38, at 406-07.

82. Leary, *supra* note 25, at 1.

83. *Id.*

propriety and course of the President's foreign policy actions, it is more likely to attack the President's foreign relations power.[84] When Congress and the President hold diverse views on substantive foreign policy issues, Congress may challenge the relative roles of the two branches in the treaty and agreement process.[85]

An alternative means of upholding Presidential power over foreign affairs is abstention, based on the political question doctrine.[86] Were it so inclined, the Supreme Court easily could cite prudential reasons for not interfering in the conduct of foreign affairs: the fact that foreign affairs clearly is not within the purview of the judicial branch, the fact that involving the Court in such questions might be perceived as expressing disrespect for the other branches of government, the lack of judicially manageable standards for making the decision, and the reality that the Court would be hard-pressed to enforce its mandate.[87] Nevertheless, the Supreme Court rarely has invoked the doctrine in such circumstances,[88] choosing instead to resolve the cases on the merits of the President's claim to constitutional power.[89] Occasionally, however, the Court has displayed its ability to avoid deciding at all, thus reaching the same result as if it had deferred on political question grounds. In a series of cases in the 1970s challenging the President's conduct of the Vietnam War, the Court simply affirmed or denied certiorari.[90] Consequently, the contours of the political

84. *Id.* For example, the Vietnam War controversy, the Watergate issues, and the general behavior of the Nixon administration gave rise to the Case Act in the early 1970s. *Id.* The Case Act requires that international agreements other than treaties be submitted to the Congress within 60 days after the agreement has entered into force. 1 U.S.C. § 112 (1976 & Supp. III 1979). The agreements are not submitted for congressional approval. Rather, the submission serves the purpose of keeping Congress informed as to the President's executive agreement activity. Rovine, *supra* note 38, at 401-02. *See generally* Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463 (1976); Kutner, *Due Process of Foreign Policy: Proposals for Presidential Guidelines*, 6 LAW. AMERICAS 346 (1974).

85. *See* Leary, *supra* note 25, at 4-5. For discussion of proposals to require subsequent legislative approval or disapproval of executive agreements, see Rovine, *supra* note 38, at 421-31. *See generally* Sparkman, *Checks and Balances in American Foreign Policy*, 52 IND. L.J. 433 (1977).

86. The Supreme Court described a political question in Baker v. Carr, 369 U.S. 186, 217 (1962), as:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

87. *See id.*

88. *See* L. HENKIN, *supra* note 8, at 213; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 43, at 180; Scharpf, *Judicial Review and the Political Question: A Fundamental Analysis*, 75 YALE L.J. 517, 542 (1966).

89. *See* L. HENKIN, *supra* note 8, at 213; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 43, at 180.

90. Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Atlee v.

question doctrine in foreign affairs are not at all clear.[91] As a result, challenges to Presidential activity remain subject to two defenses: (1) that the action is within the executive's constitutional powers, and (2) that whatever the extent of the President's powers, the Court should not interfere.

### C. *The President's Power to Settle Claims*

International law does not recognize an individual citizen or his claim against a foreign state or its citizens.[92] In theory the citizen's claim belongs to his government, just as the corresponding debt belongs to the government of the debtor. Thus, the claim and debt between individuals become a claim and debt between governments and serve as valuable bargaining chips in international negotiations.[93] Government ownership of individual claims and debts has established the international agreement as an integral part of the international claims settlement mechanism.[94] The United States has participated in many such claims settlement agreements.[95]

Historically, the President's right to conduct all negotiations with foreign states placed him in the best position to settle international claims on behalf of American citizens.[96] The President's participation in this claims settlement process can be traced to 1799 when President John Quincy Adams negotiated and concluded the Wilmington Packet with the Netherlands.[97] Acting to settle the claim of an American citizen for a seized ship and its cargo, President Adams established the earliest precedent for settlement of claims agreements without Senate approval.[98] The practice is now well-established, as Presidents repeatedly have asserted the authority to settle the claims of American citizens by executive agreement.[99] During

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Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973).

91. *See* Thomas & Thomas, *supra* note 21, at 891-94.

92. L. HENKIN, *supra* note 8, at 262.

93. *Id.* Governments traditionally have treated these claims as national assets so that the claims can be used for bargaining in international dealings. *Id.*

94. The Supreme Court articulated and applied this international claims doctrine in United States v. Diekelman, 92 U.S. 520, 524 (1876). *See* Simpson, *The Use of Executive Agreements in the Settlement of International Reclamations*, 8 DET. L. REV. 23, 23-24 (1938) (redress must be sought through claimant's own government before international tribunal will recognize claims).

95. *See* note 99 *infra*. In United States v. Pink, 315 U.S. 203, 240 (Frankfurter, J., concurring), Justice Frankfurter stated that the President's authority to settle claims long has been recognized as evidenced by practice. For discussion of *United States v. Pink*, see notes 110-14 *infra* and accompanying text.

