BYU Law Review

Volume 1982 | Issue 1 Article 4

3-1-1982

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Recommended Citation

Mark David Davis, *Presidential Power and the Iranian Hostage Agreement: Dames & Moore v. Regan*, 1982 BYU L. Rev. 161 (1982).
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CASE NOTES

Presidential Power and the Iranian Hostage Agreement: *Dames & Moore v. Regan*

As part of the agreement with Iran that made possible the release of the American hostages held in Tehran, the United States promised to transfer all Iranian assets out of the United States and to terminate all litigation by United States citizens against Iran. The President, without seeking or receiving formal congressional approval, moved to accomplish this by issuing a series of executive orders. Several of the hundreds of American claimants who thus lost their claims and their prejudgment attachments against Iran brought suit against the United States government, challenging the right of the President to settle their commercial claims by subjecting them to binding arbitration. Among these was the California-based engineering firm, Dames & Moore.[1]

I. Instant Case

The history of the *Dames & Moore* suit goes back to the beginning of the hostage crisis. In order to protect American claimants from a threatened withdrawal by Iran of its assets located in the United States, and in reaction to the seizure of the hostages, on November 14, 1979, President Carter declared a national emergency and froze "all property and interests in property of the Government of Iran" and of its "instrumentalities" which were subject to the jurisdiction of the United States.[2] Later, the Treasury Department issued regulations declaring that attachments and other judicial processes against Iranian property were void unless licensed,[3] but it soon granted a general license allowing prejudgment attachments.[4] Acting in accor-

1. Dames & Moore v. Regan, 101 S. Ct. 2972 (1981).
2. Exec. Order No. 12,170, 3 C.F.R. 457 (1980).
3. 31 C.F.R. § 535.203(e)(1981) (issued Nov. 15, 1979).
4. 31 C.F.R. § 535.504(a)(1981) (issued Nov. 26, 1979); 31 C.F.R. § 535.418 (1980) (issued Dec. 19, 1979).

dance with these regulations, on December 19, 1979, Dames & Moore filed suit in U.S. district court against Iran, the Atomic Energy Organization of Iran (AEOI), and certain Iranian banks, alleging that it was owed $3.4 million, plus interest, for services performed under a contract to conduct site studies for a proposed nuclear power plant in Iran.[5] To secure eventual judgment, the district court issued orders of attachment against certain Iranian property as authorized by the general license.[6]

Over a year later, on January 19, 1981, while Dames & Moore's suit against Iran was still pending, the United States and Iran at last came to an agreement for the release of the American hostages. This agreement was in the form of two Declarations of the Government of Algeria.[7] The Algerian Declarations required the United States

> to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.[8]

The agreement provided for the creation of an "Iran-United States Claims Tribunal" to decide the fate of claims transferred out of United States courts by the agreement.[9] The Declarations bound the United States to transfer to Iranian control all assets of Iran held in the United States, including those encumbered by judicial attachment.[10] One billion dollars of these transferred assets were to be placed in a special account, to be used to pay off the awards of the Claims Tribunal.[11]

As a first step toward fulfilling these obligations, President

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5. Dames & Moore v. Atomic Energy Org. of Iran, No. 79-04918 (C.D. Cal. filed Dec. 19, 1979). Actually the party to the contract was Dames & Moore International, S.R.L., a wholly owned subsidiary which had assigned its interest in the suit to Dames & Moore. *See* 101 S. Ct. at 2979.

6. 101 S. Ct. at 2979.

7. Declaration by the Government of the Democratic and Popular Republic of Algeria, 81 DEP'T ST. BULL. 1 (Feb. 1981) [hereinafter cited as Declaration I]; 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, 81 DEP'T ST. BULL. 3 (Feb. 1981) [hereinafter cited as Declaration II].

8. Declaration I, *supra* note 7, at 2 (General Principle B).

9. Declaration II, *supra* note 7, at 3 (Article II).

10. Declaration I, *supra* note 7, at 2 (General Principle A).

11. Declaration I, *supra* note 7, at 2 (para. 7).

Carter, on January 19, 1981, issued a series of executive orders that revoked all licenses permitting the exercise of any "right, power, or privilege" in Iranian funds, nullified all attachments and other interests in Iranian assets acquired after the November 14, 1979, freeze order, and required the transfer of all Iranian assets held by American banks to the Federal Reserve Bank of New York for return to Iran.[12]

After a month-long review of the United States' obligation under the Declarations, newly inaugurated President Reagan "ratified" on February 24 President Carter's agreement with Iran and his January 19 orders, and issued Executive Order No. 12,294, in which he "suspended" all claims against Iran which could be presented to the Claims Tribunal, providing further that all suspended claims "shall have no legal effect in . . . any court of the United States."[13]

Meanwhile, on January 27, Dames & Moore had been granted summary judgment against Iran and the AEOI.[14] Dames & Moore then attempted to execute its $3.4 million judgment against certain Iranian property in the State of Washington. But having received the executive order suspending claims against Iranian defendants, the district court stayed the judgment, vacated the prejudgment attachments obtained against Iran and AEOI, and stayed further proceedings against the defendant banks.[15]

Dames & Moore, left with a final but unenforceable judgment, then commenced this action against the United States and the Secretary of the Treasury.[16] Dames & Moore sought a declaratory judgment that the agreement embodied in the Algerian Declarations was beyond the statutory and constitutional

12. Exec. Order Nos. 12,276-12,285, 46 Fed. Reg. 7,913-32 (1981) (reprinted in the notes to 50 U.S.C.A. § 1701 (West Supp. 1981)). Nearly all the estimated $4 billion in assets in the United States were subject to United States court attachments. *See* Norton & Collins, *Reflections on the Iranian Hostage Settlement*, 67 A.B.A. J. 428, 430 (1981).

13. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981). The President authorized the Secretary of the Treasury, Donald T. Regan, to carry out the order. *Id.* at 14,112.

14. 101 S. Ct. at 2980. Although summary judgment was apparently granted on January 27, the judgment was not filed and entered until February 18. *See* Judgment Against Defendants Atomic Energy Organization of Iran and State and Government of Iran, *reprinted in* Appendix to Petition for a Writ of Certiorari at 13-14, Dames & Moore v. Regan, 101 S. Ct. 2972 (1981). Summary judgment was not granted against the bank defendants. *Id.* at 14.

15. 101 S. Ct. at 2980.

16. Dames & Moore v. Regan, No. CV 81-2064 (C.D. Cal. June 2, 1981) (filed April 28, 1981), *aff'd*, 101 S. Ct. 2972 (1981).

authority of the President and an injunction against further governmental interference in Dames & Moore's litigation against Iran.[17] The district court, however, denied Dames & Moore's motion for a preliminary injunction and on May 28, 1981, dismissed its suit for failure to state a claim upon which relief could be granted.[18]

Dames & Moore appealed to the Ninth Circuit Court of Appeals on June 3. The United States Supreme Court, concluding that the issues presented by the case were of "great significance and demand[ed] prompt resolution," granted certiorari before judgment.[19]

On July 2, just a week after oral argument, the Supreme Court announced its decision that the hostage agreement was valid and that the President had authority to return to Iran all Iranian assets and to transfer private claims against Iran to the Claims Tribunal.[20] Because the *Dames & Moore* decision removed the legal obstacles to fulfillment of the American obligations under the Algerian Declarations, it has obvious historical and political significance. But of more lasting legal importance is the significant contribution that the case makes to the law of presidential power.[21]

II. Analysis

It is generally granted that the President has the major responsibility for direction of U.S. foreign policy.[22] As part of this responsibility, but without explicit constitutional authority, the President has conducted much of that foreign policy by means of "executive agreements" with foreign nations. These executive

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17. Brief for Petitioner at 6, Dames & Moore v. Regan, 101 S. Ct. 2972 (1981).

18. 101 S. Ct. at 2980.

19. *Id.* at 2981; 101 S. Ct. 3071 (1981). Adding to the urgency in light of the July 19 assets transfer deadline was the district court's injunction against transfer of the Iranian assets sought to be executed upon by Dames & Moore, pending appeal. 101 S. Ct. at 2981; Declaration I, *supra* note 7, at 2 (para. 6). The Government filed a brief in support of certiorari before judgment, citing the need for clear binding precedent to guide the district courts in deciding the more than 400 cases involving Iranian assets then pending throughout the country. Memorandum for the Respondents, On Petition for a Writ of Certiorari Before Judgment, Dames & Moore v. Regan, 101 S. Ct. 2972 (1981).

20. 101 S. Ct. at 2984, 2991.

21. This is so despite Justice Rehnquist's careful disclaimer: "We attempt to lay down no general 'guide-lines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case." *Id.* at 2977.

22. L. Henkin, Foreign Affairs and the Constitution 37 (1972).

agreements have the force of treaty but do not require Senate approval.[23] The agreement with Iran was just such a creature.

The issue presented in *Dames & Moore* was whether the President, by executive agreement not requiring authorization by Congress, was empowered to suspend Iranian claims of American citizens as part of an important foreign policy reconciliation with Iran. The Supreme Court held that the agreement was valid but posited its validity on congressional, not executive, power. Existing historical and legal precedent could have justified the Court's finding in the President inherent authority to contract and fulfill obligations of the Algerian Declarations. The Court, however, refused to recognize such executive authority and thereby set a prudent limit on presidential power.

A. *The Attached Assets Transfer Issues*

Dames & Moore contended that (1) the nullification of judicial attachments, (2) the transfer of assets subject to attachment, and (3) the suspension of litigation against Iran were beyond the constitutional and statutory power of the President and were thus unconstitutional and void.[24]

The Court had little difficulty with the petitioner's first two contentions because "the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization."[25] The Court held that the President's orders were authorized by the International Emergency Economic Powers Act (IEEPA).[26] The IEEPA grants the President, in times of declared international emergency, and with notice to Congress, the power to "regulate, direct and compel, nullify, void, prevent or prohibit, any . . . use, transfer . . . or exercising any right, power, or privilege with respect to . . .

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23. *Id.* at 177-79.

