

Rediscovering Executive Authority: Claims Settlement and Foreign Sovereign Immunity

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On January 19, 1981, the United States signed an agreement with Iran that achieved the release of fifty-two American hostages held captive in Iran for over a year.¹ In exchange for the safe return of the hostages, the United States returned Iranian property that had been seized in this country pursuant to a presidential order.² The agreement, ending what one court termed a “sorry chapter [in] the history of our country,”³ required a controversial intrusion by the executive into federal court litigation.⁴ The Supreme Court sought to lay the controversy to rest in *Dames & Moore v. Regan*.⁵

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1. Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 I.L.M. 223 (1981). The agreement consisted of two separate declarations. The first provided for the transfer of Iranian assets held in this country to the Bank of England. The second provided for the creation of an arbitral tribunal which would adjudicate any commercial claims between American nationals and Iran, unless the underlying agreements themselves required dispute resolution exclusively in an Iranian forum.

2. Exec. Order No. 12,170, 3 C.F.R. 457 (1980), reprinted in 50 U.S.C.A. § 1701 (West Supp. 1985). The Supreme Court assumed that the assets were frozen so that they could later be used as a “bargaining chip.” *Dames & Moore v. Regan*, 453 U.S. 654, 673-74 (1981). The freeze may also be attributed to a fear of financial instability, resulting from the abrupt withdrawal of up to \$8 billion from American banks.

3. *Marschalk Co. v. Iran Nat'l Airlines*, 518 F. Supp. 69, 71 (S.D.N.Y. 1981), rev'd, 657 F.2d 3 (2d Cir. 1981). See generally G. SICK, ALL FALL DOWN (1985); J. STEWART, THE PARTNERS: INSIDE AMERICA'S MOST POWERFUL LAW FIRMS 19-52 (1982); Cutler, *Negotiating the Iranian Settlement*, 67 A.B.A. J. 996 (1981) (describing the negotiations leading to a final accord).

4. Declaration of the Government of the Democratic and Popular Republic of Algeria, General Principle E, 20 I.L.M. at 224, expressed the purpose of both nations “to terminate all litigation as between the government of each party and the nationals of the other, and bring about the settlement and termination of all such claims through binding arbitration.”

In order to effectuate the claims settlement provision of the agreement, which provided for the establishment of a new forum for binding arbitration, General Principle B specifically obligated 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.” *Id.* This necessarily required that the executive branch take steps to remove all pending litigation from federal courts in which they had properly been brought.

5. 453 U.S. 654 (1981).

The Court in *Dames & Moore* confronted two principal issues: (1) whether the seized Iranian assets lawfully could be removed from this country, and (2) whether private commercial claims against Iran could lawfully be transferred to a new arbitral tribunal. To resolve the first question, the Court relied on a broad reading of the International Emergency Economic Powers Act (IEEPA) in order to uphold the President's nullification of judicial attachments.⁶ The Court held that, under that statute, the President's wide-ranging authority to control foreign assets during a national emergency included the power to release Iranian assets seized by private American claimants.⁷

The second issue before the Court—the extent of the executive's power to dispose of private commercial claims—raised more fundamental constitutional questions concerning the scope of presidential authority in foreign affairs. The Court culled support for the constitutionality of presidential action from historical executive conduct.⁸ Instead of resting on the independent authority of the President under Article II of the Constitution, the Court ultimately relied on Congress's implicit "acquiescence" in the executive's well-established practice of settling claims.⁹

6. 453 U.S. at 672-73. The operative section of IEEPA is set out at 50 U.S.C. § 1702(a)(1) (1982):

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

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

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

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

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

7. 453 U.S. at 672-74.

8. 453 U.S. at 679-80. The Court cited with approval Justice Frankfurter's words in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (concurring opinion), that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II." 453 U.S. at 686.

This language was dictum, since Justice Frankfurter joined the majority in finding no support for President Truman's seizure of steel mills. Yet his concurring opinion remains important for its analysis of the varied sources and evolving nature of executive power. This approach is distinct from that taken in Justice Black's opinion for the Court, which confined the sources of presidential power to narrowly construed congressional delegations and express constitutional grants of authority. *Id.* at 585-89.

9. 453 U.S. at 668-77. The Court considered three separate statutes that touched on the settlement issue. First, the Court found that IEEPA did not confer authority on the executive to suspend private litigation since lawsuits were not interests in property contemplated by the

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This acquiescence was purportedly demonstrated by “the general tenor of Congress’s legislation.”¹⁰ The Court, declining to declare a “plenary” executive power to settle claims, and able to discern only “acquiescence” from congressional actions,¹¹ felt constrained “to rest [its] decision on the narrowest possible ground,”¹² rather than “to lay down general ‘guidelines’ ” which could govern other similar situations.¹³

By authorizing the release of Iranian property and suspending private lawsuits against Iran,¹⁴ the Court reached the most pressing objective—permitting the government to fulfill international obligations.¹⁵ However,

drafters of IEEPA, or its model, the Trading with the Enemy Act (TWEA). *Id.* at 675. See Note, *The United States-Iran Hostage Agreement: A Study in Presidential Powers*, 15 CORNELL INT’L L.J. 149, 173-74 (1982) [hereinafter cited as Note, *Hostage Agreement*]. But see *Chas. T. Main Int’l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 815-18 (1st Cir. 1981) (Breyer, J., concurring) (concluding that lawsuits against Iran, as exercises of a “right . . . with respect to . . . property,” may be suspended and settled pursuant to IEEPA). Nonetheless, the Court concluded that IEEPA impliedly endorsed wide executive discretion in times of national emergency. 453 U.S. at 681-82.

Second, the Court analyzed the so-called “Hostage Act,” 22 U.S.C. § 1732 (1982), and held that although the Act did not explicitly confer authority on the President to suspend the litigation, it did lend support to broad presidential discretion when American lives were in danger. 453 U.S. at 676-78. Cf. *American Int’l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 452-53 (D.C. Cir. 1981) (Mikva, J., concurring); Mikva & Neuman, *The Hostage Crisis and the “Hostage Act,”* 49 U. CHI. L. REV. 292, 334-36, 344 (1982).

Finally, the Court considered the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621-1645 (1982), creating a Foreign Claims Settlement Commission (FCSC). The FCSC, a division of the Justice Department, is authorized to adjudicate claims for which a fund has been established by international agreement, and to “preadjudicate” claims in anticipation of lumpsum settlements with countries. For example, such preadjudicated claims with the People’s Republic of China were settled in 1979 by a lump sum payment and distributed to claimants on a pro rata basis. The Court found that the procedures set out for national valuation of international claims implied congressional authorization of executive actions taken to settle such claims. 453 U.S. at 680-82. See also Note, *The Executive Claims Settlement Power: Constitutional Authority and Foreign Affairs Applications*, 85 COLUM. L. REV. 153, 177-78 (1985) (citing corroborative legislative history of the Settlement Act) [hereinafter cited as Note, *Executive Claims Settlement Power*].

10. 453 U.S. at 678.

11. *Id.* at 688. Two circuit courts of appeals had reached similar results, holding that the President’s power to settle claims was not “plenary,” *Chas T. Main Int’l*, 651 F.2d at 814, and that upholding executive authority in this instance should not be viewed as a preclusion of future congressional involvement. *American Int’l Group*, 657 F.2d at 437-39, 445.

12. 453 U.S. at 660-61.

13. *Id.* at 661.

14. Exec. Order No. 12,294, 3 C.F.R. 139 (1982), reprinted in 50 U.S.C.A. § 1701 (West Supp. 1985). President Reagan’s Order merely “suspended” litigation and provided for its revival in U.S. courts if the Iran-United States Claims Tribunal later declined to take jurisdiction over a claim. A decision on the merits by the Tribunal would terminate the litigation that had been suspended.

The President’s Order introduced elements of suspension and revival of claims nowhere provided in the agreements, which had called simply for their “termination.” The benefit to claimants from the Order’s apparent modification is questionable. After failing on jurisdictional grounds in the Tribunal, private claimants could go back to district court, but without any attached property with which to satisfy their claims.

15. 453 U.S. at 688. Some commentators have suggested that the decision was compelled

it did not provide a satisfactory legal theory for the executive's suspension of ongoing lawsuits and transfer of claims to the newly created Iran-United States Claims Tribunal.¹⁶

Commentators have criticized the Court's theory of "implied congressional delegation" of power to the executive,¹⁷ which seemed to justify unfounded executive interference in the litigation of private disputes.¹⁸ The two principal criticisms of the decision have been that the Court upheld an executive action that effectively removed the jurisdiction of the federal courts, in violation of Congress's authority over jurisdiction established in the Constitution,¹⁹ and that the Court granted Iran immunity in U.S. courts, in violation of the Foreign Sovereign Immunities Act (FSIA).²⁰ Ironically, the same critics have endorsed the Court's holding, either by embracing justifications with other serious defects²¹ or by

more by the pressure of events than by cogency of reasoning. See, e.g., Miller, *Dames & Moore v. Regan: A Political Decision by a Political Court*, 29 UCLA L. REV. 1104 (1982).

16. Two thoughtful commentators have accurately formulated the issue in *Dames & Moore* to be "whether the President could force a plaintiff with a cognizable claim pending against a sovereign government to accept an alternative forum." Marks & Grabow, *The President's Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence*, 68 CORNELL L. REV. 68, 88 (1982). They concluded that the "Court nowhere explains why 'suspension' of the statutorily-conferred right to proceed in the United States district courts . . . is not jurisdictional (and therefore invalid)." *Id.* at 96-97. This failing in the Court's decision derives from its tentativeness in "legitimizing independent executive powers in foreign affairs." *The Supreme Court: 1980 Term*, 95 HARV. L. REV. 93, 198 (1981); See also Note, *Executive Claims Settlement Power*, *supra* note 9, at 162-63.

17. See, e.g., Marks & Grabow, *supra* note 16, at 68, 91-92; *The Supreme Court: 1980 Term*, *supra* note 16, at 191, 194; Note, *Dames & Moore v. Regan: Congressional Power over Foreign Affairs Held Hostage by Executive Agreement with Iran*, 15 LOY. L.A.L. REV. 248, 274, 280 (1982); Comment, *Iranian Assets and Claims Settlements Agreements: A Study of Presidential Foreign Relations Power*, 56 TUL. L. REV. 1364, 1405 (1982).

18. Comment, *The Iranian Hostage Agreement Cases: The Evolving Presidential Claims Settlement Power*, 35 SW. L.J. 1055, 1077 (1982).

19. U.S. CONST. art. I, § 8 establishes Congress's authority "[t]o constitute Tribunals inferior to the Supreme Court." Article III, § 1 provides that "The judicial Power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

20. 28 U.S.C. §§ 1330, 1602-11 (1982) (an act which, *inter alia*, removed the executive from determinations of sovereign immunity from suit in United States courts, thus leaving that determination a strictly judicial issue). See Marks & Grabow, *supra* note 16, at 94-97; Comment, *supra* note 17, at 1400; Note, *Hostage Agreement*, *supra* note 9, at 189. See *infra* text accompanying notes 214-22.

21. It has been suggested that the Court should have invoked the political question doctrine to dispose of the thorny institutional issues posed in *Dames & Moore*, see *The Supreme Court: 1980 Term*, *supra* note 16, at 198-201, yet this approach is undesirable when the rights of private claimants and federal court jurisdiction are conceivably implicated. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 71-79 (1978).

Another proposal was to affirm the President's power to settle claims and suspend litigation, but only "under circumstances like those of the Iranian crisis." Note, *The Iranian Hostage Agreement under International and United States Law*, 81 COLUM. L. REV. 822, 868-70 (1981). This "extraordinary situation" rule suggests a limitation on executive power from the standpoint of public policy, but posits no clear legal theory justifying the exercise of executive power to guide courts in deciding when the executive has acted properly.

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approving the decision without providing an alternate legal reasoning.²² As a result, the scope of the executive's power to settle claims of Americans against foreign states remains in doubt.²³

Reliance by numerous courts and commentators on a rigid analytical framework, developed in earlier judicial opinions, has clouded reasoning about the hostage agreements. For the most part, courts have heeded Justice Jackson's admonition in *Youngstown Sheet & Tube Co. v. Sawyer*²⁴ not to resort to nebulous catchwords when characterizing executive actions. Nonetheless, they have also relied on Justice Jackson's categorization of executive action.²⁵ Courts have upheld the President's termination of Iranian litigation as the use of executive authority in the "zone of twilight"—Justice Jackson's intermediate category—in which the President acts alone, without a clear directive from Congress.²⁶ Alternatively, courts have relegated executive actions to category three—actions in conflict with the express or implied will of Congress—by interpreting claims settlement as a direct violation of the FSIA and of Congress's authority over federal court jurisdiction.²⁷ These analyses, reaching disparate re-

22. See, e.g., *Marks & Grabow*, *supra* note 16, at 69; Note, *supra* note 17, at 283-84; Comment, *supra* note 17, at 1407.

23. In the vast literature on *Dames & Moore*, only two works have inquired into the legal foundations of executive claims settlement, or "espousal" power. Further, in one treatment the consideration is brief; Note, *Settlement of the Iranian Hostage Crisis: An Exercise of Constitutional and Statutory Executive Prerogative in Foreign Affairs*, 13 N.Y.U. J. INT'L L. & POL. 993, 1042-47 (1981) [hereinafter cited as Note, *Settlement of the Hostage Crisis*], and in the other, the historical treatment concentrates narrowly on the twentieth century. Note, *Executive Claims Settlement Power*, *supra* note 9, at 157-59. More importantly, neither work places the Iranian agreement in the context of the evolving international law of claims settlement nor recognizes the critical interplay between claims settlement and sovereign immunity. See *id.* at 177, 186 (maintaining that executive power to settle claims has basically supplanted the power over foreign sovereign immunity decisions).

24. 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Also, courts have generally eschewed the declaration of expansive presidential powers in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) in assessing the hostage agreements. Compare *Dames & Moore*, 453 U.S. at 661 with *Security Pac. Nat'l Bank v. Gov't and State of Iran*, 513 F. Supp. 864, 871-75, 881-82 (C.D. Cal. 1981).

25. E.g., *Dames & Moore*, 453 U.S. at 661-62.

Justice Jackson sketched three zones of executive conduct. In the first, the President acts pursuant to an express or implied grant of authority from Congress; under these conditions, executive authority is at its strongest. In the second zone, the President acts without either support or disapproval from Congress; in this case, the result is highly uncertain. In the last zone, the President acts against the express or implied will of Congress; there, executive power is at its lowest ebb. 343 U.S. at 635-38.

Our concern with undue reliance on Justice Jackson's formula is not meant to suggest that it is unsuitable for the Iranian situation; on the contrary, it is helpful in sorting out the institutional conflicts. However, Jackson's flexible framework has grown rigid through repeated application, and sketchy categories have become reified. The framework's invocation, at least in the Iranian context, has resulted in excessive concern with categorization, and inadequate attention to the historical and legal roots of executive action.

26. E.g., *Dames & Moore*, 453 U.S. at 688.

27. E.g., *Marschalk Co.*, 518 F. Supp. at 86; *Electronic Data Systems Corp. Iran v. Social*

sults, reveal the limits of categorization. For instance, concluding that a presidential action falls into category two of Justice Jackson's scheme gives no clear guidance in determining how the action fits within existing legal rules. Therefore, this Article will forego a strict constitutional analysis, putting in its place a legal archeology that uncovers specific doctrines underlying past and present executive decisions. The Article offers a theory to explain the evolution and exercise of important executive powers.

This Article departs from previous analyses in three significant respects. The first part of the Article places the President's well-established, independent power to settle claims in the context of international legal doctrines as assimilated by executive practice and judicial opinions into domestic law.²⁸ The second part identifies a nonstatutory executive authority to grant immunity to foreign state property at the stage of execution. By providing a coherent account of preexisting, independent authority, this Article counters the expansive reading of the FSIA which has construed the statute to remove the executive entirely from litigation against foreign states.²⁹ The third part demonstrates that the claims settlement and sovereign immunity doctrines are complementary and have supported executive actions in the past that have helped to overcome diplomatic impasses.³⁰ It concludes that due to the continuing need for political involvement, a tension between private remedies and public control persists.

This analysis of the interplay between the President's powers to settle claims and to grant sovereign immunity focuses on the need for con-

Sec. Org. of Gov't of Iran, 508 F. Supp. 1350, 1364-65 (N.D. Tex 1981), *vacated in part, aff'd in part*, 651 F.2d 1007 (5th Cir. 1981) [hereinafter cited as *EDS*]; Marks & Grabow, *supra* note 16, at 95-97.

28. Other commentators have recognized an independent executive authority to settle claims, yet have founded it on a reading of terse Constitutional passages, such as that authorizing the executive to receive ambassadors, U.S. CONST. art. II, § 3. See, e.g., Note, *Executive Claims Settlement Power*, *supra* note 9, at 164-75. The value of a historical approach, such as the one presented here, was recognized, but it was not reflected in a full-scale treatment. *Id.* at 171 n.83, 172.

29. The issue of independent executive authority to grant immunity from execution was not addressed in *Dames & Moore*, since pre-judgment attachments against Iran had been granted pursuant to the President's freeze order (entered under IEEPA authority), see *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, 502 F. Supp. 120 (S.D.N.Y. 1980), and in the Court's view could be removed under authority derived from the same statute. See *supra* notes 2 and 7 and accompanying text. However, the need for independent authority was presented directly in *EDS*, 508 F. Supp. at 1356, 1361, in which the district court refused to nullify an attachment that had been granted prior to the freeze order. See *infra* text accompanying notes 281-291.

30. See R. LILICH, *THE PROTECTION OF FOREIGN INVESTMENT: SIX PROCEDURAL STUDIES* 199-200 (1965) (making a prescient, if critical, suggestion as to how the claims settlement and sovereign immunity powers might converge, giving the executive authority to stymie domestic litigation when the needs of foreign policy are pressing).

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tinuity in the conduct of foreign affairs.³¹ It does not view the Iranian agreement as an unusual exercise of executive authority, unique in the nation's history.³² Rather, the Article defends the role played by these executive powers in the past and contends that they should not be gain-said in the future, when the nation may once again be forced to overcome imposing diplomatic obstacles.

I. The Law of Claims Settlement

The absence of an appreciation of the rich law of international claims settlement has detracted from scholarly and judicial analyses of the Iranian agreements. Although that body of law has undergone conceptual changes in recent years, it still retains a vocabulary and direction that arose in the nineteenth and early twentieth centuries, a period of formalism in the study of international law. As a result, a somewhat rigid style tends to obscure otherwise sound legal rules. It is important at the outset, therefore, to state the assumptions that underlie those rules and the policy perspective that reinforces the legal analysis presented below.³³

As Professor Frederick Dunn observed in his classic account, claims settlement—or, more generally, diplomatic protection of citizens—should be seen as a practice that is closely linked to the shifting economic and political interests of states.³⁴ The legal rules of claims settlement have grown out of the efforts of states to resolve commercial disputes without endangering the entire international system of productive exchange.³⁵ While the promotion of purely individual interests is a valuable goal,³⁶ and private individuals are the ostensible beneficiaries of claims

31. See *The Iran Agreements: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 2 (1981) (statement of Senator Percy) [hereinafter cited as *1981 Hearings*].

32. As one classic work has pointed out, the assertion of private economic claims occupies a considerable part of diplomatic officials' time and is often intertwined with major policy questions. F. DUNN, *THE PROTECTION OF NATIONALS* 12-13 (1932). See also Wetter, *Diplomatic Assistance to Foreign Investment*, 29 U. CHI. L. REV. 275 (1962) (reviewing extensive government claims settlement practice between 1900 and 1940).