96. S. CRANDALL, *supra* note 26, at 108; note 27 *supra* and accompanying text.

97. Rovine, *supra* note 38, at 410. For the text, relevant documents, and history of the Wilmington Packet, see 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1075-1103 (H. Miller ed. 1971) [hereinafter cited as 5 TREATIES].

98. Rovine, *supra* note 38, at 410-11 n.65 (quoting 5 TREATIES, *supra* note 97, at 1079).

99. Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement*, 69 AM. J. INT'L L. 738, 844 (1975). The agreement may take the form of an exchange of notes, a protocol, or memorandum, and is binding when completed by the President or the President's representative. Simpson, *supra*

the nineteenth century treaties were the most common form of reclamation agreement.[100] Since World War II, however, the President almost exclusively has exercised the executive agreement power to settle claims.[101] As a practical matter, if congressional appropriations do not appear necessary, the State Department settles claims without the consent of the Senate.[102] Moreover, Congress rarely has challenged the President's authority to settle claims by executive agreement.[103]

Although the evolution of the President's power to settle claims has stemmed primarily from usage, the Supreme Court has upheld the constitutionality of the power both in *United States v. Belmont*[104] and *United States v. Pink*.[105] In *Belmont* the Court addressed a challenge to the Litvinov Assignment.[106] The controversy arose when the United States, pursuant to that assignment, sought to recover funds deposited by a Russian corporation in a New York bank. Previously, the Soviet Union had nationalized the corporation and appropriated all its assets and property. In agreeing to the Litvinov Assignment, the President of the United States reached a claims settlement with the Soviets wherein that Government assigned all its claims against American citizens to the United States Government. The Soviets relinquished all rights to pursue the claims themselves. Concluding the agreement without the consent of the Senate, the President also officially recognized and established diplomatic relations with the Soviet Government. Though the issue on appeal focused on whether the agreement could override New York public policy,[107] the Court also addressed the constitutionality of the Presidential claims settlement process. Significantly, the Court in *Belmont* viewed the recognition

note 94, at 35-36. Those claims not definitely settled by executive agreement are submitted to arbitration commissions under Presidential authority. *Id.* at 37-38; Levitan, *supra* note 38, at 382. For examples of agreements for settlement by arbitration or by definitive settlement, see S. CRANDALL, *supra* note 26, at 108-11; Hyde, *Agreements of the United States Other Than Treaties*, 17 THE GREEN BAG 229, 237-38 (1905).

100. Lillich, *supra* note 99, at 845.

101. *Id.* The Supreme Court in *Dames & Moore* noted that Presidents have completed at least 10 binding claims settlement agreements with foreign nations since 1952. Dames & Moore v. Regan, 101 S. Ct. 2972, 2987, 69 L. Ed. 2d 918, 940 (1981); the agreements are cited at *id.* n.9.

102. 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 247 (1970).

103. Lillich, *supra* note 99, at 846. Lillich discusses the Gravel Amendment, a rare example of congressional interference with the claims settlement process. In passing the Gravel Amendment, Congress blocked a lump sum settlement with Czechoslovakia on behalf of United States claimants. Trade Act of 1974, 19 U.S.C. § 2438 (1976) (commonly referred to as the Gravel Amendment).

104. 301 U.S. 324 (1937).

105. 315 U.S. 203 (1942).

106. Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Publication of the Department of State No. 528, Eastern European Series, No. 1 (1933). For details of events surrounding the exchange of notes and the agreement's implementation, see W. COWLES, TREATIES AND CONSTITUTIONAL LAW: PROPERTY INTERFERENCES AND DUE PROCESS OF LAW 275-76 (1941).

107. 301 U.S. at 327. The respondents argued that New York public policy prohibited the act of confiscation that would occur if the United States enforced the Russian nationalization decree. *Id.* The Court, however, ruled that international executive agreements take precedence over state policy. *Id.*

of the Soviet Government, the establishment of diplomatic relations, and the claims assignment as elements of a single transaction.[108] The Court noted the President's independent power to "speak as the sole organ" in foreign affairs and concluded that no doubt existed as to the President's authority to enter into the claims settlement, without the consent of the Senate, as part of the total agreement.[109]

Soon after *Belmont* the Court again considered the Litvinov Assignment in *United States v. Pink*.[110] Reasoning that the President's power to recognize foreign governments carries the authority to remove obstacles to full recognition,[111] the Court reaffirmed its position in *Belmont* that the recognition of the Soviet Government and the claims settlement constituted a single agreement.[112] Outstanding claims were an obstacle to full recognition,[113] and the Court in *Pink* ruled that the "[p]ower to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.' "[114]

Commentators have criticized the Supreme Court's reasoning in the *Belmont* and *Pink* decisions. They argue that the extension of the power to establish diplomatic relations, which in turn is based on the narrow Presidential power to receive ambassadors, is both overly extensive and unwarranted.[115] This viewpoint is supported by the fact that the resolution of the principle issue in both *Belmont* and *Pink*, whether the executive agreement could override state policy, did not require the Court to interpret the reach of the power to receive ambassadors.[116]

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108. *Id.* at 330. The Court labelled the unified transaction an "international compact." *Id.*

109. *Id.* The Court noted that "an international compact, such as this was, is not always a treaty which requires the participation of the Senate." *Id.* The Court further found that the claims assignment did not confiscate private property in violation of the fifth amendment. *Id.* at 332. The Court stated that the Constitution's protections are not extraterritorial. Therefore, redress for foreign citizens whose own country has taken their property must lie with their own government. *Id.* For treatment of fifth amendment limitations on claims settlement agreements, see notes 121-31 *infra* and accompanying text.