24. Brief for Petitioner at 6, Dames & Moore v. Regan. Petitioner was not contending that the "Government" did not have power to block its Iranian claims and nullify its attachments. Instead it was contesting the power of the President, rather than Congress, to do so. *See* Transcript of Oral Argument at 80-81, Dames & Moore v. Regan, 101 S. Ct. 2972 (1981). Further, despite the recent renaissance of the nondelegation doctrine, no one questioned the constitutional propriety of delegation of Congress' authority to the President. *See* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 445 U.S. 607, 646 (1980), and especially Justice Rehnquist's concurrence, *Id.* at 685-86 (Rehnquist, J., concurring).

25. 101 S. Ct. at 2984.

26. *Id.* at 2982-84. This act is a 1977 reform of the World War I vintage Trading with the Enemy Act, 50 U.S.C. app. § 5(b) (1976).

any property in which any foreign country or a national thereof has any interest; by any person . . . subject to the jurisdiction of the United States."[27]

The Supreme Court, and indeed all the lower courts which had ruled on the question,[28] had no trouble fitting into the language of the IEEPA both the President's freeze order (preventing or prohibiting a transfer of assets) and his later transfer order (directing and compelling the transfer of the assets from United States banks to Iran).[29] Similarly, the Court considered petitioner's attachments to be rights in Iranian property which were properly nullified by the President's authority under the Act.[30] Because it found that the President's actions were directly authorized by Congress, the Court had no occasion to touch on the question of inherent presidential power in deciding the attachments issue.

B. *The Claims-Settlement Issue*

The issue of presidential authority was central to the Court's decision with regard to the constitutional legitimacy of Executive Order No. 12,294, which provides that "all claims which may be presented to the Iran-United States Claims Tribunal" under the terms of the Algerian Declarations "are hereby suspended, except as they may be presented to the Tribunal."[31]

1. *Express congressional delegation*

In ordering the claims suspension, the President had purported to act by his constitutional authority and pursuant to the IEEPA and the recently dubbed "Hostage Act."[32] The Court

27. 50 U.S.C. § 1702(a)(1) (Supp. III 1979).

28. Memorandum for the Respondents, On Petition for a Writ of Certiorari Before Judgment at 11, Dames & Moore v. Regan.

29. 101 S. Ct. 2982-83.

30. *See also* Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 806-07 (1981).

31. 46 Fed. Reg. 14,111 (1981). An issue not directly relevant here is whether "suspension" equals "termination" under the Agreement. The Order provides for termination only upon decision on the merits by the Tribunal. If the Tribunal declines jurisdiction, a claim may be raised again in U.S. courts and will not literally have been terminated.

32. 22 U.S.C. § 1732 (1976). The President also claimed authority under 3 U.S.C. § 301 (1976) and 50 U.S.C. § 1631 (1976), but the Government did not rely on them in argument. Brief for the Federal Respondents at 52-53, Dames & Moore v. Regan, 101 S. Ct. 2972 (1981); 101 S. Ct. at 2984.

found that neither of the Acts authorized Executive Order No. 12,294. The Court decided that the broad language of the IEEPA was not broad enough to embrace th suspension of claims, since "claims of American citizens against Iran are not in themselves transactions involving Iranian property" but rather constitute an "effort to establish liability and fix damages and [do] not focus on any particular property."[33]

The second Act relied upon by the President, the Hostage Act, was passed in 1868 in response to the practice of certain foreign governments of forcibly repatriating naturalized American citizens visiting Europe.[34] The Act provides that in a case where "any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government" the President "shall forthwith demand the release of such citizen, and . . . shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release."[35]

Despite the Court's willingness to read literally the language of IEEPA in justifying the attachment nullification,[36] the Court refused to read literally the Hostage Act to allow the President the broad power to take whatever action "he may think necessary," "not amounting to acts of war," to release the hostages. The Court based its decision on its perception that the 1868 Act was not intended to apply in a crisis such as the present one.[37] In sum, the Court held that there was no express congressional authority for the presidential claims-settlement.[38]

If the President's action was to be considered valid, the obvious alternative to congressional authorization for the claims settlement would be inherent executive authority in the Presidency. Indeed, President Reagan claimed that Executive Order No. 12,294 was issued "[b]y authority vested in me as President by the Constitution."[39] But the Court refused to hold that the "President possesses plenary power to settle claims . . . against

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33. 101 S. Ct. at 2984-85.

34. *Id.* at 2985. The name "Hostage Act" apparently was coined for use in the Iranian hostage crisis. *See* American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 452 (D.C. Cir. 1981) (separate statement by Mikva, J.).

35. 22 U.S.C. § 1732 (1976).

36. *See supra* text accompanying notes 28-30.

37. 101 S. Ct. at 2985.

38. *Id.*

39. 46 Fed. Reg. 14,111 (1981).

foreign governmental entities."[40] The reasons for this decision, and indeed the decision itself, are somewhat unclear. This issue will be discussed after a consideration of how the Court upheld the claims-settlement agreements with neither express congressional authorization nor inherent presidential power.