33. Professor Dunn, in criticizing the legal formalism of his day, stressed the importance of seeking explanations and justifications for legal rules in social characteristics, not in the rules themselves. See DUNN, *supra* note 32, at 3, 197. In his functionalist legal realism, diplomatic protection was viewed as "a human institution devised for a particular social purpose." *Id.* at 9.

34. *Id.* at 26, 35 (diplomatic protection promotes the material interests of states through safe economic investment, without the dangers of forceful invasion or annexation in resolving international disputes).

35. *Id.* at 190-91 ("the underlying purpose of the institution of diplomatic protection seems to be to aid in the maintenance of the conditions of order and security that are essential for the carrying on of normal social and economic relations across national boundaries").

36. Several of the most articulate statements affirming individual rights and duties in international law appeared during and shortly after World War II. Against the background of total

settlement among states, their immediate interests are not exclusive or always paramount.³⁷ When those interests clash with the nation's, and international discord is threatened, the interest of the national community should prevail. Existing legal doctrines of claims settlement, addressed below, uphold the controlling authority of states.

A. *The International Law of Diplomatic Protection*

International law has traditionally governed only the relations among states.³⁸ Although private individuals and corporations engage in commerce directly with foreign governments, and inevitably incur compensable injuries, private persons have usually lacked substantive rights and procedural protection under international law.³⁹ Naturally, private individuals and entities have sought assistance from their governments in pressing claims against nations that breach their commitments. This is the legal setting for the practice of "diplomatic protection," by which a state proffers—or "espouses"—the claims of its nationals against foreign states.⁴⁰ At a time when individuals lacked any direct right of redress in the international sphere, espousal was in the individual's as well as the

war and tyrannical governments, a conception of the individual's status apart from membership in a state understandably took on great significance. *See, e.g.*, H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 62 (1968); P. JESSUP, *A MODERN LAW OF NATIONS* 1-2, 13-14 (1948); Dunn, *The International Rights of Individuals*, *AM. SOC'Y INT'L L. PROC.* 16-17 (1941); Wright, *International Law and Commercial Relations*, *AM. SOC'Y INT'L L. PROC.* 39 (1941). Recognition of individual dignity remains vital today, but the matter is not presented so sharply. As the movement of goods and individuals across state boundaries grows, it is conceivable that private interests could stand in the way of a genuine national interest in the resolution of conflicts. In such a case, the interest of the international community—another element in a "modern law of nations"—might counsel a result contrary to immediate individual interests. P. JESSUP, *supra*, at 11-12. In short, even in an international legal order that accords individuals a large measure of substantive and procedural rights, state prerogative could not disappear.

37. Professor Dunn, for example, had "no proposal . . . that individuals should be permitted to resort to suits against states indiscriminately. From a procedural standpoint, I think it would be very unfortunate if that were so." Dunn, *supra* note 36, at 22. *See also* F. DUNN, *supra* note 32, at 190-91 (stating the possibly salutary effect of reducing private independence in the name of diplomatic protection).

38. Lauterpacht, *The Subjects of the Law of Nations* (pt. 2), 64 *LAW Q. REV.* 97, 107 (1948); McDougal, Lasswell & Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas*, in *INTERNATIONAL LAW ESSAYS* 555, 559 (M. McDougal & W. Reisman eds. 1981). *But see* Jessup, *The Subjects of a Modern Law of Nations*, 45 *MICH. L. REV.* 383, 384-86 (1947) (international law applies to individuals).

39. It has been said that "the rules of international law are binding upon and create rights and liabilities between states only . . . Individuals . . . are the beneficiaries of the rights and duties which international law ascribes to states." E. BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 18 (1919). *See also* Lauterpacht, *The Subjects of the Law of Nations* (pt. 1), 63 *LAW Q. REV.* 438, 440-1 (1947); Note, *The Nature and Extent of Executive Power to Espouse the International Claims of United States Nationals*, 7 *VAND. J. TRANSNAT'L L.* 95 (1973).

40. *See, e.g.*, E. BORCHARD, *supra* note 39, at 349-50; Jessup, *Responsibility of States for Injuries to Individuals*, 46 *COLUM. L. REV.* 903, 907-08 (1946).

state's interest, for it was the only means of promoting the national's personal and commercial security.⁴¹

Espousal by a private claimant's government has had important legal consequences for both the status of a claim and control over its disposition. Upon espousal, what begins as a private claim is transformed, or "merged," into a public claim between the espousing government and the offending government.⁴² The practical effect of espousal is to take a claim completely out of the private claimant's control. The state, with binding effect on a claimant, may waive the claim entirely or settle it for an amount substantially less than its fair value, regardless of the claimant's wishes.⁴³ This legal regime, though built at a time when state involvement in international trade was more limited than it is today, remains basically intact;⁴⁴ growth in the volume and scope of state trading has not toppled it.⁴⁵ Some modern authorities, though hesitant to rely on the fiction of "merger" of claims, have found continued validity in the traditional espousal doctrine.⁴⁶

41. See *Mavrommatis Palestine Concessions*, 1924 P.C.I.J., ser. A, No. 2, at 12 (judgment of Aug. 30, 1924) (holding that "[i]t is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels").

42. 1 M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* 275-84 (1937); E. BORCHARD, *supra* note 39, at 356-57. See also Koessler, *Government Espousal of Private Claims Before International Tribunals*, 13 U. CHI. L. REV. 180, 182-84 (1945); Hostie, *Systematic Inquiry into the Principle of International Law Dealing with Diplomatic Protection*, 19 TUL. L. REV. 79, 80-82 (1945).

The World Court endorsed this traditional principle emphatically: "By taking up the case of one of its subjects and by resorting to diplomatic action . . . on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law." *Mavrommatis Palestine Concessions*, *supra* note 41; see also *Panavezys Saldutiskis Railway Case*, 1939 P.C.I.J., ser. A/B, No. 76 (judgment of Feb. 28, 1939); *Case Concerning the Factory at Chorzow*, 1926 P.C.I.J., ser. A, No. 17 (judgment of Sept. 13, 1928).

43. E. BORCHARD, *supra* note 39, at 358, 366-71. See also 1 M. WHITEMAN, *supra* note 42, at 275; Hostie, *supra* note 42, at 80 n.7 ("[T]here is no doubt about the correctness of [the] statement that there is nothing in international law to prevent a state from acting on behalf of a national against the expressed will of the latter.").

44. Professor Lillich has remarked that "[w]hile the traditional rules in this area . . . have undergone considerable modification, this change has occurred within the system rather than through rejection of it." INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 11 (R. Lillich ed. 1983) (collection of essays recognizing the continuing validity of traditional espousal theory). In addition, *Mavrommatis*, decided by the World Court in 1924, remains valid international precedent, *id.*, and diplomatic protection still enjoys "widespread invocation by nearly all States." *Id.* at 12.

45. See Friedmann, *The Growth of State Control Over the Individual, and its Effect Upon the Rules of International State Responsibility*, 19 BRIT. Y.B. INT'L L. 118 (1938).

46. Recent discussions of the theory and practice of claims settlement have acknowledged continuing adherence to the idea of claim transformation. See 1 F. GARCIA-AMADOR, *THE CHANGING LAW OF INTERNATIONAL CLAIMS* 80-81 (1984); 1 R. LILLICH & B. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP-SUM AGREEMENT* 1 (1975); W. BISHOP, *INTERNATIONAL LAW, CASES AND MATERIALS* 631-32 (2d ed. 1962); Seyersted, *Has*

Several writers, however, have argued that elements of the law of espousal are anachronistic.⁴⁷ Traditional espousal doctrine, they argue, does not reflect the status of individuals and entities as "objects" of international law, with both rights and duties conferred directly upon them.⁴⁸ Specifically, commentators have pointed out that there is no natural coincidence between private and public injuries, suggesting that governments do not so much espouse their own public claims as present private claims of their nationals. In this view, espousal does not mysteriously transform a claim and remove the private substantive interest entirely. Rather, it is simply a procedural mechanism for presenting a claim against a foreign state not available to individuals under international law.⁴⁹ Arbitral tribunals, in fact, have acknowledged the essentially private quality of the claims presented to them by governments.⁵⁰ Nevertheless, even under this modified theory, states take control of a claim upon formal settlement.⁵¹ While diplomatic presentation does not completely transform a

the Government a Duty to Accord Diplomatic Assistance and Protection to its Nationals?, 12 SCAN. STUD. IN L. 121, 123-24 (1968); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 211, comment a (1965) [hereinafter cited as RESTATEMENT].

47. See Lauterpacht, *supra* note 39, at 441, 458; Jessup, *supra* note 40, at 923; McDougal, Lasswell & Chen, *supra* note 38, at 560.

These distinguished writers regard the legal transformation of private commercial claims into interstate claims as a harmful fiction, consigning injured persons to the sidelines as their claims are presented diplomatically. Basically, they have urged, as an alternative, that states and individuals be placed on equal footing in international forums, thereby obviating the need for formal state control over private claims. *E.g.*, Lauterpacht, *supra* note 39, at 458-59; Jessup, *supra* note 40, at 923. In effect, they would use procedural reforms as a means of enhancing substantive rights.

Yet the formalism of a private claim's transformation into a public claim is not inconsistent with the overarching fiction that gives the state—an inanimate, artificial construct—a personality with rights and duties in international law. See E. CARR, *THE TWENTY YEARS' CRISIS, 1919-1939*, at 148-49 (1964). Just as states, not "peoples," negotiate treaties or make wars, even though individuals feel the benefits of peace and bear the burdens of war, it is arguable that private injuries become genuinely different when they are taken up as matters of state. Fictions fill the legal world; the question is whether a particular fiction serves a worthwhile purpose, as the fiction of transformation arguably does here.

48. Professor Lauterpacht has noted that state action directly against pirates, violators of a blockade, and war criminals refutes "the view that States only, and not individuals, are subjects of international duties." Lauterpacht, *supra* note 39, at 442. Lauterpacht has also drawn attention to multinational agreements which entitle individuals to vindicate rights directly in international tribunals. *Id.* at 451-52. See also McDougal, Lasswell & Chen, *supra* note 38, at 634.

49. See, *e.g.*, W. BISHOP, *supra* note 46, at 737-38, 741; Koessler, *supra* note 42, at 181, 188-89.

50. For example, a claims commission held that it dealt "with private claims of citizens which have been espoused by their respective Governments." *Parker v. United Mexican States, General Claims Commission, United States and Mexico, Opinions of Commissioners 36* (1927) [hereinafter cited as *General Claims Commission*]. See also *Admin. Dec. no. V, Mixed Claims Commission, United States and Germany, Administrative Decisions and Opinions 175, 192* ("The ultimate object of asserting the claim is to provide reparation for the private claimant.") [hereinafter cited as *Mixed Claims Commission*].

51. See, *e.g.*, 2 F. GARCIA-AMADOR, *supra* note 46, at 500 ("Whether . . . as a matter of

claim, such state protection does alter the character of the claim by subjecting it to the political imperatives that govern any other subject of diplomatic negotiation.⁵²

Although a claim settlement might occur suddenly, working an abrupt change in an individual's legal rights and duties, the process of negotiating a bargain diplomatically is often protracted. Once an alleged injury occurs, the private claimant may negotiate directly with a foreign state. At this stage the claimant's government might lend its "good offices"—for example, by helping to procure local counsel—or take a further step and make initial diplomatic contacts on the claimant's behalf.⁵³ Power to abandon or settle the claim during this period remains with the private claimant,⁵⁴ and private efforts sometimes lead to a favorable result.⁵⁵ If political relations between this country and an offending government worsen, however, private initiatives are probably futile, and formal diplomatic protection is the only realistic avenue of recovery.⁵⁶ Under these circumstances, formal presentation by the state is favorable to the claimant even though he loses control of the claim.

Diplomatic protection, therefore, is only one phase in the adjudication of private commercial claims against foreign states. The claim's nationality derives from the injured claimant, who may retain control over the claim's disposition at early stages of its presentation.⁵⁷ At the same time, formal presentation by the state is a critical step. While a private claim is

principle, the international claim is under the complete control of the espousing State, must not raise any doubt."); General Claims Commission, *supra* note 50, at 36; Mixed Claims Commission, *supra* note 50, at 190 (when a claim is espoused, "the nation's absolute right to control it is necessarily exclusive. In exercising such control it . . . must exercise an untrammelled discretion in determining when and how the claim will be presented and pressed . . . and the private owner will be bound by the action taken").

52. Although the traditional "merger" theory and the more current "control" theory have the same impact with respect to a binding diplomatic settlement, the newer doctrine may give private claimants greater freedom to contract for Calvo Clauses, by which the claimants disavow state protection under certain circumstances, 2 F. GARCIA-AMADOR, *supra* note 46, at 500, and greater freedom to bar state protection by prior settlement. See also *infra* note 57.

53. See Weiter, *supra* note 32, at 305-06, 309-10; Christenson, *International Claims Procedure Before the Department of State*, 13 SYRACUSE L. REV. 527, 539-41 (1962).

54. Throughout the Iranian crisis, for example, intense diplomatic efforts and private litigation proceeded simultaneously.

55. See 1 R. LILLICH & B. WESTON, *supra* note 46, at 10.

56. An attorney in the U.S. State Department has confirmed this view of claims settlement, identifying roughly three stages in the process: (1) private initiatives, (2) informal diplomatic correspondence, and (3) official claims espousal. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 661 (1962).

57. Private settlement of a claim will normally act as a bar to a later attempt by the claimant's government to espouse the claim. LAW OF THE UNITED STATES § 713 comment b (Tent. Draft No. 3, 1982). See also L. Sohn & R. Baxter, Convention on the International Responsibility of States for Injuries to Aliens (Draft No. 12 with Explanatory Notes), *partially reprinted in* Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 548 (1961) (Article 24 expressly bars a state from presenting a claim after

not transformed into a strictly public state claim, the claim does take on an additional public character upon state presentation.⁵⁸ In sum, once a state formally takes up a private claim, international law subordinates the individual's right to control the claim to the diplomatic interests of his government.⁵⁹

B. *Justifications of State Control*

The policy considerations behind the present law of claims settlement are compelling. For example, diplomatic involvement in settling claims after a new regime's expropriation of property or cancellation of its predecessor's contractual obligations is necessary to mitigate tensions. In fact, when international tensions are high, private claimants have the least hope for a private recovery and eagerly seek their government's assistance.⁶⁰ Professor Jessup, though an advocate of enhanced individual rights, included within the ambit of private international relations only the "ordinary claims case," apparently recognizing the need for political entry into other situations.⁶¹ The practical alternative to diplomatic protection, on many occasions, is not private control, but rather political or military actions⁶² that would embroil the inhabitants of both countries. When a dispute due to the hostile act of another state has wide political ramifications, it is reasonable for an individual claim "[to] be balanced [against] the interests of the other nationals of the State concerned."⁶³

private settlement, on the theory that the state, upon espousal, assumes a claim no greater than that possessed by the claimant).

58. See Lauterpacht, *supra* note 38, at 7 ("in relation to the current view that the rights of the alien within foreign territory are the rights of his State and not his own, the correct way of putting the matter is not that the State asserts its own right but that it enforces the rights of the individual who is incapable of asserting it in the international sphere").

59. This view was embraced by Professors Louis Sohn and Richard Baxter, who acknowledged the private character of a claim, yet accorded the state "complete control" over it, and "unfettered discretion" to "waive, compromise, or settle any claim with binding effect." Sohn & Baxter, *supra* note 57, at 580 (Art. 25 and Explanatory Note).

60. See Note, *Executive Claims Settlement Power*, *supra* note 9, at 156 n.2 ("Citizens who would otherwise have no effective means of redress generally appreciate government intervention, especially where the courts of a foreign nation may be expected to be unreceptive to American claims.").

61. Jessup, *supra* note 40, at 923.

62. See 6 J.Q. ADAMS, MEMOIRS 383, reprinted in 6 J. MOORE, INTERNATIONAL LAW DIGEST 1026 (1906).

63. Sohn & Baxter, *supra* note 57, at 580 (Art. 25 and Explanatory Note) ("the claim of the individual must on many occasions yield to the overriding demands of the Community of which he forms a part").

Umpire Parker observed that the state's control over private claims should be governed "not only by the interest of the particular claimant but by the larger interests of the whole people of the nation . . ." Mixed Claims Commission, *supra* note 50, at 190. It was clearly foreseen that the national interest might require a state to compromise or waive a claim. *Id.* at 36.

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Against this background, it is still argued that allowing individuals a direct remedy against states under international law and ending their dependence on governmental presentation of claims would achieve the goals of enhancing private rights and expanding international commerce.⁶⁴ This policy is thought to have several advantages. First, it would protect the interests of persons whose governments will not present their claims and the interests of stateless persons on whose behalf no government may present a claim. If private remedies were expanded, respect for individual rights and welfare could gain in importance relative to the political calculus of states.⁶⁵ Second, direct resolution of disputes by private persons, often large corporations that are capable of presenting their claims vigorously, might remove a source of discord among states.⁶⁶ In fact, states in the past have entitled individuals by treaty to press claims directly in international tribunals.⁶⁷

Establishing a direct international remedy against states has the potential of broadening the scope of private rights in the future.⁶⁸ However, prospects for moving in that direction are uncertain. A World Bank-sponsored convention,⁶⁹ a notable attempt to build a system of routine arbitration between private entities and states, has been a disappointment. In its first twenty years of operation, very few disputes have been resolved under its auspices, and only a small circle of highly industrialized nations have become signatories.⁷⁰

Critical to the success of such efforts to enhance individual rights is agreement and amity among states. These conditions, however, are difficult to create and maintain. Private commercial disputes are a recurring

64. See *supra* note 47.

65. See, e.g., 1 R. LILlich & B. WESTON, *supra* note 46, at 7-8; McDougal, Lasswell & Chen, *supra* note 38, at 636-37; Lauterpacht, *supra* note 39, at 458.

66. Lauterpacht, *supra* note 39, at 454; Jessup, *supra* note 40, at 908. See also Borchard, *The Access of Individuals to International Courts*, 24 AM. J. INT'L L. 359, 364 (1930).

67. Mixed Arbitral Tribunals (composed of judges from the two nations involved and a neutral country, to prevent stalemate) established by the Treaty of Versailles and the Arbitral Tribunal of Upper Silesia (between Germany and Poland in 1922) are instances in which states, by agreement, have given private claimants direct access against foreign states. See 2 F. GARCIA-AMADOR, *supra* note 46, at 529-31.

68. See Lauterpacht, *supra* note 38, at 113-16.

69. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 2 U.S.T. 570, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

70. Although the United States has signed the convention, such frameworks for dispute resolution are still exceptional and do not receive the support of many nations. See 3 A. LOWENFELD, *INTERNATIONAL ECONOMIC LAW: TRADE CONTROLS FOR POLITICAL ENDS* 616-17, n. a (1983) (only eleven disputes have been submitted to arbitration under the Convention); Lillich, *The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack*, 69 AM. J. INT'L L. 359, 363 (1975) (describing the opposition of developing countries to the World Bank Convention and other systems enforcing state responsibility).

source of international disruption, leaving troublesome disputes under the control of private claimants, which could block favorable political accommodation and harm many other individuals and commercial transactions. Conversely, state prerogative, though sacrificing private control in a specific instance, may improve political relations, thereby fostering the peaceful, private resolution of the majority of commercial disputes. As Professor H. Lauterpacht has observed, "the capacity of [individual] enforcement [in the international commercial arena] must be answered pragmatically by reference to the given situation and to the relevant international instrument."⁷¹ On a specific occasion, a state's decision to subordinate its national's interest is justified by the opportunity to bring about, through improved relations and possibly a formal agreement, the private rights conducive to healthy commerce and individual well-being. In the sphere of international claims settlement, therefore, it is "the intention of States . . ." that should govern,⁷² for without a modicum of political support and agreement, private rights have no chance to flourish.