110. 315 U.S. 203 (1942).

111. *Id.* at 229. The President recognizes a foreign government when he exercises his constitutional power to receive ambassadors. Therefore, by implication the President is deemed to have the power to recognize foreign governments through other means. A. LÉVITT, *supra* note 13, at 21. *But see* L. HENKIN, *supra* note 8, at 41 (receiving ambassadors is more a function to be performed by a figurehead than a power).

112. 315 U.S. at 230. The Court ruled, as it had in *Belmont*, that the Litvinov Assignment, an executive agreement, was valid without the participation or consent of the Senate. *Id.* at 229.

113. *Id.* at 229.

114. *Id.* (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).

115. *See, e.g.*, Ohly, *Advice and Consent: International Executive Claims Settlement Agreements*, 5 CAL. W. INT'L L.J. 271, 282 (1975). For an extensive, critical examination of the *Belmont* and *Pink* decisions, see A. LÉVITT, *supra* note 13, at 21-38.

116. Ohly, *supra* note 115, at 282. Ohly reviews the respective roles of the Congress and the President in international claims settlement. Advocating that the legislative and executive branches share the settlement power concurrently, he concludes that the Presidential power to settle claims pursuant to the recognition of foreign governments is not sufficient

Despite criticism of the Supreme Court's expansive reasoning in both *Belmont* and *Pink*, lower courts have relied on these cases to extend further the President's power to settle claims. In *Ozanic v. United States*[117] the Second Circuit upheld the implied constitutional power of the President to settle claims between the United States and a foreign government. Unlike the agreement in *Belmont* and *Pink*, however, the settlement agreement in *Ozanic* did not coincide with the recognition of a foreign government.[118] Although the Court acknowledged this factual difference from *Belmont* and *Pink*, it could find no reason to restrict the claims settlement power to incidents of government recognition.[119] Rather, the court reasoned that the continued amity between nations necessitated such settlements.[120]

Executive claims settlement agreements are subject to the constitutional prohibitions against government activity that infringes on the rights of individuals.[121] Although executive settlement agreements theoretically could be attacked through the fifth amendment prohibition against the taking of private property for public purposes without just compensation,[122] the Supreme Court never has invalidated a claims settlement agreement on fifth amendment grounds.[123] Nevertheless, the fifth amendment protection against government taking of private property without just compensation remains an issue in claims settlement practice.[124]

When the settlement calls for a lump sum payment[125] or arbitration, the United States generally agrees to the payment or arbitration without the

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legal authority to preclude Congress from exercising its own settlement powers. *Id.* at 282-83.

117. 188 F.2d 228, 231 (2d Cir. 1951).

118. *Id.* at 229-30. The case involved a maritime collision claim against the United States released by Yugoslavia in a lend-lease settlement.

119. *Id.* at 231.

120. *Id. Ozanic* was cited with approval by the Supreme Court in Dames & Moore v. Regan, 101 S. Ct. 2972, 2988-89, 69 L. Ed. 2d 918, 942 (1981).

121. *See* note 68 *supra* and accompanying text.

122. U.S. CONST. amend. V.

123. L. HENKIN, *supra* note 8, at 263. The claims settlement may be challenged as to the details of a particular settlement, the procedure used in paying private claimants, or the congressional provision or nonprovision of award and payment. *Id.* Henkin theorizes that the Court's failure to scrutinize any settlement for fifth amendment violations may be because the Court does not consider the settlement a "taking." Rather, the Court, relying on principles of international law, considers the government, not the claimant, to be the claim's owner. The Court also possibly considers the settlement a nonjusticiable political question. *Id.* at 263-64; *see* notes 86-91 *supra* and accompanying text.

124. The French Spoilition Claims in the early nineteenth century exemplify the fifth amendment issue. By treaty, in 1800, the United States waived the claims of American shipowners against France in return for forgiveness of an alleged treaty breach by the United States. The United States had taken the shipholders' claims to nullify claims against the United States for the good of the nation. Congress, however, did not appropriate compensation funds until 1885. *See* Gray v. United States, 21 Ct. Cl. 340 (1886); L. HENKIN, *supra* note 8, at 263. *See also* W. COWLES, *supra* note 100, at 211-19.