2. *Implied delegation by congressional acquiescence*

Without some legitimating authority from either the Constitution or the Congress, the President's executive orders terminating litigation and settling American claims against Iran would have been void, and the United States would have been in breach of its agreement under the Declarations. To avoid that clearly impermissible result, the Court resorted to a fiction and found in congressional acquiescence an implicit delegation of congressional claims-settlement authority to the President. The Court first established that Congress has traditionally acquiesced in the President's power to settle claims. The President has, since at least 1799, settled scores of foreign claims of American nationals by executive agreement and the Congress has not objected.[41] This " 'long-continued practice, known to and acquiesced in by Congress [raises] a presumption that the [action] has been [taken] in pursuance of its consent.' "[42]

The Court buttressed its finding of acquiescence with some positive evidences of congressional acknowledgment of the President's claims-settling power. In enacting the International Claims Settlement Act of 1949,[43] Congress recognized and institutionalized executive settlements by providing a procedure for distributing to claimants the funds received from executive settlements.[44] Further, while it declined to find the IEEPA and the Hostage Act directly controlling, the Court discovered in the purpose and legislative history of those Acts a "congressional ac-

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40. 101 S. Ct. at 2991.

41. *Id.* at 2987. *See* Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump-sum Agreement,* 69 AM. J. INT'L L. 837, 844-45 (1975). Congress has objected to certain specific settlement terms, but not to the President's power to settle claims. *Id.*

42. 101 S. Ct. at 2990 (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)).

43. Pub. L. No. 81-455, 64 Stat. 54 (1949) (current version at 22 U.S.C. §§ 1621-1645 (1976 & Supp. IV 1980)).

44. 101 S. Ct. at 2987. This Act has been amended throughout the years to provide procedures for specific claim settlements. The most recent amendment was in 1980 and involved Viet Nam claims. 22 U.S.C. § 1645 (Supp. IV 1980).

ceptance of a broad scope for executive action in circumstances such as those presented in this case."[45] In short, the Court found that presidential settlement of claims was tacitly accepted by Congress as a function of the Presidency.

Having found congressional acquiescence in the presidential practice of claims settlement, the Court's next objective was to extrapolate a delegation of congressional authority from this acquiescence. The Court approached this task by referring to the theories of presidential power explicated in *Youngstown Sheet & Tube Co. v. Sawyer*,[46] a case which, according to the Court, "brings together as much combination of analysis and common sense as there is in this area."[47] Writing for the majority, Justice Rehnquist summarized the theory of separation and concurrence of powers devised by Justice Jackson in *Youngstown*. According to Justice Rehnquist, Jackson's theory outlines

> the consequences of different types of interaction between the two democratic branches in assessing presidential authority to act in any given case. [1] When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." [2] When the President acts in the absence of congressional authorization he may enter "a zone of twilight in which he and Congress may have concurrent

45. 101 S. Ct. at 2985, 2988. The Congress stressed in enacting the IEEPA that "nothing in this act is intended to interfere with the authority of the President to . . . settl[e] claims of United States citizens against foreign countries." S. REP. No. 466, 95th Cong., 2d Sess. 6 (1977). *See* 101 S. Ct. at 2988.

46. 343 U.S. 579 (1952). This is the "Steel Seizure" case. President Truman had invoked presidential authority to seize the nation's steel mills to avert a strike during the Korean War. In that case the Supreme Court held that the President had overreached his authority because he had acted in an area in which he shared authority with Congress and refused to follow the specific procedure Congress had set up to cope with such an emergency. The most useful of the seven opinions produced by the badly fractured Court was that of Justice Jackson, who devised a tripartite analysis of presidential power and found that the President's action fit in the third of his categories. Since the President lacked inherent authority to seize the steel mills, his action could not withstand congressional prohibition. *See* Kauper, *The Steel Seizure Case: Congress, the President and the Supreme Court*, 51 MICH. L. REV. 141 (1952). The case was a domestic case, however, and so, except for the scheme devised by Jackson, is of little value in evaluating *Dames & Moore*. The commentators specifically doubted that *Youngstown* was "intended to curtail the President's power in foreign affairs." *The Supreme Court, 1951 Term*, 66 HARV. L. REV. 89, 104 (1952).

47. 101 S. Ct. at 2978.

> authority, or in which its distribution is uncertain." In such a case, the analysis becomes more complicated, and the validity of the President's action, at least so far as separation of powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including "congressional inertia, indifference or quiescence." [3] Finally, when the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject."[48]

In setting forth this tripartite analysis of presidential power, Justice Rehnquist cautioned that the exact limits of presidential power are rarely clear and that this case in particular does not fit neatly into any of the three categories. But Rehnquist stated that the Court did find Justice Jackson's method "analytically useful" in deciding *Dames & Moore*.[49]

Though it is never specifically stated in the opinion, under Jackson's analysis the President's claims-suspending order seems to fit into neither category one nor three, since the Court did not find specific congressional authorization—or prohibition—for the order.[50] Indeed, because the division of powers between the Congress and the President is much less clearly defined in the area of foreign affairs than is the case in domestic affairs,[51] the President's action, taken in the absence of congressional authorization, seems to fall in the second of Jackson's categories, the "zone of twilight" where the "distribution [of authority] is uncertain."[52]

Therefore, in order to determine the validity of the President's power to settle claims, the Court undertook "a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward the action, including 'congressional inertia, indifference or quiescence.' "[53] The Court found long-standing congressional acquiescence in executive claims-settlement and concluded "that Congress has implicitly ap-

48. *Id.* at 2981 (footnotes omitted). *See* 343 U.S. at 637-38 (Jackson, J., concurring).