Diplomatic involvement, in pursuit of an entire nation's interests as well as private claimants' satisfaction, plays several additional roles. First, it screens out frivolous claims—those that allege nominal damages or are intended to embarrass foreign states—and those that allege no violation of international law.⁷³ Second, diplomats will often prefer to negotiate with their counterparts in a given country, and enter into one agreement, rather than deal with a large group of private claimants who could demand divergent settlements.⁷⁴ Third, state espousal, in addition

71. Lauterpacht, *supra* note 38, at 97.

72. *Id.* at 112. Professor McDougal and his associates, vigorous advocates of private control of claims against states, nonetheless acknowledge that "[a]t times . . . the state interest, asserted from perspectives of the total foreign policy of the state, may be in contravention of the wishes of the individuals concerned." McDougal, Lasswell & Chen, *supra* note 38, at 560. In light of their strong support for individual rights, this observation may be seen as a further motivation for assuring private control and prohibiting state intrusion. At the same time, the writers recognize that the bolstering of individual rights would not eliminate the salutary role of states in protecting individuals. *Id.* at 637. It is not clear from their article how Professors McDougal, Lasswell, and Chen would resolve a conflict between private interests and a bona fide state interest in a particular claims settlement. This Article suggests that legal rules should give priority to the government in such a case.

73. Sohn & Baxter, *supra* note 57, at 580 (Art. 25 and Explanatory Note) (a government's "screening" function is part of its duty "to maintain good relations with a foreign State. . ."). See also E. BORCHARD, *supra* note 39, at 351; 8 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1223 (1967). Professor Lauterpacht recognizes that limiting the assertion of claims to those of sufficient weight and merit is an important goal, but believes that this will not be a serious problem if direct private action is allowed, since the costs of frivolous lawsuits would be prohibitive. Lauterpacht, *supra* note 39, at 454-55, 458.

74. 1 R. LILLICH & B. WESTON, *supra* note 46, at 13. By way of example, American citizens, following damage to their property caused by the Gut Dam, took steps to recover compensation from Canada. The claimants at one point sought a settlement directly with the

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to bolstering private claims and simplifying the task of states, also introduces an element of equity into international dispute resolution. Formal diplomatic settlement discourages powerful private claimants from obtaining preferential settlements at the expense of weaker creditors,⁷⁵ and puts the formidable weight of the government behind otherwise out-matched and vulnerable private claimants.⁷⁶ Formal settlement by either a lump sum payment or an arbitral commission could reduce inequalities in bargaining power.

Contemporary international law thus places national political interests above private control. It is against this backdrop of governmental discretion in international law, permitting state settlement of private claims in disregard of the actions or wishes of the private claimants, that the President's power to settle claims in the domestic sphere may be fruitfully analyzed.

C. *Espousal of Private Claims in Domestic Law*

Although under international law states have wide latitude to compromise private claims and enter settlements binding on private claimants, the same legal rules need not prevail in domestic law.⁷⁷ For example, a nation might pass a law permitting settlement of claims only at full value, or preventing settlement without the claimants' consent.⁷⁸ Under such a

government of Canada. Commentators attributed the failure of this effort to an inability to coordinate their activities and interests. "Negotiations between Canada and an association formed by the claimants were undertaken in 1953-54, but were unsuccessful. Since not all claimants were members of the association, it could offer Canada a settlement of only part of the claims, and that was unacceptable." Kerley & Goodman, *The Gut Dam Claims—A Lump Sum Settlement Disposes of an Arbitrated Dispute*, 10 VA. J. INT'L L. 300, 307 (1970). A similar problem would beset a government if it could not speak for all claimants. The American claimants in this case apparently had negotiated privately. Had the United States stepped in to espouse their claims, however, any settlement reached would have been binding under international law.

75. For instance, a powerful private enterprise might try to extract from a decaying government—or an unstable new government—concessions or compensation unavailable to smaller enterprises and detrimental to their interests. Diplomatic protection would sweep in all claims and mitigate such inequalities.

76. See Sohn and Baxter, *supra* note 57, at 580 (Art. 25 and Explanatory Note).

77. For example, it traditionally has been held that both espousal of a claim and determination of its validity and amount are matters of international law, while distribution of an award is a matter of domestic law. See, e.g., *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193, 212-13, (1828) (holding assignee in bankruptcy to be entitled under American law to receive award of claims tribunal established by the United States and Spain); Clark, *Legal Aspects Regarding the Ownership and Distribution of Awards*, 7 AM. J. INT'L L. 382 (1913). In actual practice, the line between claim espousal/valuation and distribution is blurred. Under lump sum claim settlements, for example, the claim is espoused internationally, yet its validity and value are determined by a national tribunal. See *supra* note 9 (discussing the operation of the FCSC). See generally R. LILICH, *INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS* (1962).

78. One commentator has actually suggested putting an affirmative duty on the govern-

law, private claimants could resort to domestic courts to compel or prevent action taken by their governments or seek damages if a claim has been settled disadvantageously.⁷⁹

A domestic legal regime subordinating governmental discretion to the autonomy of private claimants gives rise to an obvious difficulty. The narrow legal constraints of a private legal settlement could prevent the government from reaching a binding settlement of claims that would ameliorate relations or forestall their deterioration.⁸⁰ It is not surprising, therefore, that the international law of espousal, giving the government control over private claims, has been absorbed in its essential aspects into United States law.⁸¹ Traditional theories of claim "transformation" or "merger" have been accepted by some,⁸² but more recent affirmations of the claim settlement power have emphasized the practical element of "control."⁸³ The distinction is not critical, however, as demonstrated by the draft Restatement of Foreign Relations Law of the United States. It

ment, as the agent of private claimants, to settle claims at full value and making it a breach of that duty to waive a claim without the consent of the private claimant. Bannerman, *Constitutional Issues in the Settlement of Property Claims Against Foreign States*, 2 HASTINGS CONST. L.Q. 1123-24 (1975). This position understates the difficulty of proving a lack of diligent effort by the government and ignores the drawbacks of importing strict legal duties into the realm of diplomacy.

79. The difficulty of proving damages from a waiver or partial settlement of a claim would be substantial, due to the speculative nature of a private claim against a foreign government. This is especially true when international relations have soured, reducing the chance for direct recovery without diplomatic involvement. See Brownstein, *The Takings Clause and the Iranian Claims Settlement*, 29 UCLA L. REV. 984, 1012-17 (1982). Under existing law, however, "disappointed claimants have no right of judicial review as to the validity and amount of their [lump sum] awards, absent clear congressional intent to the contrary." R. LILICH, *supra* note 77, at 64 (emphasis in original).

80. See Comment, *Blocked Assets and Private Claims: The Initial Barriers to Trade Negotiations Between the United States and China*, 3 GA. J. INT'L & COMP. L. 449 (1973).

81. When a suit was brought against Mexico for the expropriation of property granted to the United States as part of an international claims settlement, a United States court, in dismissing the action, affirmed the continuing power of states to extinguish private claims: "Under well-established principles of international law, a sovereign power possesses the absolute power to assert the private claims of its nationals against another sovereign. . . This authority to espouse claims does not depend on the consent of the private claimholder . . . Once it has espoused the claim, the sovereign has wide-ranging discretion [to] . . . compromise it, seek to enforce it, or waive it entirely." *Association de Reclamates v. United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984) (citations omitted); See also 8 M. WHITEMAN, *supra* note 73, at 1216-33; RESTATEMENT, *supra* note 46, §§ 212, 213; L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 262-63 (1972).

82. See, e.g., Germany's Obligations and the Jurisdiction of this Commission as Determined by Nationality of Claims and Admin. Dec. no. V, Mixed Claims Comm., U.S. and Germany 145, 153 (Oct. 21, 1924) (U.S. Comm'ner Anderson) ("It is the settled law of the United States that by espousing a claim of an American national, and seeking redress on his behalf against a foreign government, the United States makes the claim its own. The United States has thereafter complete possession and control of the claim . . ."); Note, *Settlement of the Hostage Crisis*, *supra* note 23, at 1044-46 (arguing that the claim "merger" theory represents contemporary United States law).

83. See, e.g., Christenson, *supra* note 53, at 536-37, 539-42, 542 n.57 (suggesting, with

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states unabashedly that the government “may refuse to present a claim, settle it by negotiation, abandon it, or join it with other claims for en bloc resolution”⁸⁴

1. The Legal Setting for Claims Settlement

Judicial endorsement of the federal government’s power to settle claims emerges from several lines of case law. Courts have sanctioned and reinforced governmental discretion by (1) denying compensation under the fifth amendment⁸⁵ to American claimants dissatisfied with a particular settlement; (2) permitting Congress and the executive to withhold distribution of awards for allegedly fraudulent claims against foreign states; and (3) declining to review the awards made by national and international commissions pursuant to binding settlement agreements. The domestic law of claims settlement, emerging from these opinions, justifies the binding termination of ongoing lawsuits, an action that may be necessary to promote the nation’s interest in less volatile international relations.

a. *Denial of Compensation Under the Fifth Amendment*

The first noteworthy compensation case was *Meade v. United States*,⁸⁶ in which Richard Meade, an American claimant against Spain, had failed to secure an award from a claims commission that had been established by a treaty between Spain and the United States.⁸⁷ Although Meade had earlier sought assistance from the United States in receiving an unsecured judgment from a separate Spanish tribunal, the Claims Commission did not recognize that judgment. The Court of Claims denied compensation for loss of the claim since the government had created an alternative remedy in the Claims Commission, which had the sole authority to grant an award. In discussing the government’s underlying power over the claim, the court observed that the government “proba-

some circularity, that any claim injuring the government’s interests “is intergovernmental from the outset”).

84. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 902 comments i and m (Tent. Draft No. 5, 1984) (reaffirming traditional claim transformation principles but recognizing that some private elements remain, e.g., the ability to effect espousal through a private compromise of the claim). *See also* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 comment g, note 8 (Tent. Draft No. 4, 1983) (setting out the pattern of denying compensation under domestic law for claims settled unfavorably).

85. U.S. CONST. amend. V provides that “No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.”

86. 2 Ct. Cl. 224 (1866), *aff’d*, 76 U.S. (9 Wall.) 691 (1869).

87. For a discussion of the case, see W. COWLES, TREATIES AND CONSTITUTIONAL LAW: PROPERTY INTERFERENCES AND DUE PROCESS OF LAW 200-10 (1941).

bly” could not subject Meade’s “claim to the terms and conditions of the treaty [without his consent].”⁸⁸ Meade, however, had sought the government’s assistance, so he was subject to its political judgment.

The Supreme Court, affirming the denial of compensation, modified the Court of Claims’s cautious attitude toward the government’s power to settle claims. The Supreme Court observed initially that “the claimant . . . did invoke the aid of the United States in collecting his claims . . .”⁸⁹ This detail reinforced the Court’s decision in favor of the government, since a claimant who requested the government’s aid in settling his claim should be subject to the potential disadvantages of political assistance—namely, a settlement not entirely consistent with his wishes—as well as the potential benefits. Yet the Supreme Court employed broader language than had the Court of Claims, indicating that regardless of a claimant’s attitude toward diplomatic protection, the claimant lacked the power to deprive the government of settlement authority by resorting to a private remedy.⁹⁰ This decision suggests that private claimants should not be allowed to frustrate international settlements, even when the claimants have not directly sought government assistance.⁹¹

A settlement of private claims against France, occurring before *Meade* was decided but giving rise to controversial litigation afterwards, reinforced the rule of governmental discretion. In a treaty with France signed in 1800,⁹² the United States agreed to waive the private claims of Americans for the spoliation of their ships by French vessels enforcing a blockade against England. In return, France agreed to drop claims that it had against the United States for reneging on an earlier treaty of

88. 2 Ct. Cl. at 278.

89. 76 U.S. (9 Wall.) at 724.

90. “[T]he proposition [that the government’s power is revokable] is wholly inadmissible, as the effect would be that . . . negotiations [between nations] might be controlled by a single claimant having some pecuniary interest in the treaty.” *Id.*

91. There are scattered allusions in diplomatic correspondence to limited private control even after formal involvement by the state, but they confirm the retention of discretionary settlement power when political interests come into play. *See* DIG. U.S. PRAC. INT’L L. 332-33 (1973) (statement of Fabian A. Kwiatek, Assistant Legal Adviser for International Claims, U.S. Dept. of State). On one occasion, the Secretary of State wrote that “while the Government of the United States no doubt ought to reserve, and certainly will reserve to itself the right of pursuing such a course as a wise regard to the public interests requires, yet having originally taken up the subject at the instance of the claimants, and for their benefit, it would be altogether inexpedient to pursue it, without the attempt at least to obtain their consent beforehand to the measures adopted.” 2 F. WHARTON, INTERNATIONAL LAW DIGEST 549 (1887) (letter from Secretary of State Everett to Mr. Carvallo, Feb. 23, 1853). Even this qualified suggestion of individual control in a claim settlement was quickly retracted, however, and the Secretary of State explained that “inexpedient” did not mean “indispensable,” and that the government was not at all bound by private wishes. *Id.* (letter from Secretary of State Everett to Mr. Carvallo, Mar. 3, 1853).

92. Convention between France and the United States, Sept. 30, 1800, 2 U.S.T. 457, T.I.A.S. No. 85.

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friendship signed during the American Revolution.⁹³ The net result of the settlement was to sacrifice private claims for the sake of an overwhelming national interest in preserving peace.

In a celebrated case arising out of those events, *Gray v. United States*,⁹⁴ the Court of Claims declared a duty to compensate the private claimant,⁹⁵ but emphatically endorsed the exercise of political discretion. In sweeping language, the court also refused to attach any importance to the claimant's consent and flatly rejected its earlier cautious formulation in *Meade*.⁹⁶ Despite the apparent availability of an alternative remedy in France,⁹⁷ the government's authority to close off the private remedy by waiver—i.e., by a settlement amounting to complete forfeiture—prevailed over the wishes of private American claimants, even those who had not formally sought governmental assistance.

The Claims Court recently confronted a similar set of facts. A dissatisfied claimant against the People's Republic of China (PRC) contended that because President Carter had settled a claim against its will in connection with complete recognition of the PRC, it deserved compensation

93. See generally Note, *The French Spoliation Cases — An Unanswered Question*, 12 VA. J. INT'L L. 120 (1971) (summarizing the background of the French spoliation claims and their long history in United States courts).

94. 21 Ct. Cl. 340 (1886).

95. *Id.* at 392-93. The Court in *Gray* could not directly compensate the plaintiffs since its jurisdiction was limited to giving Congress an advisory opinion on the merits of compensation. *Gray* remains the strongest case suggesting that an unfavorable claims settlement is a compensable taking of "property" under the fifth amendment. See RESTATEMENT, *supra* note 46, § 213, Reporter's Note. Recent cases in the Claims Court indicate that the reasoning of *Gray* has been rejected, on the apparent ground that although a claim against a government is a property right, recovery is so problematic that an adverse executive action—especially one in a traditional area of executive discretion—produces merely a speculative injury that is not compensable. See, e.g., *Langenegger v. United States*, 5 Cl. Ct. 229, 236 (1984); *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 243-47 (1983); *Aris Gloves, Inc. v. United States*, 420 F.2d 1386, 1392-93 (Ct. Cl. 1970). The advisory holding in *Gray* may still have some validity, however, under the unusual circumstances presumed to exist in that case: namely, the foreign government promises compensation to private claimants but the U.S. government waives their claims for a purely public interest. See Note, *supra* note 39, at 123-24; *Aris Gloves*, 420 F.2d at 1396-97 (Nichols, J., concurring). The slim chance of compensability might not reassure anxious private claimants, but it could serve to discourage highly unfavorable executive settlements, especially when private remedies are available.

96. 21 Ct. Cl. at 392. ("That any Government has the right to [set off French national claims against American individual claims] as it has the right to refuse war in protection of a wronged citizen, or to take other action, which, at the expense of the individual, is most beneficial to the whole people, is too clear for discussion.")

97. *Id.* at 367, 376. In fact, the initial French willingness to pay compensation appeared to dissipate over time, with the French as well as the Americans demanding a set-off of private American claims against French national claims. *Id.* at 377-78. A more compelling basis for requiring compensation by the United States lay in the repeated assurances of relief by American officials. *Id.* at 355, 367, 376. In the case of Iran, by contrast, private claimants not only lacked an effective alternate remedy (since they had no vested right in the property held as security for their U.S. judgments), but they were in communication with the State Department, see 1981 Hearings, *supra* note 31, at 57-58 (statement of Warren Christopher, former Deputy Secretary of State), and could not claim to have been misled by American officials.

for the unsatisfied portion of the claims.⁹⁸ In *Shanghai Power Co. v. United States*, as in *Gray*, the court recognized the existence of an alternative remedy—a federal court action pursuant to the FSIA—yet nonetheless upheld the government’s authority to substitute another remedy by means of a binding claims settlement.⁹⁹ In justifying the government’s authority to take control of private claims without compensating for individual losses, the court recognized that there were substantial risks, generally known to businessmen, that political changes could interfere with foreign investment.¹⁰⁰ The court stressed that the government’s primary task was to improve political conditions.¹⁰¹ “Americans who trade . . . abroad rely upon the fabric of relationships established between our government and others . . . When that fabric is strained or torn . . . it may not be possible to repair it without sacrificing some pre-existing rights.”¹⁰² The government’s foremost responsibility was to restore the harmonious relations essential to trade in the future. Without the opportunity for a binding settlement, many other businessmen, and the nation at large, could be injured.

Implicit in the holdings of fifth amendment cases are two important ideas, one pragmatic, the other legal. The pragmatic understanding is that a requirement of compensation would complicate and perhaps preclude important presidential decisions in a moment of international tension. The possibility of judicial intrusion—ordering the payment of billions of dollars in damages—would surely hamper effective and decisive action.¹⁰³ Underpinning the rationale for the non-compensability of

98. Agreement Between the Government of the United States and the Government of the People’s Republic of China Concerning the Settlement of Claims, 30 U.S.T. 1957, T.I.A.S. No. 9306, (May 11, 1979), amended by 31 U.S.T. 5596, T.I.A.S. No. 9675 (Sept. 28, 1979). See also DIG. U.S. PRAC. INT’L L. 1213-15 (1979) (recounting the executive agreement under which the PRC agreed to pay \$80.5 million in satisfaction of a total debt of about \$196.9 million, yielding claimants approximately forty-one cents per dollar of claims preadjudicated before the FCSC).

99. *Shanghai Power Co.*, 4 Cl. Ct. at 240-41, 243-44. Accord *Aris Gloves*, 420 F.2d 1386 (denying compensation to owners of factories located in Czechoslovakia and areas of Germany occupied by American troops but later placed under Soviet control by the Potsdam Agreement). In *Aris Gloves*, the court rested its argument primarily on the existence of “constructive” hostilities at the time and precedents that denied compensation for property losses under such circumstances. *Id.* at 1391-92. However, in view of a lump sum agreement with Czechoslovakia, providing partial satisfaction through adjudication before the FCSC, *id.* at 1388-89, and the government’s power to waive claims against foreign states, the case could have been decided more squarely by upholding the government’s claim settlement power.

100. *Shanghai Power Co.*, 4 Cl. Ct. at 244-45.

101. Cf. *E-Systems, Inc. v. United States*, 2 Cl. Ct. 271, 274-75 (1983) (holding that alleged takings in the area of foreign affairs should be treated no differently than governmental acts in other areas of policy, yet denying any compensation for the Iranian claims settlement pending adjudication of claims before the Iran-United States Claims Tribunal).

102. *Shanghai Power Co.*, 4 Cl. Ct. at 245.