125. Under such a settlement the United States terminates the individual American claims in exchange for a lump sum payment by the foreign nation. L. HENKIN, *supra* note 8, at 262. Congress established the International Claims Commission to determine the interest of each individual American claimant in lump sum settlement funds. International Claims Settlement Act of 1949, 22 U.S.C. § 1623(a) (1976).

consent of the claimants.[126] Often a lump sum payment settlement will have a confiscatory impact on the claims, because the settlement is for less than the value at stake.[127] An unfavorable lump sum settlement or an agreement to arbitration may occur when national interests in continuing relations with a foreign state and other political considerations take precedence over the individual claimants' economic interests.[128] The claimants under a lump sum payment agreement receive little sympathy from the courts, possibly because they are more often considered recipients of a windfall, rather than as individuals deprived of legal rights.[129]

## II. THE IRANIAN CLAIMS SUSPENSION LITIGATION

The issues relevant to the Presidential claims settlement power have received recent judicial consideration in the Iranian claims suspension litigation. The facts giving rise to *Dames & Moore v. Regan*[130] illustrate the context and basis for much of the Iranian assets litigation concerning the President's suspension of American claims.[131] On November 4, 1979, Iranian militants seized the American Embassy in Tehran, taking the diplomatic staff hostage. President Jimmy Carter declared a national emergency on November 14, 1979, pursuant to the International Emergency Economic Powers Act (IEEPA)[132] and froze all Iranian assets within the jurisdiction of the United States.[133] On November 26, 1979, the President issued regulations specially licensing certain judicial proceedings against Iran, but prohibiting any entry of judgment in those proceedings.[134] Dames & Moore, a California engineering firm, brought suit in the United States District Court for the Central District of California

126. *See* RESTATEMENT (SECOND), *supra* note 43, § 213: "The President may waive or settle a claim against a foreign state based on the responsibility of the foreign state for any injury to a United States national, without the consent of such national." *See also* notes 92-94 *supra* and accompanying text.

127. Ohly, *supra* note 115, at 274 n.21. A review of 10 recent settlement programs administered by the Foreign Claims Settlement Commission reveals that the indemnification of the claimants averaged 35.47% of the amount awarded and 6.61% of the total amount claimed. *Id.* Moreover, delays in settlement payment and the effects of inflation make the compensation even more inadequate. *Id.*

128. L. HENKIN, *supra* note 8, at 263; RESTATEMENT (SECOND), *supra* note 43, § 213, Reporter's Note.

129. Lillich, *supra* note 99, at 846.

130. 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981).

131. The authority of the President to nullify judicial attachments of Iranian assets and to direct the transfer of Iranian assets also was at issue in *Dames & Moore*. *Id.* at 2982-84, 69 L. Ed. 2d at 934-37. The Court concluded that the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (Supp. III 1979), provided the authorization for the President to take these actions. 101 S. Ct. at 2984, 69 L. Ed. 2d at 937.

132. 50 U.S.C. §§ 1701-1706 (Supp. III 1979). The declaration of a national emergency under the IEEPA required a finding that the Iranian crisis constituted an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." *Id.* § 1701.

133. Exec. Order No. 12,170, 44 Fed. Reg. 65729 (1979). The President isued the order pursuant to presidential power under the IEEPA. 50 U.S.C. § 1702(a)(1)(B) (Supp. III 1979).

134. 44 Fed. Reg. 67617 (1979); *see* 31 C.F.R. §§ 535.101-.904 (1981) for current regulations governing the control of Iranian assets.

against the Iranian Government, the Atomic Energy Organization of Iran, and several Iranian banks on December 19, 1979.[135] Dames & Moore alleged that the Atomic Energy Organization owed it $3,436,694.30 plus interest for services rendered under a contract with a subsidiary to conduct a nuclear power plant site selection study in Iran.[136] Subsequently, the district court issued attachment orders against the defendants' property to secure any further judgment against them.[137]

On January 19, 1981, the United States made final the agreement with Iran securing the release of the hostages.[138] Stating that the purpose of the United States and Iran was to terminate all litigation between the two Governments and their nationals,[139] the agreement provided for an Iran-United States Claims Tribunal[140] authorized to conduct final and binding arbitration on all such claims.[141] Accordingly, the United States agreed to terminate all legal proceedings in its own courts[142] and to transfer back all Iranian assets held in the United States except for one billion dollars. That money was to be placed in escrow to satisfy Claims Tribunal awards against Iran.[143] On January 19, 1981, President Carter implemented the agreement through a series of executive orders[144] that included a nullification of judicial attachment orders[145] and a directive to initiate the transfer of Iranian assets.[146]

On April 28, 1981, Dames & Moore challenged the enforcement of the agreement, the implementing orders, and the regulations.[147] The district

135. 101 S. Ct. at 2979, 69 L. Ed. 2d at 930.

136. *Id.*

137. *Id.*

138. *See* note 1 *supra* and accompanying text.