49. 101 S. Ct. at 2981-82.

50. *Id.* at 2985. *See infra* note 58 on the Petitioner's contention that Congress had in fact prohibited the President from acting in this area, and that the action is properly in "category three."

51. L. Henkin, *supra* note 22, at 89.

52. 343 U.S. at 637.

53. 101 S. Ct. at 2981 (quoting *Youngstown,* 343 U.S. at 637 (Jackson, J., concurring)).

proved the practice of claim settlement by executive agreement,"[54] referring to the opinion of Justice Frankfurter in *Youngstown,* 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 Section 1 of Article II.' "[55] By finding implicit congressional approval of the President's actions under Executive Order No. 12,294, the Court, in effect, transplanted the presidential claims-settlement power from "category two" into "category one."[56]

The Court finally stated what seems to be a test for determining the propriety of the President's use of his power to settle private claims. The Court will uphold such an executive agreement in situations where (1) "the settlement of claims has been determined to be a necessary incident to the resolution of a ma-

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54. *Id.* at 2987.

55. *Id.* at 2990 (quoting *Youngstown,* 343 U.S. at 610-11 (Frankfurter, J., concurring)). It is curious that while the Court quoted with apparent approval Justice Frankfurter's opinion about "long-standing practice" producing a "gloss" on the executive power under the Constitution, it does not seem to have based its decision on Frankfurter's analysis. Immediately after quoting Frankfurter, the Court repeats that its decision rests on a finding of congressional consent and approval. *Id.* at 2990. In other words, despite the implications of Frankfurter's "gloss" theory, the Court declined to hold that congressional acquiescence defines or bestows new constitutional power in the Presidency. Rather, acquiescence confers on the President congressional power, which presumably can be removed by withdrawing its consent. *See infra* note 70.

56. The Court did not expressly state that in deciding this case it moved the power of the President to settle foreign claims of private American claimants from "category two" to "category one," but that is the apparent effect of the *Dames & Moore* holding. That the Court initially considered the claims-settlement power to be in Justice Jackson's second category may be shown by comparing its treatment of this issue with its treatment of the other main issue.

The Court clearly held that the nullification and transfer of assets were authorized by Congress and were thus valid under "category one." The Court in fact characterized the validity of these actions by quoting language directly from Jackson's definition of "category one." 101 S. Ct. at 2984.

In dealing with the claims settlement issue, however, the Court did not find clear congressional authorization. There was no readily apparent answer; the distribution of authority was uncertain and the Court's "analysis bec[ame] more complicated." *Id.* at 2981. To determine the validity of the President's actions, the Court considered past presidential practice and legislative attitudes and responses. It was following the test suggested in Jackson's category two. 101 S. Ct. at 2981; 343 U.S. at 637. *See supra* notes 50-52 and accompanying text.

Applying this analysis, the Court in the end concluded that Congress had impliedly authorized the President to settle claims. In doing so the Court dispelled the twilight and uncertainty about the validity of presidential claims-settlement power. If such a case should arise again, there would be unquestionable congressional authorization of executive claim settlements, and the validity of the settlements would be analyzed and upheld under category one.

jor foreign policy dispute between our country and another" and (2) "where . . . Congress acquiesced in the President's action."[57] The claims-settlement agreement in *Dames & Moore* clearly passes this test.[58] What is not so clear is why the Court apparently resorted to a theory of congressional acquiescence and implied delegation of power, rather than find in the President inherent constitutional authority to settle claims. It is to that question that we now turn.

3. *The question of inherent presidential authority*

As part of his responsibility to represent and determine U.S. foreign policy, the President has found it expedient to settle claims of Americans against other nations by executive agreement.[59] Throughout American history the President has claimed

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57. 101 S. Ct. at 2991.

58. Petitioner claimed that though in the past there may have been congressional acquiescence to executive claims-settlement, recent congressional actions have shown express congressional disapproval. Petitioner argued that the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1611 (1976), was passed by Congress to "depoliticize . . . commercial lawsuits [against foreign states] by taking them out of the arena of foreign affairs—where the Executive Branch is subject to pressures of foreign states seeking to avoid liability through a grant of immunity—and by placing them within the exclusive jurisdiction of the courts." Brief for Petitioner at 9, Dames & Moore v. Regan. The House of Representatives Report on the FSIA stated that a "principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." H.R. REP. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6606.

Before the FSIA was passed, United States claimants had no remedy in American courts if the State Department indicated that a foreign nation should be immune from suit. Thus executive settlement on behalf of the plaintiff was the only avenue to any recovery. By passing the FSIA and removing the necessity of executive intervention, argued petitioner, Congress registered its objection to that practice. *See* Brief for Petitioner at 9-13, 18, Dames & Moore v. Regan.