103. See *Langenegger*, 5 Cl. Ct. at 233-34 (recognizing that judicial involvement in foreign

claims is the fact of potential governmental control.¹⁰⁴ Phrased differently, the authority of the government to take over a claim and take it into the political domain at any pressing moment renders a claim's value too speculative to calculate. The right to a claim against a foreign state is qualified, and therefore may be unenforceable. To trace the doctrine of political control in domestic law, it is necessary to move to another body of case law.

b. *The Creation of a National Fund*

The government's right to politicize a private claim, thereby subordinating it to diplomatic concerns, comes under the rubric of the "national fund" doctrine.¹⁰⁵ This doctrine emerged from an assortment of cases in which private claimants sought writs of mandamus ordering the Secretary of State to distribute funds received from foreign governments in settlement of international claims.¹⁰⁶ The Supreme Court refused to grant writs on the ground that such funds belonged legally to the United States government.¹⁰⁷ Although private claimants were said to have an equitable "expectancy of interest in the fund, that is, a possibility coupled with an interest,"¹⁰⁸ the Court refrained from interfering in the government's discretionary decision as to its distribution.¹⁰⁹ Courts have considered that disbursements by the government to private claimants are "by way of gratuity, payments as of grace and not of right."¹¹⁰

Behind the government's extensive control over the distribution of

policy could frustrate the goals of secrecy and unity in diplomatic negotiations and harm relations with foreign nations).

104. *Shanghai Power Co.*, 4 Cl. Ct. at 244-45, 245 n.14.

105. See R. LILLICH, *supra* note 77, at 23-40 (giving an overview of the national fund doctrine in United States law); Brownstein, *supra* note 79, at 984, 992-98 (offering a critical assessment of the doctrine's impact on private claimants).

106. See, e.g., *U.S. ex rel. Boynton v. Blaine*, 139 U.S. 306, 321-23, 325 (1891); *United States ex rel. Angarica v. Bayard*, 127 U.S. 251, 259 (1888); *Frelinghuysen v. Key*, 110 U.S. 63, 71 (1884); *Great Western Insurance Co. v. United States*, 19 Ct. Cl. 206, 216-18, *aff'd*, 112 U.S. 193 (1884). See also Clark, *supra* note 77, at 382 (discussing government espousal of claims and the establishment of a national fund).

For modern restatements of political control, see Seyersted, *supra* note 46, at 143 (Norway); J. CASTEL, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA* 1022-43 (2d ed. 1965) (Canada); *RESTATEMENT*, *supra* note 46, § 213 (United States).

107. See, e.g., *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 458 (1899) ("As between the United States and Mexico, indeed as between the United States and American claimants, the money received from Mexico under the award of the commission was . . . the property of the United States . . .").

108. *Williams v. Heard*, 140 U.S. 529, 538 (1891) (upholding claim of assignee in bankruptcy to an award of a domestic claims commission established by Congress to make awards from a national fund paid into by Great Britain under the "Alabama Claims" settlement of 1871).

109. *Id.* at 537-38.

110. *Blagge v. Balch*, 162 U.S. 439, 457 (1896) (denying the ownership interest of an assignee in bankruptcy in a claim against France growing out of the French spoiliations of the late eighteenth and early nineteenth centuries). *Cf.* *Williams v. Heard*, 140 U.S. 529 (1891);

funds from international claims settlements is its control over the disposition of private claims. The Court's recognition of this governmental power is evident in its treatment of the notorious claims of Benjamin Weil and the La Abra Silver Mining Company, adjudicated by a Mexican-United States claims commission established in 1868.¹¹¹ After Mexico began its payments under the agreement and the United States proceeded to transmit them to American claimants, the Mexican government learned of the claims' possible fraudulence and sought a rehearing on their validity. After the United States ceased disbursing the awards, the claimants sued for their continuation. On the theory that the claims, though traceable to private claimants, had become international and political in character, the Court plainly subordinated private interests to public demands. "Every citizen who asks the intervention of his own government against another for the redress of his personal grievances must necessarily subject himself and his claims to [the] requirements of international comity."¹¹² In a later decision growing out of the same contested claims, the Court deleted the reference to the request for intervention and stated simply the government's possession of, and authority over, the claim:

As between nations, the proprietary right in respect to those things belonging to private individuals or bodies corporate within a nation's territorial limits is absolute, and the rights of [an individual] cannot be regarded as distinct from those of his government. The government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it.¹¹³

In both traditional and modern doctrines of claims settlement, it is the act of presenting and settling a claim that critically changes its legal character by coloring a private claim with diplomatic priorities and accounts for the government's discretion over its disposition.¹¹⁴

c. *The Enforcement of Settlement Agreements*

To ensure the integrity of international settlements, the government has discretionary authority to withhold awards for dubious claims. The government also has authority to guarantee the usefulness of those settlements by insulating awards from the challenge of dissatisfied private

Comegys v. Vasse, 26 U.S. (1 Pet.) 193 (1828) (upholding the interests of assignees in bankruptcy in claim against foreign states).

111. *La Abra Silver*, 175 U.S. at 469-500.

112. *Id.* at 434 (citing *Frelinghuysen v. Key*, 110 U.S. at 73).

113. 175 U.S. at 439 (citing *United States ex rel. Boynton v. Blaine*, 139 U.S. at 323).

114. This may not always have been true. According to one commentator, the Supreme Court's view of espousal evolved in the course of the nineteenth century from the notion that the state "represents" a private claim to the theory that it "transforms" a private claim into one that is public. Hostie, *supra* note 42, at 86-87.

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claimants. Without that legal safeguard, private claimants could embroil their governments in a fight over the wisdom of a particular settlement, and greatly encumber a process designed to facilitate the resolution of international disputes.

The Supreme Court faced a challenge to an arbitral award in *Z. & F. Assets Corp. v. Hull*.¹¹⁵ The Court's decision shielded the government's control of the process of settling claims from the potentially debilitating effect of private interference.¹¹⁶ In *Z. & F. Assets*, private claimants who had already received awards from the United States-German Mixed Claims Commission opposed the rehearing and acceptance of other claims, since any further awards would dilute the value of their share of a limited fund. The Court rejected their request for an injunction barring distribution of the challenged awards on the ground that the act of submitting the claims to international adjudication had converted a private claim into one between the two governments.¹¹⁷ While Chief Justice Hughes's opinion for the Court was argued narrowly, resting on a statute giving the Secretary of State discretion over the certification and payment of international arbitral awards,¹¹⁸ the concurring opinion of Justice Black and the opinions of the lower courts were broader.¹¹⁹ Justice Black, joined by Justice Douglas, maintained that private claimants had no avenue of relief in domestic courts, as their settled claims had become "the subject of a diplomatic controversy between the United States and Germany."¹²⁰ Under either theory, the government possessed authority to block the interference of private claimants with the settlement of a claim.¹²¹

The thread running through this body of case law is political control. This control is essential to the legal validity of a transfer of claims to an arbitral tribunal and the alleged infringement on federal court jurisdiction. First, it is apparent that the United States may settle a claim (without the necessity of compensation) even when an alternate remedy exists. Second, public settlement subordinates a claim to perceived diplomatic

115. 311 U.S. 470 (1941).

116. *Accord Meade v. United States*, 76 U.S. (9 Wall.) 691 (1869) (holding that the Court of Claims lacked jurisdiction to review a decision of domestic claims tribunal, denying the validity of a claim against Spain); *see supra* notes 86-91 and accompanying text.

117. 311 U.S. at 487.

118. *Id.* at 489. *See supra* note 77 (ownership of claims is a domestic law issue subject to ordinary judicial resolution whereas the government's separate power to enter binding claims settlements is a political matter).

119. 31 F. Supp. 371 (D.D.C. 1940), *aff'd*, 114 F.2d 464 (D.C. Cir. 1940).

120. 311 U.S. at 492-93 (Black, J., concurring).

121. The importance of securing claims settlement from private challenge is reflected in 22 U.S.C. § 1623(h) (1982), which bars judicial review of determinations of the Foreign Claims Settlement Commission. *See, e.g., American & European Agencies, Inc. v. Gilliland*, 247 F.2d 95 (D.C. Cir. 1957) (broadly applying the ban on judicial review of FCSC valuations).

needs, thereby removing private control. After a settlement, therefore, a domestic court does not lose jurisdiction over the same private claim, but rather, faces a substantially different claim, one that is no longer tied to the interests and wishes of private parties.

Language employed many years ago by the Court of Claims, in rejecting the argument that the government acted simply as trustee of a private claim, illustrates the legal principle that obviates the jurisdictional problem presented by a claims settlement:

When the national government urged upon Great Britain the demands of American citizens, . . . those demands . . . passed out of the region of mere private right into the domain of international law, and out of the hands of the citizen into those of his government . . . [After presentation of the claim] *there existed no private claims of American citizens against Great Britain for the depredations of the rebel cruisers; they were all obliterated by the act of the United States as a sovereign, in demanding and receiving satisfaction therefor.*¹²²

Though such a stark expression of the claim transformation theory is rare in contemporary legal discourse, it is not inconsistent with the current view, according to which the government assumes control over a claim by taking it into the realm of diplomacy. However it is characterized, the government's authority in foreign affairs encompasses the power to settle a dispute in the course of private litigation and bind possibly resistant nationals. Once this authority is recognized, the method of settlement is not critical.¹²³ For example, the government's authority to enter a binding settlement of claims has been as valid when the settlement resulted from adjudication by an international commission as when it resulted from adjudication by a national commission.¹²⁴

122. *Great Western Insurance Co. v. United States*, 19 Ct. Cl. 206, 217-18, *aff'd*, 112 U.S. 193 (1884) (emphasis added) (denying claim against the residue of a fund paid into by Great Britain in connection with the "Alabama Claims" settlement and only partially distributed by a domestic claims commission).

123. Diplomatic protection includes an array of remedial techniques. See Note, *Executive Claims Settlement Power*, *supra* note 9, at 156 n.2. In the words of Professor Dunn regarding diplomatic protection in the case of citizens abroad: "the subject of diplomatic protection of citizens abroad embraces generally all cases of official representation by one government on behalf of its citizens or their property interests within the jurisdiction of another . . ." 2 F. DUNN, *DIPLOMATIC PROTECTION OF AMERICANS IN MEXICO* 2 (1933). In a 1961 memorandum, the Department of State provided for three specific means of settlement: (1) compensation through diplomatic submission of individual claims; (2) lump sum settlements with national adjudication of individual claims; and (3) submission of claims to an international arbitral tribunal. These methods were distinguished from "espousal," whose precise meaning was left unclear. Kerley, *Contemporary Practice of the United States Relating to International Law: International Claims*, 56 AM. J. INT'L L. 165, 167 (1962). Professor Lillich, by contrast, viewed the first option—settlement through diplomatic negotiation—as espousal, and distinguished the remaining two. R. LILLICH, *supra* note 30, at 167.

124. Compare, e.g., *Z. & F. Assets*, 311 U.S. 470 (United States-German Mixed Claims Commission, established by executive agreement in 1922), with *Shanghai Power*, 4 Cl. Ct. 237

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Similarly, the government assumes control over claims both when its agent actually argues the cases before an international commission and when private claimants control the presentation before national commissions.¹²⁵ The essential element is not a procedural formality, but the creation of an alternate remedy by international agreement.¹²⁶ It is the power to take over a private claim that underpins the United States government's authority to reach a binding settlement agreement.

Two issues stand in the way of complete acceptance of the espousal doctrine in domestic law: (1) the proper institutional roles of the President and Congress in settling claims; and (2) the right of claimants to seek private remedies in domestic courts, which in turn may interfere with the executive's effort to settle a claim.

With respect to the separation of powers, both historical practice and judicial decisions support an independent executive power to settle claims by executive agreement as well as treaty. In view of unbroken historical practice approved by the judiciary, it is unnecessary to attach an uninformative label, such as "inherent" or "implied" constitutional power, to justify the executive's authority.¹²⁷ The executive has long exercised the power to settle claims; the only, but by no means unimportant, institutional question is whether Congress has taken any steps to withdraw or restrict that power.

(lump sum agreement with PRC, established by executive agreement in 1979). See also Stewart & Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, in THE IRAN-UNITED STATES CLAIMS TRIBUNAL, 1981-1983, at 13-14 (R. Lillich ed. 1984) (noting that a lump sum settlement is anticipated for claims of less than \$250,000). But see *Marschalk Co.*, 518 F. Supp. at 88, in which Judge Duffy wrote that "[t]here is no settlement of a case where the adjudication of the rights of the parties is merely transferred to another forum." This view disregards the common procedures by which states render diplomatic protection to private claims in the international setting.

125. The Office of the Legal Adviser to the U.S. Department of State apparently takes a different view. It maintains that the private claims against Iran have not been espoused, but rather, have been simply transferred, as shown by the capacity of individual claimants to present their cases directly before the Claims Tribunal. While previous international claims commissions restricted the presentation of cases to government agents, see A. FELLER, THE MEXICAN CLAIMS COMMISSION, 1923-1924, at 287-88 (1934), the view of the Deputy Legal Adviser is overly formalistic. Unless a lump sum agreement is reached, the United States will directly present claims for less than \$250,000 to the Tribunal. Stewart & Sherman, *supra* note 124, at 6, 13. Given the government's complete discretion over any remedy, the Claims Tribunal is simply a form of diplomatic protection, or governmental settlement of claims.

126. Instead of drawing fine terminological distinctions, it is more helpful to view diplomatic protection in the form of claims settlement power as a basis of an "agreement on specific procedure for settlement" Wetter, *supra* note 32, at 324. See also Christenson, *supra* note 53, at 532. The crucial point is that the government may remove control of the claim from the private claimant once a procedure is established to pay valid claims or a direct payment is made. See, e.g., *id.* at 536-37, 541-42; R. LILlich, *supra* note 30, at 200.

127. For a summary of the classic debate over the "sole organ" and "concurrent authority" theories of executive foreign affairs power, see E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, at 207-14 (1984).

Congress, in fact, has taken no action that casts doubt on the distinct, well-established executive authority to settle claims. On the contrary, it has flatly rejected attempts to alter the executive's institutional role in the espousal of claims against foreign states. In the face of congressional reticence, there is no need to cast doubt on the executive's power or rummage through sparse legislative history for its source, as the Court did in *Dames & Moore*.¹²⁸

2. The Historical Basis of Executive Power

Claims settlements by the executive have occupied an important place in American foreign policy. Central to the early diplomacy of the nation were treaties of amity, which included provisions settling claims for damage to American commercial vessels that had become entangled in European strife.¹²⁹ International compacts, such as the one with France in 1800,¹³⁰ have been an important means of defusing hostilities. Claims of American nationals have been settled by executive agreements as well as by treaties.¹³¹ The first settlement by executive agreement was with the Netherlands in 1799.¹³² Settlement by the executive continued throughout the nineteenth century.¹³³

Thus resting on a solid historical foundation, executive claims settlements have continued through the present as a normal diplomatic practice. In the nineteenth century, both mixed claims commissions and lump sum agreements (with valuation by national commissions) were common.¹³⁴ In the twentieth century, mixed claims commissions gave

128. 453 U.S. at 677, 680-82, 688.

129. See, e.g., Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, United States-Great Britain, art. VII, 2 U.S.T. 245, T.I.A.S. No. 105 (Jay Treaty); Treaty of Friendship, Limits, and Navigation, Oct. 27, 1795, United States-Spain, art. XXI, 2 U.S.T. 318, T.I.A.S. No. 325.

130. See *supra* note 92 and accompanying text.

131. There has been no clear rationale governing the choice of treaty or executive agreement, except to the extent that many of the treaties have involved reciprocal claims against the United States, requiring congressional appropriation of funds. Treaty ratification would foster congressional support for the arrangement. See Moore, *Treaties and Executive Agreements*, 20 POL. SCI. Q. 385, 399-403 (1905); but see McDougal & Lans, *Treaties and Congressional Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 269-70 (1945). Executive agreements settling strictly American claims lacked that rationale for congressional participation.

132. Settlement of the Case of the Schooner "Wilmington Packet," Dec. 7, 1799, United States-Netherlands, 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1075 (H. Miller ed. 1937).

133. For an exhaustive list of claims settlement agreements by executive agreement as well as by treaty through United States history, see Brief for Intervenor, Bank Markazi Iran at Appendix A, *Dames & Moore v. Regan*, 453 U.S. 654 (1981). See also Moore, *supra* note 131, at 399-408; Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 80-82, 244 (1922); McDougal & Lans, *supra* note 131, at 273-77.

134. See, e.g., R. LILICH, *supra* note 77, at 5-23; M. HUDSON, INTERNATIONAL TRIBUNALS 3-9 (1944).

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way after World War II to lump sum agreements dispensed by the Foreign Claims Settlement Commission.¹³⁵ The Iran-United States Claims Tribunal thus harks back to a post-World War II form of claims settlement.¹³⁶ Claims settlements by executive agreement have not lost their significance or regularity, even as the volume of private litigation against states has grown.¹³⁷

Given the deep-rooted nature of independent executive power to settle claims, the Court's search in *Dames & Moore* for a legislative grant of authority was unnecessary. By conducting that search without setting the government's action in the context of the extensive law of claims settlement, the Court was forced to tease strained meanings out of scattered congressional actions and to rest executive power on the shaky foundation of congressional acquiescence. The approach presented here shows that executive power to settle claims need not rely on a implied congressional delegations of authority.

a. *Congressional Acceptance of Executive Authority*

Although the approach in *Dames & Moore* was overly cautious and cast needless doubt on executive authority, the Court's reading of congressional action was not inaccurate. Congressional acts touching on claims settlement have confirmed the executive's predominant institutional role.

In 1963, a resolution was introduced in Congress requesting that international claims settlement agreements be submitted to the Senate as treaties if a national commission, such as the Foreign Claims Settlement Commission, had already adjudicated the claims.¹³⁸ The resolution did not cover all settlement agreements, but only those that had been so adjudicated. Presumably, settlements arranged under emergency conditions were exempt, since mandatory Senate approval might impede executive action in a crisis. The necessity of disclosing secret negotiations and delaying an agreement so that a treaty could be ratified would severely re-

135. See 1 R. LILlich & B. WESTON, *supra* note 46, at 3-4, 30, 33; see also *supra* note 9.

136. Commentators differ as to the proper classification of the Iran-United States Claims Tribunal. Professor Sohn views it in the light of prior tribunals, see Sohn, *The Iran-United States Claims Tribunal: Jurisprudential Contributions to the Development of International Law*, in THE IRAN-UNITED STATES CLAIMS TRIBUNAL, 1981-83, at 92 (R. Lillich ed. 1984), while Professor Lowenfeld has pointed to its novelty, see 3 A. LOWENFELD, *supra* note 70, at 616-17. A more realistic assessment is that the Tribunal is a hybrid, adjudicating public claims that also appear to be private, see Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility*, 24 VA. J. INT'L L. 259 (1984), and having the form of a traditional mixed commission although applying rules of private commercial arbitration. See Carter, *The Iran-United States Claims Tribunal: Observations on the First Year*, 29 UCLA L. REV. 1076, 1076-80, 1084-85 (1982).

137. See *Dames & Moore*, 453 U.S. at 680-81, 681 n.9 (list of ten claims settlement agreements entered by the executive since 1952).

138. S. RES. 2403, 88th Cong., 1st Sess., 109 CONG. REC. 25, 148-49 (1963).

duce the likelihood of a claims settlement. Moreover, the constitutionality of a congressional statute that compels submission of claims settlement agreements as treaties is doubtful.¹³⁹

Congress next took action affecting the executive's power to enter international agreements in 1971 when it passed legislation requiring the Secretary of State to submit to Congress the text of all executive agreements "as soon as practicable" after they have taken effect.¹⁴⁰ The bill's legislative history expressly states that "[t]he right of the President to conclude executive agreements is not in question"; the legislation's sole purpose was disclosure.¹⁴¹ With regard to claim settlements in particular, the sponsor of the legislation recognized that Congress had "accepted the right of the President, one individual, acting through his diplomatic force, to adjudicate and settle claims of American nationals against foreign countries"¹⁴²

The FSIA, passed in 1976, made no reference to claims settlement agreements.¹⁴³ In extensive hearings on the legislation, public officials and scholars testified that a private remedy in domestic courts did not supplant the role of national claims settlement;¹⁴⁴ diplomatic settlement and private law suits were meant to be complementary.¹⁴⁵ Congress's recognition of executive power was reiterated one year later with passage of

139. See Matthews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L. J. 344, 384 (1955) (denying Congress's power to limit the executive agreement power when national interests are threatened); but see Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972) (denying constitutional validity to executive agreements and thus implicitly permitting congressional restrictions).