139. Agreement I, *supra* note 2, ¶ B.

140. Agreement II, *supra* note 2, art II, ¶ 1: "An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States . . . ."

141. *Id.* art. IV, ¶ 1: "All decisions of the Tribunal shall be final and binding."

142. Agreement I, *supra* note 2, ¶ B: "[T]he United States agrees 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 [and] to prohibit all further litigation based on such claims . . . ."

143. *Id.* Points II-III, §§ 2-9.

144. Exec. Order Nos. 12,276-12,285, 46 Fed. Reg. 7913 (1981).

145. Exec. Order No. 12,277, 46 Fed. Reg. 7915 (1981). The President ordered the revocation of the license authorizing attachment of the frozen Iranian assets and nullification of the attachments made pursuant to that license. *Id.*

146. Exec. Order No. 12,279, 46 Fed. Reg. 7919 (1981). The President ordered all banks holding Iranian assets to transfer them to the Federal Reserve Bank of New York in preparation for their return to Iran. *Id.* On Feb. 24, 1981, President Ronald Reagan ratified the Carter executive orders. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981). Relevant Treasury Department regulations followed. Treas. Reg. § 535 (1981). The Reagan order also suspends all claims "except as they may be presented to the tribunal." Exec. Order No. 12,294, 46 Fed. Reg. 14,111, 14,111 (1981). According to the order, the claims had no legal effect in the United States courts during the suspension period, suspension of a particular claim terminated if the Tribunal determined it did not have jurisdiction, and the Tribunal's decision on the merits of a claim operated as a final resolution and discharge of the claims for all purposes. *Id.*

147. 101 S. Ct. at 2980, 69 L. Ed. 2d at 932. Dames & Moore sought declaratory and

court denied a motion for a preliminary injunction and dismissed the complaint for failure to state a claim upon which relief could be granted.[148] Subsequently, Dames & Moore appealed to the Ninth Circuit and sought a writ of certiorari before judgment because of the rapidly approaching June 19, 1981, deadline for the transfer of Iranian assets.[149] The United States Supreme Court granted certiorari and adopted an accelerated review schedule due to the significance of the issues and the demand for prompt resolution.[150]

In granting certiorari, the Supreme Court noted that the contradicting opinions of the lower courts in the Iranian assets litigation merited a clarifying statement on the relevant issues by the Supreme Court.[151] For example, in *Marschalk Co. v. Iran National Airlines Corp.*[152] the United States District Court for the Southern District of New York held that the President lacked the authority to suspend an advertising agency's breach of contract claim against the Iranian national airline.[153] After determining that the President did not have the express or implied authority under the IEEPA to suspend the litigation of the claims in the United States court,[154] the court addressed the question of the President's constitutional authority.[155] Noting that by definition a settlement means that the claimants receive something of value in exchange for terminating United States court proceedings on their claims, the *Marschalk* court reasoned that the agreement did not constitute a settlement.[156] The court contended that the

injunctive relief against the United States and the Secretary of Treasury. *Id.* Previously, the district court had granted Dames & Moore's motion for summary judgment. *Id.* at 2980, 69 L. Ed. 2d at 931-32. The court, however, later stayed the execution of judgment because of the relevant Executive Orders. *Id.*, 69 L. Ed. 2d at 932. As a result, Dames & Moore sought relief on the grounds that the President and Secretary of the Treasury had exceeded their constitutional and statutory authority in implementing the agreement. *Id.*

148. *Id.*, 69 L. Ed. 2d at 932.

149. *Id.* at 2981, 69 L. Ed. 2d at 932; *see* Agreement II, *supra* note 2, art. I.

150. 101 S. Ct. at 2981, 69 L. Ed. 2d at 932-33.

151. *Id.* at 2977, 69 L. Ed. 2d at 928.

152. 518 F. Supp. 69 (S.D.N.Y.), *rev'd and remanded*, 657 F.2d 3 (2d Cir. 1981). The Second Circuit previously had remanded 96 Iranian assets cases to the district court with instructions to determine the validity of the President's actions in nullifying the attachments and suspending the claims. New Eng. Merchant's Nat'l Bank v. Iran Power Generation & Transmission Co., 646 F.2d 779, 784-85 (2d Cir. 1981). The district court chose *Marschalk* as the case most appropriate to the resolution of the issue. 518 F. Supp. at 75-76.

153. 518 F. Supp. at 91-92.

154. *Id.* at 78-81. The court noted that pursuant to the IEEPA, 50 U.S.C. § 1702(a)(1)(B) (Supp. III 1979), the President has the power in a national emergency to regulate foreign property located in the United States. 518 F. Supp. at 78. The court concluded, therefore, that because Marschalk's claim was an effort to establish a contractual right to compensation irrespective of the location of Iranian property, it was not amenable to Presidential regulation under the IEEPA. *Id.* at 79. Moreover, the court found that the legislative history of the IEEPA limited Presidential power to economic regulation in times of national emergency. It did not, the court concluded, expand that power to include the seizure of property for the benefit of the United States. *Id.* at 79-80. The court also found that Congress, pursuant to the Foreign Sovereign Immunities Act [FSIA], 28 U.S.C. §§ 1330, 1602-1611 (1976), intended to prohibit the President from interfering in litigation by American citizens against foreign defendants. 518 F. Supp. at 81-83.