But because the existence of unbroken congressional acquiescence was vital to the Court's decision, the Court disagreed with Dames & Moore's reading of the legislative history of the FSIA and declined to find in the FSIA an attempt by Congress to divest the President of settlement power. 101 S. Ct. at 2990. On balance, the Court determined that the purposes and effects of the FSIA do not amount to a questioning of presidential power to settle claims. In fact, the Court found that the Congress which enacted the FSIA had rejected legislation which would have required limiting the President's power to settle claims by executive agreement. *Id.*

59. 101 S. Ct. at 2986. Professor Henkin has noted:

> International agreements settling claims by nationals of one state against the government or nationals of another are established international practice reflecting traditional international theory. . . . [G]overnments have dealt with

the right to do so without congressional approval.[60]

According to Justice Frankfurter, it is indisputable that "the President's control of foreign relations includes the settlement of claims."[61] This principle is confirmed in the Restatement of the United States Foreign Relations Law: "The President may waive or settle a claim against a foreign state for injury to a United States national, without the consent of such [injured] national."[62] The two circuit courts of appeals that had previously considered the validity of the claims-settlement order held that the President does have inherent power under article II of the Constitution to settle private international claims.[63]

Why then did the Supreme Court refuse to acknowledge that the "long-standing practice" of settling private American claims against foreign governments through executive agreements was a constitutional power of the President sufficient to support his Executive Order terminating American claims against Iran? Justice Rehnquist's opinion gives little direct response to that question. Although in the course of the opinion he repeatedly mentioned judicial and congressional recognition of executive claims-settlements, the purpose of these references was to establish a history of congressional acquiescence in the President's claim to power, and not to address the question of whether inherent executive authority exists.[64]

The Court hinted at its motive in declining to recognize inherent presidential authority in this area: " '[T]he sheer magnitude of [plenary power to settle claims], considered against the background of the diversity and complexity of modern international trade, cautions against any broader construction of au-

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> such private claims [against foreign governments] as their own, treating them as national assets and as counters in international bargaining. . . . The United States has been party to many such settlements.

L. HENKIN, *supra* note 22, at 262.

60. Lillich, *supra* note 41, at 844.

61. United States v. Pink, 315 U.S. 203, 240 (1942) (Frankfurter, J., concurring).

62. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1962).

63. American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 443 (D.C. Cir. 1981); Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 810 (1st Cir., 1981). *Accord* Unidyne Corp. v. Government of Iran, 512 F. Supp. 705, 708 (E.D. Va. 1981); Security Pac. Nat'l Bank v. Government and State of Iran, 513 F. Supp. 864, 871 (C.D. Cal. 1981).

64. 101 S. Ct. at 2988-90. As mentioned above, the Court noted but declined to follow Justice Frankfurter's belief that congressional acquiescence serves to define the limits of inherent presidential power and not merely to delegate congressional power to the President. *See supra* note 56.

thority than is necessary.' "[65] Further, the Court cautioned that its notice of the history of presidential claims-settling practice is not to be construed as judicial constitutionalization of that practice: "Past practice does not, by itself, create power."[66]

The Court was wary of too generous a grant of inherent presidential power. A finding of a constitutional power of commercial claims settlement would give the President plenary power over an important segment of international commerce—an area where Congress has an explicit constitutional mandate.[67] By refusing to base its decision on a recognition of such power, the Court acknowledged the recent congressional trend to limit unilateral presidential authority in areas constitutionally entrusted to Congress.[68]

The Court's holding leaves the President with the flexibility he traditionally has had to settle claims.[69] But by making clear that the source of this power is a congressional grant of authority through acquiescence, the Court arguably preserves in Congress the power to "veto" presidential claims-settlement in a particular case. Under this analysis it follows that by nonacquiescence, that is, by express objection, the Congress could divest the President of this power altogether.[70]

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65. 101 S. Ct. at 2991 (quoting Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 612 F.2d at 814. The Court also noted Justice Jackson's response to a claim of "virtually unlimited powers for the executive" in *Youngstown:* "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image." 343 U.S. at 641; 101 S. Ct. at 2978.

66. 101 S. Ct. at 2990.

67. U.S. CONST. art. I, § 8.

68. For example, the "Case Bill," passed in 1972, required the President (through the Secretary of State) to notify Congress within 60 days of any executive agreement. 1 U.S.C. § 112(b) (1976). *See* Rehm, *Making Foreign Policy through International Agreement,* in THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY 126, 130-31 (F. Wilcox & R. Frank eds. 1976). Also, the Gravel Amendment to the Trade Reform Act of 1974 explicitly disapproved a certain executive claim settlement concluded with Czechoslovakia in 1975. 19 U.S.C. § 2438 (1976). *See* Lillich, *supra* note 41, at 842.

69. This flexibility would have been curtailed if the Court had depended on direct congressional authority under the IEEPA or the Hostage Act.

70. This power would of course have vanished had the Court held that the settlement power was inherent in the Presidency.

Actually, there is little question that if Congress should in the furture withdraw its acquiescence and attempt to limit the President's claims-settlement power, the action would raise difficult constitutional issues. The opinions and precedent cited above (*see supra* notes 56, 60-63) support the proposition that congressional acquiescence has created a nonrevocable "gloss" on the President's article II power. However, that constitutional question is not confronted here. As discussed above, it appears that in *Dames &*

A healthy distrust of excessive presidential authority concentrated outside the usual checks-and-balances system seems to have motivated the Court's decision and explains its roundabout approach to the case. This case could have become an example of a hard case making bad law, but by using its "delegation by acquiescence" artifice, the Court managed to arrive at the politically imperative result without recognizing in the President an imprudent concentration of inherent constitutional power.