140. 1 U.S.C. § 112b (1982).

141. H.R. REP. NO. 1301, 92d Cong., 2d Sess. 4 (1972), reprinted in 1972 U.S. CODE CONG. & AD. NEWS 3067, 3070.

142. *Transmittal of Executive to Congress: Hearings on S. 596 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 74 (1971) (statement of Sen. Case).

143. Congress made FSIA subject only to existing international agreements, not future agreements. 28 U.S.C. §§ 1604, 1609 (1982). This does not imply that all future executive agreements, for example, on claims settlement, are barred. But see *Marschalk Co. v. Iran Nat'l. Airlines Corp.*, 518 F. Supp. 69, 82-83 (S.D.N.Y. 1981). Instead, it was merely intended to ensure that ad hoc executive agreements with respect to immunity from suit did not reemerge as an impediment to ordinary commercial litigation. See *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 52 (1973).

144. See *Immunities of Foreign States: Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 18 (1973) (statement of Bruno Ristau, Chief, Foreign Litigation Division, Dept. of Justice) [hereinafter cited as *1973 Hearings*]; *id.* at 26, 31 (statement of Charles Brower, Acting Legal Adviser, Dept. of State).

145. The Supreme Court held that FSIA restricted executive discretion with respect to sovereign immunity determinations but did not prohibit the executive's claims settlement power. *Dames & Moore*, 453 U.S. at 685-86. Judge Breyer, however, was more troubled that FSIA, by providing an alternate mechanism for resolving commercial disputes with foreign governments, had weakened the legal foundation beneath binding executive claims settlements. *Chas. T. Main Int'l*, 651 F.2d at 817-18, 818 n.5 (concurring opinion).

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IEEPA, whose legislative history expressly disavows any attempt to limit the President's power to settle claims.¹⁴⁶

Judicial support for independent executive authority comes from the controversial case of *Pink v. United States*,¹⁴⁷ in which the Supreme Court upheld a claims settlement with the Soviet Union. Under the "Litvinov Assignment," the United States waived claims of American citizens for nationalization of their property in exchange for an assignment to the United States of property in the United States seized by the Soviet Union under expropriation decrees. Out of this "assigned" property the United States was to pay off the claims of American nationals through adjudication by a national commission.¹⁴⁸

Despite the serious question whether Soviet decrees had any force over property held lawfully in this country, the Supreme Court upheld the interest of the United States in the assignment over the interests of private claimants.¹⁴⁹ In the process, the Court developed a theory of independent executive claims settlement power as an incident of the President's authority under Article II of the Constitution to recognize foreign nations.¹⁵⁰ Such agreements were deemed to be critical to the nation's foreign policy, a view that strongly favored independent executive authority.¹⁵¹

The *Pink* case has been relied on heavily by litigants both defending and contesting executive claims settlement power. One of President Carter's chief assistants, deeply involved in the hostage release negotiations, looked to this case as the strongest foundation for the U.S.-Iran settlement agreement.¹⁵² The respondents in *Dames & Moore*, the Iranian and U.S. governments, opened their defense of presidential claims

146. S. REP. NO. 466, 95th Cong., 2d Sess. 6, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 4540, 4544.

147. 315 U.S. 203 (1942).

148. See 22 U.S.C. § 1641d(a) (1982) (providing for adjudication of pre-1933 claims against the Soviet Union by the Foreign Claims Settlement Commission).

149. See also *United States v. Belmont*, 301 U.S. 324 (1937).

150. *Belmont*, 301 U.S. at 330-31; *Pink*, 315 U.S. at 229-30. The President's constitutional authority to "recognize" foreign sovereigns is not explicit and rests on a vague conferral of authority to receive ambassadors. Through actual practice this grant of authority has become equivalent to an "inherent" constitutional power to recognize or withdraw recognition from foreign nations. See L. HENKIN, *supra* note 81, at 41-42.

151. Justice Douglas, writing for the majority in *Pink*, recognized the need for executive maneuverability:

Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President . . . Effectiveness in handling the delicate problems of foreign relations requires no less. Unless such a power exists, the power of recognition might be thwarted or seriously diluted.

315 U.S. at 229-30 (citations omitted).

152. *Emergency Economic Powers: Iran: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Relations*, 97th Cong., 1st Sess. 7 (1981) (statement of Lloyd Cutler).

settlement power with citations to *Pink*.¹⁵³

If the language of the Court in *Pink* is read strictly, presidential claims settlement power is confined to settlements incident to recognition. Such a construction, however, is too narrow. Immediately after upholding the settlement power exercised in connection with recognition, the Court broadened executive settlement power to include an agreement connected with any "rehabilitation of relations between this country and another nation."¹⁵⁴ Drawing a distinction between recognition of a new government and restoration of friendly relations, for the purpose of fencing in executive discretion, is impractical and unwise.¹⁵⁵ In a concurring opinion in *Pink*, Justice Frankfurter did not even suggest a confinement of executive claims settlement power.¹⁵⁶ No rational line could be drawn.¹⁵⁷

Commentators who criticize executive discretion, and applaud such congressional efforts as the Gravel Amendment¹⁵⁸—which used congressional leverage over trade legislation to block a claims settlement with Czechoslovakia—still recognize as unchanged the constitutional allocation of claims settlement power to the President.¹⁵⁹ The President's discretionary authority to settle private claims remains unimpaired.

b. *The Rights of Private Litigants*

Pink also lends support to the executive's independent authority to intervene in ongoing litigation. The case not only stands for the rule that executive agreements, like treaties, take priority over state law, but also

153. Brief for Intervenor, Bank Markazi Iran, at 16 and Brief for the United States at 40, *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

154. 315 U.S. at 230.

155. *But see* Note, *Executive Claims Settlement Power*, *supra* note 9, at 184-85 (conditioning the exclusivity of executive claims settlement authority on the contemporaneity of "recognition").

156. 315 U.S. at 240-41 (Frankfurter, J., concurring).

157. Other courts, both before and after *Pink*, have upheld the executive's independent power to settle claims as it deems appropriate. Furthermore, this power was not treated as limited by the Constitution or in practice to particular types of foreign policy contexts. *See Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951). For instance, the Court of Appeals for the Second Circuit, when faced with a challenge to the United States's claim under the Litvinov assignment, upheld without hesitation the President's right to settle claims, stating that, "The President . . . is entrusted with the right of conducting all negotiations with foreign governments and is the judge of the expediency of instituting, conducting, or terminating such negotiations in respect to claims against foreign governments. Agreements of such claims are not submitted to the Senate." *Russia v. Nat'l City Bank of New York*, 69 F.2d 44, 48 (2d Cir. 1934). A district court upheld an executive claims settlement with Bulgaria, simply stating that "the settling of claims of United States citizens against foreign countries is within the implied powers given to the Executive by the Constitution." *Avramova v. United States*, 354 F. Supp. 420, 422 (S.D.N.Y. 1973).

158. Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement*, 69 AM. J. INT'L L. 837 (1975).

159. *Id.* at 844.

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upholds executive power to enter a binding claims settlement that cuts off an otherwise viable private remedy.¹⁶⁰ The actions of alien claimants in New York were effectively terminated when the Supreme Court enforced an executive claims settlement, affirming the federal government's interest in disputed property needed to satisfy private claims.¹⁶¹ Lower courts, following that decision, have swept away not only the remedies of foreign creditors but also the actions of state-appointed receivers and private American claimants asserting rights after a claims settlement has taken legal effect.¹⁶²

The Supreme Court in *Pink* reinforced the executive's independent power to enter a binding settlement that interferes with private judicial remedies. Lower courts have grounded their deference to executive claims settlements on the "political question" doctrine,¹⁶³ and have held that actions demanding or rejecting a presentation of claims are not cognizable in domestic court.¹⁶⁴ This applies to suits against foreign governments as well as against the United States, for in both instances an executive settlement may take away private control and move the claim into the public domain of diplomacy. The initiation of a lawsuit does not empower private claimants to veto the nation's foreign policy.¹⁶⁵ While some private maneuverability remains,¹⁶⁶ it is limited and subject to ter-

160. See R. LILICH, *supra* note 30, at 87 ("where diplomacy has functioned . . . the courts may be closed to individual litigants in the interest of all claimants. . . .").

161. *Pink* was problematic in its enforcement of Soviet expropriation decrees against property held in the United States. In 1942, enforcement of the Litvinov assignment was not integral to the nation's foreign policy. The Supreme Court could have upheld the rights of foreign creditors without political repercussions, but instead went to great lengths—even to the point of applying Soviet law as interpreted by a Soviet official at the request of the Court—to defeat those rights. Justice Douglas's dismissal of fifth amendment due process protection for foreign creditors was certainly troubling, 315 U.S. at 228. Cf. *Russia v. Nat'l City Bank of New York*, 69 F.2d at 47-48 (upholding, at the time of entering the Litvinov assignment, the President's right to settle claims).

162. See, e.g., *United States v. New York Trust Co.*, 75 F. Supp. 583, 589-90 (S.D.N.Y. 1946), *aff'd, modified in part*, 161 F.2d 571 (2d Cir. 1947); *Steingut v. Guaranty Trust Co.*, 58 F. Supp. 623, 633-34 (S.D.N.Y. 1944).

163. Courts have denied declaratory and injunctive relief to private claimants who sued to compel satisfaction of claims in a manner deemed politically unwise. See, e.g., *Logan v. Secretary of State*, 553 F.2d 107 (D.C. Cir. 1976); *Redpath v. Kissinger*, 415 F. Supp. 566 (W.D. Tex.) *aff'd*, 545 F.2d 167 (5th Cir. 1976) (refusing to issue writ of mandamus compelling the extension of diplomatic protection to an American imprisoned abroad). Courts have also refused to order espousal after the State Department declined to do so. See e.g., *United States ex rel. Holzendorf v. Hay*, 194 U.S. 373, 375 (1904). Courts in a variety of contexts have declined to review executive actions affecting international relations, above all when the actions rested on discretionary decisions as to proper negotiating posture. See, e.g., *Adams v. Vance*, 570 F.2d 950, 954-56 (D.C. Cir. 1977).

164. See, e.g., *Z. & F. Assets Corp. v. Hull*, 311 U.S. 470, 487 (1941). If this view were expanded, it would defeat any right private claimants might have to litigate a claim in spite of executive espousal, the very issue presented in *Dames & Moore*.

165. See *Meade*, 76 U.S. (9 Wall.) at 724-25.

166. RESTATEMENT, *supra* note 46, at § 211 comment a ("under normal conditions" a United States citizen could not be prevented "from seeking reparation from . . . the foreign

mination by an executive settlement.¹⁶⁷

If a private claimant could reject the government's settlement by choosing a private remedy that was deemed inviolable, the executive branch's settlement power would be meaningless. The inability of the executive to enter a binding settlement would greatly reduce the value to the foreign government of dealing with U.S. officials. A choice of remedies—in essence a private claimant's veto power over a diplomatic settlement—would likely result in no public settlement at all. An individual claimant might upset a delicate arrangement that balanced numerous interests at once, such as that in the Iranian crisis. One group of claimants might thus injure not only the interests of another group but also the interests of the entire nation. Effective execution of national foreign policy requires an executive claims settlement power that includes the capacity to provide one remedy—be it an international arbitral commission or lump sum award—and preclude others. The authority to foreclose domestic remedies is a logical extension of the claims settlement power. It does not revolutionize that power or expand it in a way inconsistent with rules of international or domestic law.

Critics of the President's power to enter a claims settlement agreement once litigation has begun have turned to the FSIA for support.¹⁶⁸ Although its drafters envisioned a continuing, meaningful claims settlement power, the critics maintain that the Act's removal of executive power over jurisdictional immunity decisions took away all executive power over domestic litigation.¹⁶⁹ This conclusion is unsatisfactory, for it presupposes that executive control over immunity determinations has been the sole basis for the executive's involvement in litigation. On the contrary, such executive involvement has doctrinal and historical roots in an independent executive claims settlement power, which was neither created by Congress nor produced by a judicially fashioned rule of decision. A new rule for sovereign immunity determinations did not eviscer-

state before the United States espouses the claim"). *See also supra* notes 53-57 and accompanying text.

167. Litigants against Iran are not the only individuals whose private efforts at adjudication have been disturbed by an international claims settlement. A commentator has observed that under the mixed arbitral tribunals established by the Treaty of Versailles (regarded favorably by many scholars for their conferral of *locus standi* on private individuals, *see supra* note 67) "litigants had . . . been deprived of their rights to resort to the ordinary courts and . . . no appeal of any sort lay from the decisions of the Tribunal . . ." Note, *The Mixed Arbitral Tribunals Created by the Peace Treaties*, 12 BRIT. Y.B. INT'L L. 135, 141-42 (1931).

168. *See EDS*, 508 F. Supp. at 13-62; *Marschalk Co.*, 518 F. Supp. at 84, 90-92; *But see Dames & Moore*, 453 U.S. at 685-86, which held that FSIA dealt narrowly with sovereign immunity decisions and did not silently work a revolutionary change in the President's claims settlement power.

169. *Marschalk Co.*, 518 F. Supp. at 82-83; *EDS*, 508 F. Supp. at 1364-65; *see also infra* note 177 and accompanying text.

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ate the executive's power to take over a claim and settle it—even if it meant termination of a private lawsuit.

The FSIA has also been invoked to suggest that the initiation of private litigation confers on private claimants a right to opt out of, or veto, a national claims settlement.¹⁷⁰ The notion that executive settlement power is justifiable only in the absence of a domestic remedy, and thereby is vitiated by sovereign immunity rules that ensure access to a domestic forum, overlooks the continuity over time of the executive's settlement power. That power antedates theories of sovereign immunity,¹⁷¹ which would deny a domestic remedy altogether, and has been exercised after adoption of a policy expanding access to U.S. courts.¹⁷² In short, the claims settlement power does not legally expand and contract in response to rules of sovereign immunity. It thrives independently of congressionally and judicially fashioned rules of jurisdiction. The executive's authority was not withdrawn or even challenged by FSIA, even if the Act's effect was to raise claimants' hope of an alternative to diplomatic protection.

Above all, the rationale for permitting executive interference in domestic litigation lies in the requirements and purposes of national diplomacy. To be effective, the President requires independence in negotiation and the capacity to enter into a binding agreement. The President must be free to put the national interest above the interests of particular private claimants. Claims settlement is a practice designed to secure a national interest, which normally coincides with the full satisfaction of private claims,¹⁷³ though on occasion it might not. The Iranian hostage crisis was a situation in which national and private interests diverged. The logic of espousal, in international and domestic law, compelled that national interest take priority.

The executive's independent authority to intrude in domestic litigation is not boundless.¹⁷⁴ It is confined to the sphere of claims settlements, in which the executive's discretionary authority has a firm historical foundation and remains valid law. The authority is also confined to ongoing litigation not yet reduced to a judgment. Before a determination on the

170. See *Marschalk Co.*, 518 F. Supp. at 83.

171. See *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 146 (1812) (sovereign has control over whether to exercise jurisdiction, including over foreign public entities).

172. See *Dames & Moore*, 453 U.S. at 680-81.

173. See *Wetter*, *supra* note 32, at 294 (canvassing exercises of diplomatic protection by the United States from 1900-1940, concluding that "[o]nce an American citizen possesses vested rights abroad which are exposed to danger of politically motivated loss or unwarranted interference, the national will—absent strong reasons to the contrary—normally coincide with that of the investor.").

174. Several writers have stressed the State Department's adherence to international law and consultation with private claimants in the settlement of private claims. See, e.g., *Wetter*, *supra* note 32, at 276, 297, and *Christenson*, *supra* note 53, at 528, 531-33.

merits, the claim is still inchoate, and may still be taken over for settlement by the executive. Once adjudicated, however, the American national has a judgment lien, a property interest. Interference at that stage of the judicial process would give rise to a more serious infringement on the independence of the court.¹⁷⁵ To introduce foreign policy considerations in the post-judgment period, the executive must rely on authority other than that of espousing international claims, i.e., the authority to block execution of judgments through suggestions of immunity for foreign states' property. Like the power to settle claims, it is a deeply rooted executive prerogative. In actual practice, aside from legal doctrine, the power to grant immunity is vital, for claims settlements commonly involve the unencumbered removal of property located in this country.

II. Execution of Judgments Against Foreign Sovereigns

The Foreign Sovereign Immunities Act¹⁷⁶ effected a major reform of the law of foreign sovereign immunity in the United States. This legislation marked a substantial departure from the pre-1976 practice of coordinated actions between the judicial and executive branches in the process of determining foreign sovereign immunity.

The FSIA is commonly interpreted as making two changes in the practice of cooperation between the State Department and the courts when granting immunity to foreign sovereigns in the United States.¹⁷⁷ First, the FSIA is regarded as transferring the determination of foreign sovereign immunity into the domain of the judicial branch. Second, it is considered as barring the exercise of executive authority over the sovereign immunity determination.¹⁷⁸

The conventional reading of the FSIA is overly broad and distorts the statute's effect on foreign sovereign immunity law in the United States.

175. See *American Int'l Group*, 657 F.2d at 446 (regarding it as "advisable to limit the effect of [the Iranian] agreements on the judicial process to the greatest extent possible consistent with . . . international obligations . . .").

176. 28 U.S.C. §§ 1330, 1602-11 (1982).

177. See, e.g., von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978); Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 SW. L.J. 1009 (1979); Marks & Grabow, *supra* note 16, at 68; Maier, *The Proposed Sovereign Immunities Act: Its Effect on Judicial Deference in Litigating the Immunity of Foreign Sovereigns: Selected Problems of Presenting Your Case in the Courts and the Executive Branch*, AM. SOC'Y INT'L L. PROC. 41, 48 (1976) [hereinafter cited as 1976 PROCEEDINGS].

178. The State Department has recognized that the FSIA did not preclude all executive participation; like other interested parties, the executive retains the right to participate as an amicus curiae in court proceedings. See Letter from the Legal Adviser to the State Department to the Attorney General (Nov. 10, 1976), reprinted in 41 Fed. Reg. 50,883 (1976) (discussing the State Department's future role in determining foreign sovereign immunity).

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The history of this body of law prior to 1976 and the legislative history of the statute justify a narrower and more balanced interpretation of the FSIA. To discern the actual scope of reforms introduced by the FSIA, it is imperative first to clarify the pre-1976 state of foreign sovereign immunity law in the United States.

A. *The Evolution of Foreign Sovereign Immunity in United States Law*

1. The Distinction Between Immunity from Suit and Immunity from Execution

Although Article III of the Constitution places suits against a foreign state within the subject matter jurisdiction of federal courts,¹⁷⁹ these courts have traditionally relinquished their jurisdiction under the theory of absolute foreign sovereign immunity. Introduced into American courts by Chief Justice Marshall, the principle of absolute immunity derives from his celebrated opinion in *The Schooner Exchange v. M'Faddon*.¹⁸⁰ Under the absolute theory of sovereign immunity, foreign states and their instrumentalities were absolutely immune from the jurisdiction of American courts regardless of the nature of the activity that resulted in a legal claim against them. The theory of absolute foreign sovereign immunity from the jurisdiction of American courts reached its zenith in *Berizzi Bros. v. Steamship Pesaro*,¹⁸¹ in which the Supreme Court upheld the jurisdictional immunity of a merchant ship owned by the government of Italy.