155. 518 F. Supp. at 85-92.

156. *Id.* at 88.

claimants had not yet received pecuniary satisfaction for their claims,[157] and had lost their access to United States courts and the corresponding due process safeguards, including the right to appeal.[158] The court determined that successful claimants probably would recover only twenty cents for every dollar claimed, because the total claims against Iran exceed the amount in the settlement fund by five times.[159] Furthermore, the court could not find any evidence that Iran had given up any consideration in the agreement other than the release of the hostages.[160] The court in *Marschalk* therefore concluded that the hostage crisis, rather than the claims of American citizens, had been settled by the agreement.[161]

Assuming arguendo that a settlement occurred, the *Marschalk* court went on to discuss whether the President had the constitutional authority to conclude such a settlement to secure the hostages' release.[162] The court distinguished the *Belmont* and *Pink* cases as standing for the President's authority to enter executive agreements vital to the recognition of a foreign government, but not for the President's power to use the private claims of citizens for bargaining purposes in international agreements.[163] In addition to a lack of judicial precedent, the President's action, the court noted, violated the separation of powers doctrine.[164] Reasoning that the Congress holds the power to grant jurisdiction to the courts, the *Marschalk* court concluded that the President usurped this power by depriving the courts of congressionally legislated jurisdiction over the Iranian assets claims.[165] Finally, the court in *Marschalk* found that the agreement violated the fifth amendment prohibition against the taking of private property for public purposes without just compensation.[166] The court based this determination on a finding that the termination of a right to enforce a contract constituted a taking[167] and that the adjudication before the Tribunal did not guarantee just compensation.[168]

Although the *Marschalk* court resolved the claims suspension issue in favor of the claimant, other lower courts found that the President had the authority to take such action. In *Charles T. Main International, Inc. v. Kyuzestan Water & Power Authority*[169] the First Circuit Court of Appeals upheld the authority of the President to suspend the claim of an American

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* The court noted that in the agreement Iran could not give up its sovereign immunity defense because that defense had never been available. *Id.* Furthermore, the establishment of a settlement fund did not operate as consideration because it made up only a minor portion of the attached assets sacrificed by the claimants. *Id.*
161. *Id.*
162. *Id.* at 89-90.
163. *Id.*; *see* notes 104-16 *supra* and accompanying text.
164. 518 F. Supp. at 90-92.
165. *Id.* at 91.
166. *Id.* at 93-94; *see* notes 121-29 *supra* and accompanying text.
167. 518 F. Supp. at 93.
168. *Id.* at 93-94; *see* text accompanying note 159 *supra*.
169. 651 F.2d 800 (1st Cir. 1981).

engineering firm seeking payment for services rendered in Boston and Iran on Iranian electrification projects.[170] Finding that the IEEPA could not provide the statutory authority for the Presidential claims suspension,[171] the First Circuit relied on the President's long-accepted, inherent constitutional power to settle the claims of American nationals.[172] The court concluded that the need to maintain a flexible Presidential power to resolve international disputes necessitated continued recognition of the claims settlement authority.[173] Accordingly, the submission of private claims against Iran to the Arbitral Tribunal constituted an appropriate settlement.[174] Furthermore, the First Circuit could find no Presidential interference with the jurisdiction of the courts, because a binding settlement did not result in a dismissal of the claim for lack of jurisdiction.[175] Rather, the court stated that the compelled dismissal resulted from a failure to state a claim for relief.[176]

Similarly, in *American International Group, Inc. v. Iran*[177] the District of Columbia Circuit found that the claims suspension did not modify the jurisdiction of the courts.[178] Instead, the court ruled that the President, in light of long-standing practice, had the inherent authority to modify substantive law in settling the international claims of American citizens by international agreement.[179] The court considered the suspension, as opposed to the cancellation, of the claims[180] and the provision of the Tribunal as an alternative forum to be determinative factors.[181] Moreover, the court noted that the Congress's failure to disapprove of the President's actions enhanced the validity of the agreement and its corresponding executive orders.[182] Finally, the courts in both *Charles T. Main* and *American International Group* agreed that issues flowing from the taking clause[183] were not yet ripe for adjudication.[184]

The Supreme Court's accelerated action in *Dames & Moore* succeeded

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170. *Id.* at 814.

171. *Id.* at 809. This ruling was in agreement with the *Marschalk* court's ruling on the same issue. *See* note 154 *supra* and accompanying text.

172. 651 F.2d at 810-13.

173. *Id.* at 812-13.

174. *Id.* at 814.