C. *Other Constitutional Issues*

Two more constitutional issues are worth noting, though they do not directly concern the inherent presidential power issue.

1. *FSIA and the jurisdiction of federal courts*

Dames & Moore argued that by enacting in 1976 the Foreign Sovereign Immunities Act (FSIA),[71] Congress vested in the federal district courts exclusive jurisdiction over suits by Americans against foreign sovereigns.[72] If that is true, then arguably the President's order transferring American suits against Iran out of the district courts was an unconstitutional interference by the President in the jurisdiction of article III courts, over which Congress has authority.[73] At least one federal district court had

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Moore the Court did not rely on the "gloss" theory and did not in its opinion recognize claims settlement as an inherent presidential power. In fact, the decision seems clearly to condition presidential claims-settlement on congressional approval. In its response to petitioner's argument that the FSIA constituted a revocation of past acquiescence, the Court arguably implied that had there in fact been a revocation of congressional acquiescence, the President's power would have been unsupported. Had the Court analyzed this case as an inherent constitutional power problem (using Frankfurter's analysis) it would have approached petitioner's FSIA argument differently. Rather than holding that the FSIA did not manifest congressional disapproval of presidential claim settlement, the Court could simply have ruled that since long-term acquiescence established a "gloss" on the President's inherent constitutional power, a manifestation of congressional disapproval in the FSIA or anywhere else would be ineffective to curtail that power. *See supra* note 58.

71. 28 U.S.C. §§ 1330, 1602-1611 (1976).

72. The FSIA grants the district courts jurisdiction over suits against foreign states that have waived immunity and over suits based on commercial activity by foreign states carried on in the United States or having a direct effect in the United States. 28 U.S.C. § 1605 (1976). Justice Rehnquist's restatement of the law in his opinion seems to limit jurisdiction to those states that have waived immunity, which is not accurate. 101 S. Ct. at 2989.

73. U.S. CONST. art. III, § 1.

agreed with petitioner's theory that the President had overstepped his authority, and held the claims-suspension order void because "only Congress can confer and redefine the jurisdiction of United States Courts."[74]

The Supreme Court answered this contention by explaining that the President's termination order did not actually terminate the suits; it "suspend[ed] the claims."[75] This, according to the Court, effected a change in the *substantive* rule of law to be applied, but did not affect jurisdiction.[76] In other words, the district courts will have jurisdiction of the suits against Iran but will be obligated to dismiss them for failure to state a claim for which relief can be granted, since under the substantive law[77] relief can be granted only in the Claims Tribunal.[78] Those claims over which the Claims Tribunal declines jurisdiction will "revive" and "become judicially enforceable in United States Courts."[79] So despite the obvious fact that the effect of the President's order was to take the suits out of the federal courts, the Supreme Court concluded that there was not technically an interference with the courts' jurisdiction, and thus the order was permissible.[80]

2. *The taking question*

Dames & Moore also claimed that the suspension of its claims, if authorized, would amount to a taking of private property by government for a public purpose, which would require compensation.[81] The Court ruled (and in fact the petitioner con-

74. Electric Data Sys. Corp. Iran v. Social Security Org. of the Gov't of Iran, 508 F. Supp. 1350, 1363 (N.D. Tex.), *aff'd in part,* 651 F.2d 1007 (5th Cir. 1981). After *Dames & Moore,* the Fifth Circuit reversed the holding of the district court that the Executive Order was invalid, but affirmed its injunction against transferring the attached assets to Iran since the attachment was in effect before the November 14, 1979, freeze order.

75. 101 S. Ct. at 2989. This is despite the clear language of the Declaration I, *supra* note 7, at 2 (General Principle B): "terminate all litigation."

76. 101 S. Ct. at 2989.

77. The substantive law is Executive Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

78. 101 S. Ct. at 2990.

79. *Id.* This raises the question of whether the Executive Order actually complies with the Declarations.

80. *Id.* Such ultra-technical justifications by the Court may satisfy academicians, but certainly offer little comfort to litigants.

81. Brief for Petitioner at 40, Dames & Moore v. Regan. Dames & Moore also contended that the President's nullification of its attachments on Iranian property was a taking of property, which under the fifth amendment would require compensation. The Court, however, concluded that since the petitioner's attachments were granted under a license specifically made revocable (31 C.F.R. §§ 535.203(e), 535.805 (1981)) the attach-

ceded) that the fact and extent of the taking in this case were yet speculative and that the question was not yet ripe for review. But the Court did find "ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims under the Tucker Act," if it turns out that, after the Tribunal has run its course, the President's order suspending and transferring claims to the Claims Tribunal does, in fact, constitute a taking.[82]

This issue was the last constitutional obstacle that the President's order was required to hurdle before receiving judicial approval. What raised the hurdle was the fifth amendment requirement that in order for a presidential action that may constitute a taking to be legally authorized, there must be *at the time of taking* a "reasonable, certain and adequate provision for obtaining compensation" for the taking.[83] There was a possibility that the "treaty exception" to the jurisdiction of the Court of Claims[84] would bar the petitioner from presenting its eventual taking claim to that court.[85] Without the resolution of the jurisdiction problem, compensation was not reasonably certain, and the President's action, though authorized by Congress, would be unauthorized under the Constitution. On this issue the Court held that the treaty exception would present "no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act."[86]

This portion of the Court's holding may reveal the motiva-

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ments themselves were "revocable," "contingent," and "specifically made subordinate to further actions which the President might take under the IEEPA." 101 S. Ct. at 2983, 2984 n.6. Therefore the attachments were not a "property interest" of the sort that would support a constitutional claim for compensation. *Id.* at 2984 n.6.