Since 1952, American courts and the State Department have adhered to a restrictive theory of sovereign immunity, which was formally enunciated as executive policy in the Tate letter.¹⁸² Unlike the theory of absolute immunity, the restrictive theory allows foreign states and their instrumentalities to raise the defense of foreign sovereign immunity only in suits involving their public acts (*jure imperii*). Under the restrictive theory, the defense of sovereign immunity does not defeat the jurisdiction of American courts over commercial claims brought against a sovereign for its non-public acts (*jure gestionis*).¹⁸³

179. U.S. CONST. art III, § 2 (“The judicial Power shall extend to all Cases . . . between a State or the Citizens thereof, and foreign States Citizens or Subjects.”).

180. 11 U.S. (7 Cranch) 116 (1812).

181. 271 U.S. 562 (1926).

182. Letter from Jack B. Tate, Acting Legal Adviser to the State Department, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984 (1952).

183. In *M'Faddon*, Chief Justice Marshall alluded to the possible distinctions in applying the doctrine of foreign sovereign immunity to public and non-public acts of a sovereign: “It may safely be affirmed that there is a manifest distinction between the private property of a person who happens to be a prince, and that military force which supports the sovereign

It is important to recognize that from its very inception the restrictive theory applied only to the jurisdictional immunity of foreign states. The property of foreign states continued to be absolutely immune both from attachment to obtain jurisdiction and from execution to satisfy a judgment.¹⁸⁴ The distinction between foreign sovereign immunity from jurisdiction and foreign sovereign immunity from attachment and execution has been firmly embedded in American law at least since *Dexter & Carpenter v. Kungliga Jarnvagsstyrelsen*,¹⁸⁵ in which the court refused to authorize execution notwithstanding the defendant's waiver of jurisdictional immunity.

The absolute immunity of foreign state property from attachment and seizure hindered recovery by private claimants. Prior to the Tate Letter, however, the issue of immunity from execution rarely surfaced, since plaintiffs could not even obtain a judgment unless a foreign sovereign had waived its immunity from jurisdiction. After 1952, when foreign sovereigns lost their prerogative of jurisdictional immunity in cases of *jure gestionis*, their immunity from execution and attachment became a subject of controversy. American claimants could often secure in rem or quasi in rem jurisdiction over a foreign sovereign through the attachment of its property. Yet due to the governing doctrine of absolute foreign sovereign immunity from seizure of its property, in cases where jurisdiction over a foreign sovereign was obtained by the attachment of its property, courts were obligated to release the attached property and consequently relinquish their jurisdiction over the case.¹⁸⁶

power, and maintains the dignity and the independence of a nation." 11 U.S. (7 Cranch) at 145. Later, Marshall elaborated on this theory and stated in a clear fashion the principle that one hundred and fifty years later would become the foundation of the modern American law of sovereign immunity: "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests [sic] itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen." *Bank of United States v. Planters Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 907 (1824).

184. In a letter to the Attorney General, the Secretary of State indicated "that under international law property of a foreign government is immune from attachment and seizure, and that the principle is not affected by a letter dated May 19, 1952, from the acting Legal Adviser [Tate] to the Acting Attorney General [Perlman]." *New York and Cuba Mail S.S. Co. v. Republic of Korea*, 132 F. Supp. 684, 685 (S.D.N.Y. 1955).

185. 43 F.2d 705 (2d Cir. 1930). This case was litigated under the rule of absolute jurisdictional immunity, yet jurisdiction was retained due to the sovereign-defendant's waiver of its immunity from jurisdiction. However, the court emphasized that the waiver of jurisdictional immunity did not apply to the sovereign's immunity from execution of judgment: "[I]t is hoped that the judgment of our courts will be respected and payment made by the Swedish government." *Id.* at 710. This hope remained the only resort of American claimants suing foreign sovereigns until the passage of the FSIA in 1976.

186. In *New York and Cuba Mail S.S. Co.*, the court observed: "[The] Department of State declares in unmistakable language that the property of a foreign government is immune from attachment. Since jurisdiction here rests on the seizure under the writ of attachment, the lifting of the attachment makes it unnecessary for the court to decide whether the Republic of Korea would otherwise be entitled to immunity from suit." 132 F. Supp. at 686. It is impor-

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Subsequently, the State Department as well as the courts recognized that in order to make the restrictive theory of jurisdictional immunity meaningful, absolute immunity from attachment, secured to obtain jurisdiction, should not be granted.¹⁸⁷ However, even after plaintiffs were allowed to secure jurisdiction over a foreign sovereign by the attachment of its property, the property of the foreign state remained absolutely immune from post-judgment execution.¹⁸⁸

In sum, from the issuance of the Tate Letter in 1952 until the passage of the FSIA in 1976, the United States law of foreign sovereign immunity recognized a substantive distinction between immunity from jurisdiction and immunity from execution. The denial of jurisdictional immunity and permission to attach property as a means of securing jurisdiction over a foreign sovereign had no bearing upon immunity from execution, the latter being treated as an absolute privilege of a foreign sovereign.

2. The Role of the State Department

The Supreme Court recognized the leading role of the State Department in the determination of foreign sovereign immunity in *Compania Española De Navegacion Maritima v. The Navemar*.¹⁸⁹ Since that case was decided, the courts have assumed an obligation of deference towards the State Department's suggestions of immunity with respect to both jurisdiction and execution. The judiciary adopted this stance due to the political ramifications of sovereign immunity determinations.¹⁹⁰

tant to emphasize that in this case the State Department complied with the standards of the Tate letter and did not raise the defense of foreign sovereign immunity from jurisdiction; it only filed a suggestion of foreign sovereign immunity from seizure.

187. See *Weilamann v. Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959); Note, *Castro Government in American Courts*, 75 HARV. L. REV. 1607, 1613 (1962).

188. This position was clearly expressed in a letter from Legal Adviser Becker to Attorney General Rogers which was written with respect to *Weilamann*. The letter stated:

The Department has always recognized the distinction between "immunity from jurisdiction" and "immunity from execution." The Department has maintained the view that under international law property of a foreign sovereign is immune from execution to satisfy even a judgment obtained in an action against a foreign sovereign where there is no immunity from suit.

. . . .
The Department is of the further view that even when the attachment of the property of a foreign sovereign is not prohibited for the purpose of jurisdiction, nevertheless the property so attached and levied upon cannot be retained to satisfy a judgment ensuing from the suit because, in the Department's view, under international law the property of a foreign sovereign is immune from execution even in cases where the foreign sovereign is not immune from suit.

See Letter from the Legal Adviser [Becker] to the Department of State to the Attorney General [Rogers] (Mar. 9, 1959), reprinted in 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 709, 711 (1968).

189. 303 U.S. 68, 74 (1938).

190. In *Ex Parte Peru*, 318 U.S. 578 (1942), the Court observed:

The Department has allowed the claim of immunity and caused its action to be certified to

Publication of the Tate Letter did not alter the State Department's dominant role in the process of sovereign immunity determinations. Judicial opinions of the post-1952 period displayed the utmost deference to suggestions of immunity transmitted by the State Department: courts ruled on issues of foreign sovereign immunity as prescribed by the State Department.¹⁹¹

Since the law of foreign sovereign immunity in the United States after 1952 was still controlled by the theory of absolute immunity from execution, a foreign state usually solicited the State Department's assistance only in the form of a suggestion of immunity from jurisdiction.¹⁹² Although the State Department attempted to make its decisions in conformity with the principles it had enunciated in the Tate Letter, on occasion it deviated from them.¹⁹³ Courts followed the State Department's suggestions of immunity regardless of their consistency with Tate letter standards.¹⁹⁴

the District Court through the appropriate channels. The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the government that the continued retention of the vessel interferes with the proper conduct of our foreign relations. Upon the submission of the certification to the District Court, it became the court's duty, in conformity to established principles, to release the vessel and to proceed no further in the cause.

Id. at 588. See also *Mexico v. Hoffman*, 324 U.S. 30 (1945).

191. See, e.g., *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974), where the court held that "[w]hen the executive branch has determined that the interests of the nation are best served by granting a foreign sovereign immunity from suit in our courts, there are compelling reasons to defer to that judgment without question."

192. In any case involving the issue of foreign sovereign immunity, a sovereign defendant could either raise this issue in court or approach the State Department and solicit its intervention. In the latter case, the State Department would request the pleadings of the parties and, having made its decision, would send its suggestion to the office of the Attorney General which would present it to the court. In the late 1960's, the State Department began to hold its own hearings on assertions of foreign sovereign immunity before sending suggestions of immunity to the court. For a critique of these proceedings, see Leigh & Atkeson, *Due Process in the Foreign Relations Law of the United States*, 22 *BUS. LAW.* 3, 21 (1965); Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 *HARV. L. REV.* 608 (1954); Timberg, *Wanted: Administrative Safeguards for the Protection of the Individual in International Economic Regulation*, 17 *AD. L. REV.* 159 (1965).

193. The State Department has recognized that political considerations have influenced its determinations on only four occasions. In these four cases, the courts followed the State Department suggestions of immunity. See Sandler, Vagts & Ristau, *Sovereign Immunity Decisions of the Department of State 1952-1977*, 1977 *DIG. U.S. PRAC. INT'L L.* 1021. Critics of the State Department's decision-making process have also singled out four cases as decided on a political rather than a legal basis; however, they cite different cases. See Note, *Statutory Reform in Claims Against Foreign States*, 5 *VAND. J. TRANSNAT'L L.* 393, 400 (1971).

In those cases where the Department of State failed for any reason to make a suggestion of immunity, courts usually applied Tate Letter standards on their own initiative. See, e.g., *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 357-62 (2d Cir. 1964).

194. In *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971), the court stated:

The potential harm or embarrassment resulting to our government from a judicial finding of jurisdiction, in the face of an Executive recommendation to the contrary, may be just as

The Department of State infrequently filed suggestions of immunity from execution. The rarity of these cases can readily be explained. Before the State Department would file a suggestion of immunity from execution, three conditions normally had to be satisfied: (1) the sovereign defendant had to be denied jurisdictional immunity; (2) it had to waive its immunity from execution; and (3) it had to convince the State Department to interfere in court proceedings with a suggestion of immunity from execution, despite the prior waiver of this immunity by the foreign sovereign. In cases where these conditions were satisfied, courts construed State Department suggestions of immunity as superseding prior waivers of immunity by foreign sovereigns.¹⁹⁵ Thus, a foreign sovereign could avoid execution against its property notwithstanding a denial of jurisdictional immunity or even its prior waiver of immunity from execution.

*Rich v. Naviera Vacuba, S.A.*¹⁹⁶ illustrates judicial deference to State Department suggestions of immunity from execution. In that case, the court blocked the seizure of a Cuban ship, sought by plaintiffs to satisfy a prior judgment against Cuba.¹⁹⁷ Execution on the judgment was denied despite the foreign sovereign's waiver of immunity from execution with respect to one of the claimants.¹⁹⁸ The court heeded the State Department's suggestion of immunity, even though it was based on purely political considerations.¹⁹⁹ This judicial practice of adhering completely to

severe where the foreign sovereign had initially contracted to waive its claim of sovereign immunity as where it had not done so. Though we sympathize with appellant because of the difficult position in which such a holding places it, we have no alternative but to accept the recommendation of the State Department.

195. See *Flota Maritima Browning De Cuba v. Motor Vessel Ciudad de la Habana*, 335 F.2d 619 (4th Cir. 1964). In that case, the court observed, with respect to foreign sovereign immunity from both jurisdiction and execution, that although "a foreign power may have waived its immunity in a pending action by the entry of a general appearance, the overriding political considerations would require recognition of the immunity when the State Department suggests its allowance is in the national interest. . . ." *Id.* at 625.

196. 197 F. Supp. 710 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961).

197. *Id.* at 712; see also *Chemical Natural Resources v. Venezuela*, 420 Pa. 134, 184, 215 A.2d 864, 888 (Musmanno, J., dissenting), *cert. denied*, 385 U.S. 822 (1966).

198. 197 F. Supp. at 723; 295 F.2d at 26.

199. A note signed by Secretary of State Rusk and Attorney General Kennedy stated, "[t]his is to inform you that it has been determined that the release of this vessel would avoid further disturbances to our international relations in the premises. . . ." 197 F. Supp. at 714. The trial court held that "the clear weight of authority in this country, as well as that in England and continental Europe is against all seizures, even though a valid judgment has been entered." *Id.* at 722 (citing *Dexter & Carpenter*, 43 F.2d at 708). The court of appeals concluded that the "refusal of the State Department in these circumstances to enforce Cuba's earlier waiver over its present assertion of immunity is within the Department's authority, and constitutes no violation of the libellant's rights under the Fifth Amendment." 295 F.2d at 26.

At a press conference held during the incident, Secretary of State Rusk reiterated the State Department's authority to immunize foreign sovereign property:

When Cuban airplanes arrive in the United States and when an effort is made by claimants in the U.S. to have such airplanes attached and sold, such airplanes, like any other

the State Department's suggestions of immunity continued until the passage of the FSIA in 1976.²⁰⁰

As revealed by the preceding historical analysis, before enactment of the FSIA, the United States practice of foreign sovereign immunity was governed by the following principles:

1. The restrictive theory applied to jurisdictional immunity of foreign sovereigns. The State Department possessed the power to raise the sovereign immunity defense in its suggestion to a court. This power was available even in cases involving a foreign sovereign's waiver of jurisdictional immunity as well as those involving a foreign sovereign's commercial activity.²⁰¹ Courts treated all State Department suggestions of immunity as binding.

2. The absolute theory applied to foreign sovereign immunity from execution. The State Department's suggestions of immunity superseded the foreign sovereign's prior waiver of immunity from execution.

In sum, executive power to make binding suggestions of foreign sovereign immunity to courts did not depend on the type of foreign sovereign immunity involved: either from jurisdiction or from execution. Nor did executive power depend on the applicable theory of foreign sovereign immunity, whether absolute or restrictive. Established practice and settled law were grounded in the doctrine of "comity" between these two

property owned by Cuban government can be released from attachment for purposes of execution to satisfy a judgment. And if there are any lawyers here, may I repeat that phrase—property owned by the Cuban government can be released from attachment for purposes of execution to satisfy a judgment if a timely plea of sovereign immunity is interposed.

DEP'T ST. BULL., Aug. 1961, at 275-78. Such cases as *Rich* could arise only on rare occasions. In *Rich*, the State Department was anxious to intervene in court proceedings with a suggestion of immunity from execution due to the necessity of retrieving from Cuba an American airplane hijacked to the island. See generally A. CHAYES, T. ERLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS 87 (1968) (describing the diplomatic background of the case). Even the most celebrated legal opinion criticizing the pre-1976 practice of judicial deference to executive suggestions of immunity endorsed the result reached in *Rich*. See *Chemical Natural Resources*, 420 Pa. at 184, 215 A.2d at 888 (Musmanno, J., dissenting).

200. On April 2, 1974, a panel of three attorneys in the Office of the Legal Adviser to the Department of State, working on a case involving foreign sovereign immunity, gave a summary of the law then in effect:

[In] a case of immunity from execution, rather than immunity from suit, the distinction drawn by the Tate Letter between public and private transactions does not apply, in view of the Department's existing policy that property of a sovereign is immune from attachment for execution even in cases where there is no immunity from suit. . . . Moreover, courts have recently held that even explicit waivers [of immunity from execution] do not withstand a suggestion of immunity by the Department.

Sandler, Vagts & Ristau, *supra* note 193, at 267.

201. It is important to realize that the commercial activity exception to the rule of general foreign sovereign immunity from jurisdiction can be viewed as a form of an implicit waiver which is presumed from the nature of the activity involved, as opposed to an explicit contractual waiver. See Griffin, *Execution Against the Foreign Sovereign's Property: The Current Scene*, AM. SOC'Y INT'L L. PROC. 105, 109-12 (1961).

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branches of the federal government and reflected the concern of the judiciary that the conduct of the country's foreign relations not be embarrassed or hindered by its own independence.²⁰²

B. *A New Law of Foreign Sovereign Immunity*

Congress passed the FSIA to change the pre-existing law of foreign sovereign immunity. It envisioned four primary purposes to be achieved by the new statute:²⁰³

1. To codify the restrictive theory of sovereign immunity;
2. To transfer the determination of sovereign immunity from the executive to the judicial branch;
3. To provide a statutory procedure for service of process upon foreign sovereigns; and
4. To replace a foreign sovereign's absolute immunity from execution with restrictive immunity.²⁰⁴

Interpreting the FSIA, legal scholars, practitioners, and courts have construed it to impose a total ban on "the President's authority to make binding determinations of the sovereign immunity to be accorded foreign states."²⁰⁵ In its assessment of the State Department's future role, this reading of the FSIA fails to make the critical distinction between immunity from suit in United States courts and immunity from execution after the courts have exercised jurisdiction and rendered a judgment. The FSIA eliminated the State Department's power to make binding suggestions of jurisdictional immunity. However, the right of the executive branch to file with courts suggestions of foreign sovereign immunity from execution, previously acknowledged by courts and exercised by the State Department, remained intact. A careful analysis of the text of the FSIA, its legislative history, and other documents relating to its evolution

202. Some courts have viewed this law as growing out of the constitutional principle of separation of powers. Thus, the court in *Rich* stated:

We conclude that the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry. We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion.

295 F.2d at 26 (citations omitted). See also *Spacil v. Crow*, 489 F.2d at 619 (principle of separation of powers requires judicial deference to executive determinations of immunity). But see *Maier*, *supra* note 177, at 49.

203. Foreign Sovereign Immunities Act of 1976, H.R. REP. NO. 94, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604 [hereinafter cited as H.R. REP.].

204. *Id.* at 6606.

205. *Dames & Moore*, 453 U.S. at 685; See also 1981 Hearings, *supra* note 31, at 100 (testimony of Thomas Luce); von Mehren, *supra* note 177, at 65; Carl, *supra* note 177, at 1063.

demonstrate that Congress proscribed State Department interference only in the domain of jurisdictional immunity. The FSIA did not alter the executive power to make suggestions of foreign sovereign immunity from execution.²⁰⁶

1. The Intent of the FSIA

None of the FSIA's provisions expressly limit executive power to make binding suggestions of immunity to the courts, as exercised before 1976. Therefore, to discern the effect of the FSIA on the pre-existing law of foreign sovereign immunity, it is important to look separately at each purpose of the statute.

The first purpose of the FSIA was to codify the restrictive theory of sovereign immunity from jurisdiction, which had originally been announced as national policy in the Tate letter.²⁰⁷ The FSIA leaves no doubt that the restrictive theory of jurisdictional immunity had become the law of the United States, applicable in all sovereign immunity proceedings.²⁰⁸ Codification of the restrictive theory put Congress's stamp on a jurisdictional principle which earlier had been a unilateral and non-statutory executive policy. This action also signalled Congress's goal of preventing future deviations from Tate Letter standards of jurisdictional immunity, which had resulted in the past from the State Department's receptiveness to political pressures.

This congressional objective of "insulating" the procedure for determining foreign sovereign immunity from political pressures was manifested in the second purpose of the FSIA: to "transfer the determination of sovereign immunity from the executive branch to the judiciary, thereby reducing the foreign policy implications of immunity determinations."²⁰⁹ Since passage of the FSIA, the corresponding statutory provision has been interpreted as a denial of the State Department's right to make any foreign sovereign immunity suggestions to the courts. No distinction has been made between suggestions of immunity from jurisdiction and suggestions of immunity from execution.