175. *Id.* at 810.

176. *Id.*

177. 657 F.2d 430 (D.C. Cir. 1981).

178. *Id.* at 440-42.

179. *Id.* at 443-45. *But see* Marschalk Co. v. Iran Nat'l Airlines Corp., 518 F. Supp. 69, 83-84 (S.D.N.Y.), *rev'd and remanded*, 657 F.2d 3 (2d Cir. 1981) (the distinction by the *American Int'l Group* court between suspension of litigation as a jurisdictional modification and claims suspension as a substantive law modification is difficult to understand).

180. 657 F.2d at 447-48.

181. *Id.* at 447.

182. *Id.* at 445; *see* note 103 *supra* and accompanying text.

183. U.S. CONST. amend. V.

184. The court in *Charles T. Main* concluded that it was impossible to determine if the provision of an international tribunal constituted an inferior alternative to the previously available American courts such that a taking had occurred. 651 F.2d at 814-15. The court in *American Int'l Group* held that the court could not be assured the claimants would suffer loss. 657 F.2d at 447.

these conflicting lower court decisions. Because of the significance and exigencies of the situation, however, the Court qualified its decision as being narrowly confined to the interpretation of the Iranian hostage agreement.[185] The Court cautioned that the decision did not provide rules or guidelines to be followed in other situations.[186] Initially, Justice Rehnquist, writing for a unanimous Court, reviewed the IEEPA. The Court concluded that the IEEPA provided the authority for the President to nullify the claimants' post-November 14, 1979, attachments and to order the transfer of the Iranian assets in preparation for their return to Iran.[187] The Court, however, found that the IEEPA could not be interpreted as authorization for the President's claims suspension.[188] In reaching this conclusion, the Court reasoned that the private American claims against Iran did not constitute Iranian property transactions.[189] As a result, the Court agreed with the lower courts that these efforts to establish liability fell outside the authority of the President to regulate under the IEEPA.[190] The Court also declined to find the statutory authority for the claims suspension in the Hostage Act of 1868.[191] Yet, the Court found that Congress intended, through both the IEEPA and the Hostage Act, to allow the President broad discretion in times of international crisis.[192] Thus, the two statutes proved relevant to the Court's determination of whether the President acted alone in effecting the claims settlement, or with the implied assent of Congress.[193]

The Court concluded that Congress historically had acquiesced to the President's settlement of international claims by executive agreement and that it implicitly had approved such practice.[194] Noting the prevalence of such acquiescence in the past, the Court cited the International Claims Settlement Act of 1949 as Congress's way of marking such agreements with congressional approval.[195] Specifically, the Court remarked that Congress had not acted in any way to disapprove or resist the agreement settling the American claims against Iran.[196] The Court found further support for the President's actions in prior Supreme Court decisions that rec-

185. 101 S. Ct. at 2977, 2991, 69 L. Ed. 2d at 928, 945-46.
186. *Id.* at 2977, 69 L. Ed. 2d at 928.
187. *Id.* at 2984, 69 L. Ed. 2d at 937.
188. *Id.*; *see* note 171 *supra* and accompanying text.
189. 101 S. Ct. at 2984-85, 69 L. Ed. 2d at 937.
190. *Id.* at 2985, 69 L. Ed. 2d at 937.
191. *Id.* The Hostage Act of 1868 provides the President with authority to take necessary actions, short of war, to secure the release of any American citizen held unjustly by a foreign government. 22 U.S.C. § 1732 (1976). The Court refused to apply the statute to the Iranian hostage crisis because Congress intended it to apply only when foreign governments refused to recognize the citizenship of naturalized Americans travelling abroad. 101 S. Ct. at 2985, 69 L. Ed. 2d at 938.
192. 101 S. Ct. at 2985, 69 L. Ed. 2d at 938.
193. *Id.* at 2985-86, 69 L. Ed. 2d at 938-39.
194. *Id.* at 2987, 69 L. Ed. 2d at 939-40.
195. *Id.* at 2987-88, 69 L. Ed. 2d at 941; *see* note 125 *supra*.
196. 101 S. Ct. at 2991, 69 L. Ed. 2d at 945. The Court noted that Congress could have enacted legislation affecting the agreement's enforcement or passed a resolution expressing disapproval of the agreement. *Id.*

ognized the executive agreement power.[197] The Court also approved the Arbitral Tribunal as an appropriate and traditional means of attaining a claims settlement because the claimants had received something of value, an international tribunal, in exchange for the suspension of their claims in American courts.[198]

In response to Dames & Moore's argument that the President had violated the separation of powers, the Court determined that the President had not modified the jurisdiction of the federal courts in suspending the claims.[199] The Court ruled that the President merely had modified the applicable substantive law by exercising the power to settle claims.[200] Finally, the Court refused to consider whether the claims suspension constituted a violation of the fifth amendment prohibition against the taking of private property without just compensation, because the issue was not ripe for adjudication.[201]

Thus, the Supreme Court in *Dames & Moore v. Regan* upheld the power of the President to suspend the claims of American nationals against Iran in order to achieve a resolution to the Iranian hostage crisis.[202] Relying on its prior decision in *Youngstown Sheet & Tube Co. v. Sawyer*,[203] the Court noted that "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."[204] Although the Court attempted to limit the precedential effect of the *Dames & Moore* decision, the Court's recognition of a gloss on Presidential power in upholding the President's actions resolving the Iranian hostage crisis has precedential implications.