82. 101 S. Ct. at 2991-92.

83. Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641, 659 (1890).

84. 28 U.S.C. § 1502 (1976). The "treaty exception" reads, "Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations." *Id.*

The uncertainty surrounding the applicability of the treaty exception was a result of a conflict of authorities as to "whether the treaty exception would bar Petitioner from seeking redress in the Court of Claims." Brief for Petitioner at 42, Dames & Moore v. Regan. The Supreme Court resolved the problem by holding that the treaty exception would not block a suit by petitioner in the Court of Claims, but it gave no rationale for its holding. The Court merely stated that the Solicitor General had, in oral argument, given assurances that the Government did not consider the jurisdiction of the Court of Claims to be barred by § 1502. 101 S. Ct. at 2992.

85. 101 S. Ct. at 2992.

86. *Id.*

tion behind this whole suit. Surely Dames & Moore did not entertain too seriously the expectation that the Supreme Court would void the Hostage Agreement at the last moment. But Dames & Moore had to get a ruling one way or the other in order too ensure its ability to get compensation from the Government in the Court of Claims. It needed a holding as to the legitimacy of the President's claim suspension, since under the Tucker Act *unauthorized* takings are not compensable.[87] That is, if the President had lacked proper authority to block its claim, petitioner would have had no Court of Claims remedy. It did not want to risk a decision in an eventual suit against the Government that there was no remedy because the taking was unauthorized.[88]

So, although it lost this battle, Dames & Moore may eventually be able to win the more significant victory. The Supreme Court refused to decide that Dames & Moore had suffered a taking, but it did hold that it and other "parties whose valid claims are not adjudicated [by the Claims Tribunal] or not fully paid may bring a 'taking' claim against the United States in the Court of Claims."[89] Moreover, the Court of Claims has implied that it would give consideration to a suit against the United

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87. Brief for Petitioner at 42, Dames & Moore v. Regan. Regional Rail Reorganization Act Cases, 419 U.S. 102, 127 n.16 (1974).

88. The scenario feared by Dames & Moore might proceed something like this: Dames & Moore decides not to contest the validity of the President's order nullifying its attachments against Iranian property in the United States. It takes its claim against Iran to the Claims Tribunal in The Hague, but receives a wholly inadequate judgment. It then commences an action in the United States Court of Claims against the United States Government, alleging that the President's claims-settlement agreement constituted a "taking" of Dames & Moore's property which must be compensated.

The Court of Claims, now under little urgency or political pressure, reviews the precedent and decides that the President's claims-settlement was a taking, but that it was unauthorized, unconstitutional, and invalid (for any of the reasons urged by petitioner in its actual suit). Since unauthorized takings are not legally compensable in the Court of Claims, there is no remedy against the Government. Then, assuming the court's holding is affirmed on appeal, the invalidated Executive Order no longer prevents Dames & Moore from continuing its suit against Iran in United States courts. However, since the formerly attached assets were long since transferred to Iran, there is no Iranian property in the U.S. upon which it can levy to satisfy its judgment. It is left with a right but without a remedy.

89. 101 S. Ct. at 2992 (Powell, J., concurring in part and dissenting in part); 101 S. Ct. at 2991 n.14. Justice Powell objected to the majority's holding that the nullification of attachments was not a taking which must be compensated. He would have allowed litigation in the Court of Claims based on both the claims suspension and the attachments nullification. He agreed, however, with the Court's holding with respect to the claims suspension and settlement, and its decision to allow the Court of Claims to adjudicate Dames & Moore's future taking claim. *Id.*

States on the theory that an executive claims-settlement is a compensable taking.[90] Justice Powell, concurring in the judgment, commended the Court for allowing the petitioner to seek compensation in the Court of Claims and added, "The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts."[91]

This second chapter in the *Dames & Moore* case will have to await the outcome of the Claims Tribunal, but it may prove as significant as the first. This is especially so since so far

> [n]o one has successfully argued in the Supreme Court that in purporting to dispose of private claims . . . the United States deprived the original claimants of property without due process of law . . . or appropriated their claims for a public purpose and was obligated to pay them just compensation for any loss.[92]

III. Conclusion

The relief and celebration with which Americans greeted the return of the Iranian hostages was tempered somewhat for those few whose properties were part of the ransom paid for the release. The urgent and politically charged nature of this case could have tempted the Court to give its constitutional blessing to a potentially dangerous expansion of inherent executive authority. Instead, the Court managed to preserve the basic integrity of the constitutional limits on presidential power while still reaching the result dictated by political realities and providing a means for compensating any loss to those whose claims were suspended by the agreement.

Mark David Davis

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90. *See* American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 446 (D.C. Cir. 1981).

91. 101 S. Ct. at 2993 (Powell, J., concurring in part and dissenting in part).

92. L. Henkin, *supra* note 22, at 263.