Some scholars discussing the FSIA have found support for this interpretation of the statute's effect on executive powers in the broad state-

206. It appears that Congress was not informed about the existing differences between State Department suggestions of immunity from jurisdiction and from execution. This issue was never presented to Congress and was never discussed in the context of the future State Department role in sovereign immunity proceedings. Interview with William Shattuck, Counsel of the Subcomm. on Administrative Law and Government Relations of the House Judiciary Comm., in Washington, D.C. (Apr. 15, 1985) (notes on file with the *Yale Journal of International Law*).

207. H.R. REP., *supra* note 203, at 6605.

208. 28 U.S.C. § 1602 (1982).

209. H.R. REP., *supra* note 203, at 6606.

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ment of congressional purpose.²¹⁰ Other commentators²¹¹ have grounded this reading on the intent of the FSIA's sponsors, as expressed in letters accompanying the submission of the draft legislation to Congress.²¹² Further, a party to litigation involving the FSIA has tried to draw the purposes of the statute out of a public statement made by President Ford after passage of the bill, to the effect that American courts had now opened their doors much wider to disputes against foreign states.²¹³ Although the ambiguous language of the statute and other legislative documents can be interpreted as precluding executive interference in all sovereign immunity proceedings, including those addressing the issue of execution, in the final analysis, this view is not warranted. Careful exposition of the FSIA's second objective against the background of its legislative history demonstrates that Congress acted only with respect to State Department control over jurisdictional immunity and did not extinguish executive power to make suggestions of immunity from execution.

Congress's second purpose was actually to ensure consistent implementation of the restrictive theory of foreign sovereign immunity from jurisdiction.²¹⁴ Congress not only remained silent with respect to immu-

210. See, e.g., Carl, *supra* note 177, at 1063.

211. Comment, *Proposed Draft Legislation on the Sovereign Immunity of Foreign Governments: An Attempt to Revest the Courts with a Judicial Function*, 69 NW. U.L. REV. 302, 326 (1974).

212. Letter from the Department of State and the Department of Justice to the President of the Senate (Jan. 22, 1973), *reprinted in* 12 I.L.M. 118 (1973) [hereinafter cited as Letter of Jan. 22, 1973]. The letter stated:

The effect of the draft bill would be to accomplish [*inter alia*]: [t]he task of determining whether a foreign state is entitled to immunity would be transferred wholly to the courts, and the Department of State would no longer express itself on requests for immunity directed to it by the courts or by the foreign state.

An analogous statement was made in the Letter from the Department of State and Department of Justice to the President of the Senate (Oct. 31, 1975), *reprinted in* 15 I.L.M. 88 (1975).

213. Counsel for Electronic Data Systems Corporation, involved in litigation against Iran, asserted that the following statement of President Ford raised expectations of recovery against Iran:

This legislation will enable American citizens and foreign governments alike to ascertain when a foreign state can be sued in our courts. In this modern world where private citizens increasingly come into contact with foreign government activities it is important to know when the courts are available to redress legal grievances. This statute will make it easier for our citizens and foreign governments to turn to the courts to resolve ordinary legal disputes.

See 1981 Hearings, *supra* note 31, at 100. Ironically, President Ford's statement, especially as the remark of a lawyer, supports the point of view of the present Article. President Ford no doubt saw the statute as addressing only the problem of jurisdiction. At any rate, he made no allusions to its possible effect on executive authority over foreign sovereign immunity from execution.

214. After stating the first congressional purpose, the legislative analysis continued: "The bill will insure that the restrictive principle is applied in litigation before U.S. courts. Although the State Department espouses the restrictive principle of immunity the foreign state may attempt to bring diplomatic influence to bear upon the State Department." H.R. REP., *supra* note 203, at 6606. Here, as well as in other instances, Congress did not explicitly specify the

nity from execution, but expressly confirmed that as a result of achieving the principal purpose of the FSIA, "the Department of State will be freed from pressures from foreign governments to recognize *their immunity from suit* and from any adverse consequences resulting from an unwillingness of the Department to support that immunity."²¹⁵

It is evident from the legislative history that Congress was primarily concerned with the quasi-judicial nature of the proceedings conducted by the State Department after a foreign state's request for recognition of immunity from jurisdiction.²¹⁶ A general consensus existed that the State Department was neither suited to guarantee due process in these proceedings nor capable of withstanding pressures emanating from foreign states.²¹⁷ The abolition of State Department proceedings should be seen as an attempt to cure procedural defects in the process of making immunity decisions.²¹⁸ The transfer of authority to courts represents the last step of a trend toward upgrading the legality of the adjudication of sovereign immunity claims.²¹⁹

However, entrusting adjudication of sovereign immunity claims to the judiciary addresses only the issue of foreign sovereigns' jurisdictional immunity and has no apparent bearing upon the question of execution. No proceedings on the issue of execution had been held in the State Department prior to the passage of the FSIA because of the absolute immunity from execution of the property of foreign states. In addition, quasi-judicial State Department hearings are not necessary before entering sugges-

immunity to which it refers. It is clear, however, that Congress spoke only about foreign sovereign immunity from jurisdiction, which prior to the passage of the FSIA was governed by the restrictive theory of sovereign immunity, and not about the immunity from execution, which was absolutely granted to foreign sovereigns.

215. *Id.* at 6606 (emphasis added).

216. The State Department's procedural difficulties in complying with Tate Letter principles appeared to have been the only concern expressly brought to the attention of Congress as a justification for the transfer of the sovereign immunity decision-making process to the courts. *See Jurisdiction of United States Courts in Suits Against Foreign States: Hearings before the Subcomm. on Administrative Law and Government Relations of the Comm. on the Judiciary, 94th Cong., 2nd Sess. 26 (1976)* (statement of Monroe Leigh) [hereinafter cited as *1976 Hearings*]. *See also* H.R. REP., *supra* note 203, at 6607.

217. *See 1976 Hearings, supra* note 216, at 34 (statement of Monroe Leigh). *See also* Leigh, *Sovereign Immunity—The Case of the "Imias,"* 68 AM. J. INT'L L. 280 (1974) (criticizing State Department immunity determinations).

218. *See supra* note 192.

219. One commentator, who called for the expansion of procedural safeguards in State Department administrative hearings, nonetheless warned that "accountability should not be secured by placing the executive branch under restraints not contemplated by the Federal Constitution and subordinating it to the legislative branch. Greater administrative accountability need not involve any infringement upon the constitutional doctrine of separation of powers." *See* Timberg, *supra* note 192, at 169. The constitutional validity of the FSIA remains an unresolved question. Nonetheless, the suggested interpretation of the statute will mitigate many constitutional problems raised by the restriction placed on the executive's foreign policy powers by Congress in the FSIA.

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tions of immunity from execution, since at that stage suggestions may be transmitted on strictly political grounds.²²⁰ Therefore Congress, displeased with the procedure of determining a foreign sovereign's jurisdictional immunity, cured only the widely conceded problem of State Department intervention in litigation through its suggestions of immunity from suit. This position is also supported in a letter expressing the intent of the sponsors of the draft legislation that was attached to the bill when it was sent to the Senate for consideration:

[T]he courts normally defer to the views of the Department of State, which puts the Department in the difficult position of effectively *determining whether the plaintiff will have his day in court* [I]t was not satisfactory that a department acting through administrative procedures, should in the generality of cases determine whether the plaintiff *will or will not be permitted to pursue his cause of action*.²²¹

Legislative history is consistent with the express language of section 1602 of the FSIA which refers only to the courts' exclusive authority over the "determination of the claims of foreign states to the *immunity from jurisdiction*."²²² Although courts are also authorized to adjudicate claims of foreign sovereign immunity from execution,²²³ as they usually did before 1976, there is no indication anywhere in the statute or other legislative materials that the State Department had lost the authority to block execution of judgments against foreign sovereigns. Though the acquisition of executive power through congressional acquiescence has been criticized, it is even more problematic to read into congressional silence a denial of well-established executive authority, especially in an area integral to the discharge of the executive's foreign policy responsibilities.²²⁴

The third purpose of the FSIA—establishment of new rules for service of process—has no direct bearing on the changes in relations between the judicial and the executive branches. However, the continuity of the State Department's role in the process of adjudication of claims against foreign sovereigns is underscored even in sections which provide for service of process through diplomatic channels.²²⁵

Lastly, the extension of the restrictive theory to foreign sovereign im-

220. See *supra* note 199 and accompanying text.

221. Letter of Jan. 22, 1973, *supra* note 212, at 120 (emphasis added).

222. 28 U.S.C. § 1602 (emphasis added).

223. "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." *Id.*

224. See *supra* note 17 and accompanying text.

225. Thus § 1608(a)(4) of the FSIA, authorizing service of process through the State Department, indicates the dependence of the judicial branch on assistance from the State Department even in bringing foreign sovereigns into U.S. courts. The special position of the State Department is further bolstered by the fact that the transmission of the notice of suit through

munity from execution—the fourth congressional purpose in the FSIA—by no means alters the pre-existing balance in the relations between the courts and the State Department in favor of the former.²²⁶ Sections 1609 and 1610 (a) & (b) of the FSIA codified the restrictive theory of sovereign immunity from execution by allowing post-judgment attachment of some types of foreign sovereign property. As indicated in the House report explaining the statute's objectives, these sections effected a move from absolute immunity from execution to a regime "conforming more closely" with the restrictive immunity of foreign states from jurisdiction.²²⁷ There is no sign anywhere in the legislative materials that these provisions were intended to have any impact on executive powers.²²⁸ The practical effect of sections 1609 and 1610 (a) & (b) can be compared to the operation of the restrictive theory of jurisdictional immunity from 1952 to 1976. During that period, despite the courts' and the State Department's adherence to Tate Letter standards, the State Department continued to file binding suggestions of foreign sovereign immunity from jurisdiction if political necessity so demanded.²²⁹ In effect, the FSIA changed the law of foreign sovereign immunity from execution in the same way as the Tate letter had changed the law of foreign sovereign immunity from jurisdiction: the FSIA introduced the restrictive theory into the area of immunity from execution. It did not eradicate executive authority to make suggestions of immunity from execution to courts.

Thus congressional documents amply demonstrate that only the State Department's power over the determination of foreign sovereign immunity from jurisdiction was removed by the FSIA. Even if the wording of some legislative materials can be interpreted as withholding executive authority in the area of sovereign immunity from execution, this interpretation clearly misrepresents congressional intent. An overview of the

its network is deemed valid even without a formal acceptance of the message by a foreign sovereign.

226. The legislative history, if anything, points in the opposite direction, indicating that Congress was dissatisfied chiefly with foreign sovereign immunity from execution "in ordinary litigation, when commercial assets are available for the satisfaction of the judgment." H.R. REP., *supra* note 203, at 6610. By implication, Congress recognized that non-judicial assistance—State Department interference—would be required to satisfy a judgment in an extraordinary case with no adequate commercial property within the country.

227. H.R. REP., *supra* note 203, at 6626.

228. Although on its face § 1610 might be read as establishing strict principles of execution of judgments not to be circumvented by any executive policy, its language is similar to § 1605 which defined exceptions to jurisdictional immunity of foreign states (restrictive theory of jurisdictional immunity), but is not purported to have any bearing upon executive authority. Accordingly, § 1610 must be interpreted only as introducing a restrictive theory of execution. All changes in the allocation of responsibilities between the State Department and the courts were made in § 1602, which did not touch the executive's right to make suggestions of foreign sovereign immunity from execution. *See supra* notes 222-23 and accompanying text.

229. *See supra* notes 193-94 and accompanying text.

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FSIA's evolution and of prevailing standards of international law confirms this conclusion.

2. The History of the FSIA

The initial draft of the legislation which would eventually embody the principles of foreign sovereign immunity law in the United States was proposed in 1969.²³⁰ This proposal, as well as the FSIA, codified the restrictive theory of foreign sovereign immunity from jurisdiction. Unlike the FSIA, however, the original draft provided for absolute immunity of foreign sovereign property from execution of adverse judgments in American courts.²³¹ The proposal's drafters adopted this approach not only because they believed that it adequately reflected international practice, but also because they considered that only a rule of absolute immunity from execution would promote independent judicial determinations of foreign sovereign immunity. In the opinion of the drafters of the 1969 version, a liberal rule permitting enforcement of judgments against foreign sovereign property was fraught with unforeseeable foreign policy risks which would inevitably require State Department participation in the decision-making process. Thus, the original drafters considered the adoption of absolute immunity from execution as the only means for achieving the major objective of their proposal—total eradication of quasi-judicial proceedings conducted in the State Department for the purpose of determining foreign sovereign immunity. At the same time, the sponsors of the Act conceded that the introduction of the restrictive theory of foreign sovereign immunity from execution remained a viable alternative. In that event, however, they insisted that adoption of restrictive immunity would require retention of executive control over the determination of immunity from execution.²³² Thus, diplomatic considerations were central at the outset of the reform of rules of sovereign immunity from execution. Drafters of a revised version of the legislation in 1973 opted to introduce a restrictive theory of foreign sovereign immunity from execution which afforded more meaningful protection to

230. Note, *Statutory Reform in Claims Against Foreign States: The Belman-Lowenfeld Proposal*, 5 VAND. J. TRANSNAT'L L. 393, 401 (1972). Both Belman and Lowenfeld served as Assistant Legal Advisers to the State Department. Lowenfeld was appointed to oversee the preparation of the State Department's review of foreign sovereign immunity law.

231. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 937 (1969) (provision 2(d)(1) of the proposed Act); Belman, *New Departures in the Law of Sovereign Immunity*, AM. SOC'Y INT'L L. PROC. 182, 186 (1969) [hereinafter cited as 1969 PROCEEDINGS]. The rule of absolute immunity from execution was also advocated in the first memorandum proposing codification of the new law of foreign sovereign immunity. This memorandum was submitted to the Legal Adviser to the State Department in the fall of 1966. See A. CHAYES, T. EHRLICH & A. LOWENFELD, *supra* note 199, at 150-53.

232. Lowenfeld, *supra* note 231, at 928, 930.

American claimants.²³³ Although the drafters of the 1969 proposal were clearly concerned about the compatibility of the chosen theory of immunity from execution with the role of the State Department in the determination of this immunity, in 1973 this correlation was neglected. The need to revive expressly the State Department's role in response to the shift toward a restrictive theory of sovereign immunity from execution was overlooked.

Testimony at the 1973 hearings regarding the legislation suggests that in submitting the new bill for congressional deliberations, the State Department intended to retain some control over the sovereign immunity determination process. The extent of this control, however, was never spelled out.²³⁴ Nonetheless, the text of the 1973 bill, by referring to the principles of the Tate letter, implies that Congress—in concert with the State Department—addressed only the issue of executive suggestions of foreign sovereign immunity from jurisdiction, and not the issue of sovereign immunity from execution.²³⁵

By 1976, all references to the survival of the State Department's role in the foreign sovereign immunity determination process—with respect either to jurisdiction or to execution—vanished from congressional hearings.²³⁶ Certainly, the absence of any discussions regarding the State Department's authority to make suggestions of immunity from execution cannot be viewed as an indication of congressional intent to deprive the

233. See Note, *supra* note 230, at 406.

234. The Acting Legal Adviser to the State Department stated that "of course [the State Department's] ability to make suggestions with respect to other questions would remain unimpaired." 1973 Hearings, *supra* note 144, at 15 (statement of Charles Brower). It appears from the context of the testimony that Brower referred to suggestions with respect to questions other than those "of law and fact," namely those of a political nature.

235. Thus, in the legislative analysis of § 1602 of the 1973 bill, Congress states that "decisions concerning claims of foreign states to immunity are best made by the judiciary on the basis of the statutory regime which incorporates the restrictive theory of sovereign immunity." S. 566, 93d Cong., 1st Sess., reprinted in 12 I.L.M. 118, 132 (emphasis added). Because Congress explicitly equated "restrictive theory" with the Tate Letter principles, which do not apply to foreign sovereign immunity from execution, Congress was clearly speaking only about foreign sovereign immunity from jurisdiction. The same argument with respect to the 1976 bill is less forceful, since the words "restrictive theory" were replaced by the words "international law." The latter, in contrast with the Tate Letter, has no uniformly accepted standard. This discrepancy is certainly not vital to the argument here, since the 1976 bill, according to Congress, did not deviate in substance from the 1973 version. See H.R. REP., *supra* note 203, at 6608.

236. It is interesting to note that the currently accepted interpretation of the FSIA represents primarily the views of Monroe Leigh as he expressed them during the 1969 discussion of the subject. See Leigh, *New Departures in the Law of Sovereign Immunity*, 1969 PROCEEDINGS, *supra* note 231, at 187. Leigh became the Legal Adviser to the State Department in 1975, and his testimony was the cornerstone of the 1976 congressional hearings. Yet, even Leigh in his testimony talked only about the enforcement of the restrictive theory of jurisdictional immunity and did not allude to the possible effects of the bill on the State Department's control over foreign sovereign immunity from execution. See 1976 Hearings, *supra* note 216, *passim*.

executive branch of this power. It remains somewhat mysterious that such a critical issue as the State Department's control over foreign sovereign immunity from execution was never raised at the hearings; it is even more mysterious that the interpretation of the FSIA that deprives the State Department of this long-established authority was readily accepted.²³⁷

A possible explanation for the lack of concern on the part of State Department officials testifying at the 1976 hearings can be found in the "safety valve" built into §§ 1604 and 1609 of the draft legislation.²³⁸ These sections made all provisions of the bill subject to "existing and *future* international agreements," thus providing the State Department with a viable solution to any diplomatic conflict in the form of an ad hoc international (executive) agreement.²³⁹ The State Department's possible reliance on this language becomes ironic, since after the hearings reference to "future" international agreements was deleted.²⁴⁰ As a result of this amendment, the State Department was apparently deprived of an option it had advocated at the 1976 hearings.²⁴¹ Thus, in addition to misconstruing congressional intent, the present interpretation of the FSIA, which denies the State Department any leverage in foreign sovereign immunity cases, does not accurately reflect the views of the executive branch—the statute's main sponsor.²⁴²

Moreover, the current interpretation of the FSIA does not give full

237. See *supra* note 177. It has been suggested that the State Department's support for the FSIA was "intended merely as a smokescreen to hide the nature of the Executive's real decision-making power in this area from foreign sovereigns in view of the diplomatic pressures that flow naturally from the general international knowledge that the United States Executive has such power." Note, *supra* note 39, at 126 n. 124. This theory is in complete agreement with the argument of this Article, which attempts to decipher the powers transferred to the courts and those reserved to the executive. Unfortunately, the State Department's support of the FSIA may be seen as an expression of a shortsighted unwillingness to get involved in cumbersome and politically controversial sovereign immunity decisions. In addition, it is conceivable that the drafters of the bill in Congress did not consult adequately with representatives of the State Department. If so, the absence of continuous communications with Congress may account for the State Department's failure to raise many pertinent issues during the hearings.

238. See *1976 Hearings, supra* note 216, at 6, 17 (draft of 1976 version of FSIA).

239. The hearings proceeded under the assumption that the statute would include reference to "future" agreements. *Id.* at 32, 52.

240. H.R. REP., *supra* note 203, at 6610. See also 28 U.S.C. §§ 1604, 1609 (1982).

241. This is a questionable result for two reasons. First, it runs counter to the wishes of the State Department, which had supported the retention of an authority to enter formal treaties regarding sovereign immunity. *1976 Hearings, supra* note 216, at 52 (testimony of Monroe Leigh). Second, and more strangely, it deprives the Senate of a power granted to it in the Constitution.