The exigencies of the Iranian hostage crisis possibly influenced the

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197. *Id.* at 2988-89, 69 L. Ed. 2d at 942-43. The Court cited the *Belmont*, *Pink*, and *Ozanic* cases with approval. *Id.*; *see* notes 106-20 *supra* and accompanying text.

198. 101 S. Ct. at 2990-91, 69 L. Ed. 2d at 944-45. *But see* notes 156-61 *supra* for the *Marschalk* court's treatment of the question.

199. 101 S. Ct. at 2989, 69 L. Ed. 2d at 943. *But see* the *Marschalk* court's treatment of this question at notes 164-65 *supra* and accompanying text.

200. 101 S. Ct. at 2989, 69 L. Ed. 2d at 943. The Court discussed the FSIA in light of this issue. The Court concluded that the FSIA, which was intended to remove barriers to commercial litigation in federal courts against foreign states waiving sovereign immunity, did not bar the President from settling international claims. *Id.* at 2989-90, 69 L. Ed. 2d at 943-44. *But see* note 159 *supra* for the *Marschalk* court's interpretation of the FSIA.

201. 101 S. Ct. at 2991, 69 L. Ed. at 946. The Court noted, however, that should an unconstitutional taking be found, petitioner could seek restitution in the Court of Claims. *Id.* at 2991-92, 67 L. Ed. 2d at 946-47. The Court already had determined that the nullification of the judicial attachments did not constitute a taking, because the President had the authority to control the attachments and the claimants had not acquired a sufficient property interest in the attachments. *Id.* at 2984 n.6, 69 L. Ed. 2d at 936-37 n.6. In a separate opinion Justice Powell agreed with the Court's opinion except as to the determination that the attachments nullification did not constitute a taking entitling the claimants to just compensation. *Id.* at 2992, 69 L. Ed. 2d at 947. Justice Powell stated that both taking questions should have been left open for individual case resolution by the Court of Claims. *Id.* at 2992-93, 69 L. Ed. 2d at 947 (Powell, J., concurring in part, dissenting in part).

202. *Id.* at 2990, 69 L. Ed. 2d at 944.

203. 343 U.S. 579 (1952). For a discussion of *Youngstown*, see note 64 *supra*.

204. 101 S. Ct. at 2990, 69 L. Ed. 2d at 944 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)).

Court's decision to uphold the President's claims settlement actions. The Court's repeated cautions as to the narrowness of its decision indicate that the Court primarily intended to avoid the political consequences that would have resulted if the agreement had been invalidated. The Court, however, by basing its decision on past claims settlement practice, congressional acquiescence, and judicial recognition of the Presidential power to settle claims by executive agreement, defeated its own effort to render a narrow decision of limited precedential effect. In essence, the Court applied the traditional case-by-case delineation method of establishing the scope of the total Presidential foreign relations power.[205] The Court's decision to uphold the Iranian Hostage Agreement stretched the President's power to settle international claims further than ever before. For the first time, the Court upheld the President's power to settle claims by suspension and submission of the claims to arbitration when the claims were before a United States court prior to the suspension. Yet, the Court persisted in its avoidance of the fifth amendment taking question relevant to Presidential claims settlements. As a result the taking question remains a valid constitutional issue in claims settlement practice. Thus, *Dames & Moore v. Regan* represents an expansion of the President's power to settle international claims through the traditional means of a Presidential practice acquiesced to by Congress and recognized by the Supreme Court.

## III. CONCLUSION

Traditionally accepted practice has vested the President with the power to enter executive agreements without the advice and consent of the Senate. Similarly, the aggregation of Presidential foreign relations power authorizes the President to settle the claims of nonconsenting American citizens. The Supreme Court, acting to resolve the conflicting opinions of the lower courts, relied on these generally recognized powers in *Dames & Moore v. Regan* and upheld the validity of the President's suspension and submission to arbitration of American claims against Iran. Acknowledging that the President's actions were necessary to resolve the hostage crisis, the Court expanded the President's claim settlement power to new limits by upholding the settlement of claims already before United States courts as a valid exercise of Presidential power. In addition, the Court continued its practice of refusing to invalidate a claims settlement on fifth amendment grounds. As a result, future litigants undoubtedly will give the Court the opportunity to decide whether *Dames & Moore v. Regan* will stand as precedent or will remain merely an emergency adjudication of specific facts.

205. *See* notes 71-73 *supra* and accompanying text.