242. An accurate interpretation of the State Department's intent is important for the constitutional validity of the FSIA. See, e.g., von Mehren, *supra* note 177, at 66. A complete denial of executive power in the FSIA over the objection of the executive branch would cause a serious conflict over separation of powers. The preservation of State Department authority over execution, however, as suggested in this Article, deflects possible constitutional attacks on the statute.

effect to the express congressional objective of bringing the United States's foreign sovereign immunity practice into line with that of "virtually every other country."²⁴³ The restrictive theory of foreign sovereign immunity from execution is not, in itself, a uniformly accepted norm of international practice.²⁴⁴ Even after the introduction of a restrictive theory of immunity from execution in the United States, the State Department invoked the principle of absolute immunity when faced with enforcement of judgments against American property abroad.²⁴⁵ Furthermore, the exclusion of the State Department from sovereign immunity determination conflicts with the practice in "courts of Europe [which] essentially follow the instructions of their [respective] executive branches on matters of sovereign immunity."²⁴⁶ A statute requiring judicial enforcement of judgments against foreign sovereigns without any allowance for participation by political branches of the government would make the United States law of foreign sovereign immunity an imprudent exception from general international practice.²⁴⁷

243. H.R. REP., *supra* note 203, at 6606.

244. Congress acknowledged that "the enforcement of judgments against foreign state property remains a somewhat controversial subject in international law." *Id.* at 6626. *See also 1976 Hearings, supra* note 216, at 33 (testimony of Monroe Leigh) ("[I]n one respect we would be going somewhat further than other countries in that we would be providing for execution after judgment in favor of American litigants").

245. Two years before the passage of the FSIA, the State Department continued to espouse the principle of absolute immunity from execution as a valid norm of international law. For example, in protesting the seizure of American property pursuant to an Iraqi court judgment, the State Department asserted: "The clear weight of authority . . . is against all seizures, even though a valid judgment has been entered . . . [i]t is but recognizing the general international understanding, recognized by civilized nations, that a sovereign's person and property ought to be held free from seizure or molestation. . . ." DIG. U.S. PRAC. INT'L L. 274 (1974) (quoting Department of State note to Iraqi interest section of Embassy of India, Jan. 14, 1974). It is even more ironic that this statement is quoted from *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705, 708 (2d Cir. 1930), a case described as outdated in the House Report explaining the FSIA provisions on foreign sovereign immunity from execution. H.R. REP., *supra* note 203, at 6626.

246. 1969 PROCEEDINGS, *supra* note 231, at 202 (statement of Professor B. Yanakakis).

247. The European Convention on State Immunity and Additional Protocol, May, 1982, Europ. T.S. No. 74, which had a substantial impact on the FSIA, makes execution of judgments against foreign states optional. *Id.* art. 23. Moreover, a state is not obliged to give effect to such a judgment in any case where it would be manifestly contrary to public policy in that state. *Id.* art. 20. *See generally* Comment, *Sovereign Immunity From Judicial Enforcement: The Impact of the European Convention of State Immunity*, 12 COLUM. J. TRANSNAT'L L. 130 (1973).

Some European countries disallow execution of any judgment against a foreign sovereign without approval of the executive branch. During the discussion of the 1969 Act it was noted that executive suggestions of immunity did not exist in civil law countries. *See 1969 PROCEEDINGS, supra* note 231, at 189 (statement of Bruno Ristau). Ristau offered as an example of American parochialism attempts to approach government officials in Italy, Holland, and Greece when the United States had been brought to court in these countries. Ironically, in all these countries the executive branch has the authority to intervene in sovereign immunity proceedings. *See* Condorelli & Sbolci, *Measures of Execution Against the Property of Foreign States: The Law and Practice in Italy*, 10 NETH. Y.B. INT'L L. 68 (1979) (Italy); Voskuil, *The International Law of State Immunity as Reflected in the Dutch Civil Law of Execution*, 10

An objection may be raised to the apparent inconsistency in the suggested legal order between complete judicial power over subject-matter jurisdiction—vested in the courts by Congress—and limited control over the enforcement of judgments rendered in the exercise of this power. The proposed interpretation of the FSIA, although not as expansive as the common one which completely separates the responsibilities of the two branches, still represents a considerable improvement over the earlier practice which provided for an overlap of executive and judicial authority on two levels: jurisdiction and execution. Moreover, the suggested reading of the FSIA parallels other areas of law integrally linked to foreign policy in which the executive branch, even after a judicial decision, has a veto power over the execution of judgments. The extradition law of the United States, for instance, expressly places the ultimate decision-making authority within the exclusive purview of the Secretary of State, regardless of initial judicial rulings.²⁴⁸

3. Pragmatic Considerations Supporting the Suggested Reading of the FSIA

The suggested approach to the FSIA has the salutary effect of promoting diplomatic effectiveness without hurting potential American claimants. It achieves a necessary compromise between the total exclusion of the executive branch from sovereign immunity determinations and the executive's discretionary intervention in all foreign sovereign immunity decisions.²⁴⁹

Forceful execution of judgments against a foreign state is widely recognized as a more serious encroachment upon its sovereignty than submission to the jurisdiction of another nation's courts.²⁵⁰ In addition, the

NETH. Y.B. INT'L. L. 288 (1979) (Holland); Decision of the Athens Court of Appeals, No. 1690 of 1949, 3 REV. HILLENIQUE DE DROIT INT'L 331 (1950), cited in Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT'L. L. 820, 834 (1981) (Greece).

248. 18 U.S.C. § 3184 (1982). See also *Escobedo v. United States*, 623 F.2d 1098 (5th Cir. 1980) (judicial decision refusing extradition of a U.S. citizen to Mexico subject to Executive review).

249. Michael Cardozo appears to be the most consistent and adamant advocate of the necessity for the State Department's right to intervene in all sovereign immunity proceedings. See 1976 Hearings, *supra* note 216, at 61-67; Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper*, 48 CORNELL L.Q. 461 (1963). In agreement with the views of Cardozo, it has been suggested that the FSIA should be supplemented with a provision analogous to the Hickenlooper Amendment to the Foreign Assistance Act of 1962, 22 U.S.C. §§ 2370 (e) (2) (1976). See Carl, *supra* note 177, at 1067; Note, *supra* note 230, at 430. This amendment, if passed, would authorize executive intervention also on the issue of jurisdiction, and therefore would effectively reintroduce problems from the pre-1976 era.

250. See, e.g., Sinclair, *The Law of Sovereign Immunity: Recent Developments*, in II RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 113, 219-20 (1980) ("[W]hatever may be the theoretical relationship between jurisdictional immunity and immunity from execution, the sensitivities of foreign States are likely to

international community generally agrees that enforcement of judicial decrees is not only a more offensive measure which may result in unpredictable retaliatory actions, but can also be a less efficient and less productive path for the recovery of a judgment.²⁵¹

The correlation between attachments of foreign sovereign property and their consequences for foreign policy is also recognized in the legislative history of the FSIA:²⁵² "The elimination of attachment as a vehicle for commencing a lawsuit will ease the conduct of foreign relations by the United States and help eliminate the necessity for determinations of claims of sovereign immunity by the State Department."²⁵³ Taken to its logical conclusion, this statement undermines the conventional interpretation of the FSIA. It is unlikely that Congress recognized the foreign policy problems stemming from pre-judgment attachments only to permit the very same problems to emerge in the area of execution. Introduction of the restrictive theory of sovereign immunity from execution, which provides for enforcement of judgments by attaching foreign sovereign property, injects a new irritant into the conduct of foreign affairs and, therefore, should be accompanied at least by the retention of the State Department's participation in determining foreign sovereign immunity from execution.

This conclusion is most forcefully supported by Professor H. Lauterpacht, who as early as 1951, advocated complete abolition of foreign sovereign prerogatives with respect to execution of valid judgments.²⁵⁴ However, even such an extreme opponent of immunity from execution as Professor Lauterpacht concluded:

[C]ontingencies are conceivable in which seizure of the property or of the assets of the foreign state might cause friction and raise issues likely to disturb in a serious way the friendly relations with the state concerned. Accordingly, if immunity from execution is abolished in principle, it may be

be aroused if, following upon the denial of a claim to jurisdictional immunity, the courts of the State of the forum authorise the levying of forced execution against the property of the defendant State.").

251. "Apparently it has been felt experience in the past that it is better for the state against which judgment is rendered to be led by public opinion, the obligations of good faith or diplomatic pressure to carry out the award than to have its property seized in execution by the officials of another government." Griffin, *supra* note 201, at 113. This view is also supported by the fact that before passage of the FSIA most of the judgments rendered by American courts were satisfied by foreign states. See Belman, *supra* note 231, at 186; Lowenfeld, *supra* note 231, at 929; von Mehren, *supra* note 177, at 43.

252. H.R. REP., *supra* note 203, at 6626.

253. *Id.* In this statement Congress was apparently referring to foreign sovereign immunity from jurisdiction which prior to 1976 could be secured by the attachment of sovereign's property. Even in this section, devoted to the new rules of execution of judgments, Congress did not mention the abolition of the State Department's role in the determination of foreign sovereign immunity from execution.

254. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y. B. INT'L L. 220 (1951).

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considered whether on the application of the foreign state concerned one branch of the Executive—such as the Ministry of Foreign Affairs—should not be given the power to stay the execution.²⁵⁵

Although the FSIA promulgates a restrictive theory of foreign sovereign immunity from execution, it is clear that the need for the State Department's right to control execution of judgments against foreign sovereigns is indispensable in the existing legal regime as well as in the more radical one advocated by Professor Lauterpacht.

III. Sovereign Immunity and Claims Settlement: The Interplay

The proposed reconstruction of executive power under the FSIA, which provides for State Department participation in the determination of foreign sovereign immunity from execution, promotes not only the nation's interest in a sure and potent foreign policy, but also the business community's interest in effective remedies against foreign states. This reading of the FSIA, more accurately representing congressional intent, calls on the State Department to reconsider its unwarranted abstention from immunity determinations with respect to execution when they implicate the country's foreign affairs.²⁵⁶ Private parties, in turn, should see through the illusion of a completely non-political remedy against a foreign state, independent of international realities.²⁵⁷ Upon reflection, the virtue of a clearly defined executive role in mediating between foreign states and private claimants becomes apparent. Recognition of executive authority over immunity from execution reaffirms the State Department's place in resolving international disputes, thereby affording United States nationals an alternate mechanism for obtaining relief from recalcitrant foreign states.

255. *Id.* at 243. Another international authority, Prof. Bouchez of the Netherlands, concluded that the executive branch should be entitled to request foreign sovereign immunity from execution, although from a judicial standpoint, foreign sovereign immunity from execution should not be granted. See Bouchez, *The Nature and Scope of State Immunity from Jurisdiction and Execution*, 10 NETH. Y.B. INT'L L. 3, 19-20 (1979).

256. The Legal Adviser to the State Department wrote to the Attorney General: "The Department of State will not make any sovereign immunity determinations after the effective date of P.L. 94-583. Indeed, it would be inconsistent with the legislative intent of the Act for the Executive Branch to file any suggestions of immunity on or after January 19, 1977." Letter from the Legal Adviser to the State Department to the Attorney General (Nov. 10, 1976), reprinted in 41 Fed. Reg. 50,883 (1976).

257. During a discussion of the 1976 bill, Professor McDougal commented perceptively that "if our foreign affairs interests were prejudiced by a court taking jurisdiction of a case any rational President would suggest immunity and any rational court would listen." 1976 PROCEEDINGS, *supra* note 177, at 57. Although Professor McDougal limited his remarks to the issue of jurisdictional immunity, his reasoning would appear to support the retention of a limited executive power over immunity from execution. This is particularly true since interference on the level of jurisdiction is usually unnecessary and premature if the executive has the statutory authority to intervene on the level of execution.

A. *Retrieving the Executive's Positive Role*

A revival of political discretion over enforcement of judgments against foreign states poses no danger to the independence of judicial process or interests of private claimants.²⁵⁸ The courts' primary role in adjudication of sovereign immunity claims, which Congress conferred upon them in the FSIA, will restrain the State Department from any attempts to overuse its discretion. In routine cases, the State Department will have no incentive to intervene in litigation, especially since it can always make its views known to the court in an *amicus curiae* brief. U.S. claimants, for their part, will face no obstacles to recovery against a foreign state in a typical commercial dispute. It is only in extraordinary cases, with severe political ramifications, that the State Department will be pressed to intervene in the proceedings by requesting a stay of execution.

The necessity for the State Department's active involvement in litigation will arise when the prospect of execution against a foreign state's property causes the state to threaten a serious breach of relations with the United States. In this situation, the position of American claimants is vulnerable to the foreign sovereign's ability to withdraw its commercial assets from the United States and thus frustrate enforcement of any judgment through judicial process.²⁵⁹ Under these conditions, it will be in the common interest of the State Department and private claimants to improve faltering relations even at the cost of State Department interference with a suggestion of immunity from execution. Ultimately, this intervention is consistent with the broad purposes of the FSIA—"to minimize irritation in foreign relations arising out of such litigation"²⁶⁰—and advantageous to the claimants themselves, since their grievances could be redressed through diplomatic negotiations. The conventional reading of the FSIA, to the contrary, excludes the State Department from foreign sovereign immunity disputes and deprives private

258. It should be reemphasized that between 1952 and 1976, when the State Department possessed full discretion over immunity decisions—with respect to both jurisdiction and execution—political considerations were said to have influenced its decision on only four occasions. See *supra* note 193. Both the State Department's sponsorship of the FSIA and its subsequent reluctance to interfere in any litigation, even after repeated requests from a foreign power, underscore its unwillingness to interfere in sovereign immunity proceedings. See State Department's Response to Notes from the Soviet Embassy Requesting Assistance in an Ongoing Litigation Against Novosti Press Agency and Telegraph Agency of the Soviet Union, DIG. U.S. PRAC. INT'L L. 515-16 (1977).

259. This result is especially likely since Congress intended the execution provisions of the FSIA to "provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment." H.R. REP., *supra* note 203, at 6606 (emphasis added). See also 28 U.S.C. § 1610(c) (1982).

260. Executive Communication from the Department of State and Department of Justice to the Speaker of the House of Representatives, *reprinted in* H.R. REP., *supra* note 203, at 6634.

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claimants of a possible non-judicial recovery against recalcitrant foreign states.²⁶¹

Relaxation of the FSIA pre-judgment attachment rules could also enhance the commercial security of potential American claimants and represents a judicial alternative to diplomatic involvement.²⁶² Yet this change in the FSIA provisions would defeat the very purpose of the statute—to transfer the entire process of determining foreign sovereign immunity prior to judgment from the State Department to the courts.²⁶³ Only a total elimination of pre-judgment attachments for purposes of obtaining jurisdiction allowed Congress to eliminate the State Department's power over jurisdictional immunity of foreign states.²⁶⁴ Consistency with this congressional scheme would require reintroduction of the State Department's right to intervene in sovereign immunity proceedings prior to the entry of a judgment—as opposed to post-judgment intervention as suggested in this Article—if pre-judgment attachment rules were liberalized and foreign states, as before 1976, were threatened with the forceful attachment of their property. Considering that the FSIA provisions on execution of judgments against foreign states are already more expansive than the corresponding norms of international practice,²⁶⁵ it is clearly preferable to let the State Department assist private claimants in recovering against foreign states by means of political negotiation.

Situations may arise, however, when the State Department's interference could impair claimants' ability to collect from a foreign state. American claimants who have obtained a judgment against a foreign state may be forced to forego its enforcement. This will occur if the State Department suggests immunity from execution pursuant to an agreement with a foreign state that releases, in return, American property in its possession.²⁶⁶ Such an exchange will primarily benefit national interests by reducing tension in the relations between the states; it will also benefit

261. Had Iran not taken American hostages, and the President not frozen Iranian assets, the majority of claimants would have been unable to obtain valid attachments of Iranian property. This serves as one example of a multitude of situations when the executive branch will hesitate to initiate offensive measures against a foreign state in order to protect claims of the U.S. nationals. In these cases, diplomatic negotiations following a stay of execution provide the only relief available to the claimants.

262. This amendment to the FSIA was advocated in Smit, *The Foreign Sovereign Immunities Act of 1976: A Plea for Drastic Surgery*, AM. SOC'Y OF INT'L L. PROC. 48, 67-68 (1979). Although the author acknowledged the destabilizing impact of attachments on foreign relations, he did not examine the necessity for State Department involvement in sovereign immunity proceedings if such an amendment were passed.

263. See *supra* note 209 and accompanying text.

264. See *supra* notes 252-53 and accompanying text.

265. See *supra* notes 244 and 247.

266. The return of the hostages held by a foreign state is a good example of an overwhelming national interest requiring State Department intervention in the judicial process. The sub-

individuals whose rights were violated by the foreign state. However, there may be private claimants whose property interests are sacrificed for the sake of these agreements and who may suffer an uncompensable loss.

*Rich v. Naviera Vacuba, S.A.*²⁶⁷ provides a good illustration of the executive's use of foreign sovereign immunity laws to block execution against foreign sovereign property in order to reach a diplomatic accommodation. The court followed the State Department's suggestion of immunity and denied execution against a Cuban vessel held as security by the plaintiffs. The released ship was returned to Cuba in exchange for a hijacked Eastern Airlines plane.²⁶⁸ Discussed in the context of foreign sovereign immunity laws, the incident stirred heated debate in the academic community.²⁶⁹

Viewed from a different angle, *Rich* constitutes in essence a classic claims settlement agreement.²⁷⁰ It is a notable example of limited executive interference with the expectations of private claimants for the sake of concrete national interests. Undoubtedly, the executive could have reached its objective through a formal claims settlement agreement with Cuba, as the court acknowledged in its decision.²⁷¹ This agreement would not have been defeated either by individuals, who had no rights to a secured judgment,²⁷² nor by Congress and the judiciary which had sup-

ject of an agreement can certainly be more mundane, such as a legal claim to commercial goods, but usually the two sides will give up comparable values.

267. 197 F. Supp. 710 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961).

268. *See supra* note 199.

269. Professor Lillich described the case as "one of the international legal monstrosities . . ." 1969 PROCEEDINGS, *supra* note 231, at 191. Cardozo, on the other hand, charged that a political monstrosity would have resulted from the failure to grant immunity. *Id.* at 194.

270. Within the framework of sovereign immunity law, this episode may be analyzed as an exercise in reciprocity which, like claims settlement, relies on give and take between nations. Reciprocity is a widely practiced norm recognized by international law. It has been adopted in Italy, *see* Condorelli and Sbolci, *supra* note 247, at 212-213; Yugoslavia, *see* Varady, *Immunity of State Property from Execution in the Yugoslav Legal System*, 10 NETH. Y.B. INT'L L. 85, 94-95 (1979); and the United Kingdom, *see* Higgins, *Execution of State Property: United Kingdom Practice*, 10 NETH. Y.B. INT'L L. 35, 52 (1979). For the statutory rules in socialist countries, which adhere to the principle of reciprocity in sovereign immunity proceedings, *see* 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 563-64, 580-82 (Soviet Union and Poland). Although reciprocity was considered to be one of the relevant factors in drafting the FSIA, U.S. courts have never formally adopted it. For criticism of the reciprocity rule, *see* Lauterpacht, *supra* note 254, at 245.

271. In *Rich*, the court explicitly stated that the State Department could have settled claims against the Cuban vessel under the authority of *Ex Parte Peru*, 318 U. S. 578 (1942), although it chose not to do so. 197 F. Supp. at 720.

272. It should be remembered that the case was decided during an era of absolute foreign sovereign immunity from execution, and that the government-owned ship, diverted to the United States by the crew, was a windfall to the claimants. *See supra* note 188 and accompanying text.

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ported analogous agreements in the past.²⁷³ Without question, the State Department's recourse to a binding suggestion of immunity from execution, as a more expedient and less overt mechanism for consummating the agreement, should have the same legal consequences as a valid claims settlement agreement leading to an identical outcome.

In fact, many cases traditionally analyzed like *Rich*, in the context of foreign sovereign immunity law, often obscure an underlying claims settlement agreement. When the government grants immunity to foreign state property seized by private claimants, it essentially forfeits—or settles—the private claims. The claims are settled for the sake of national political interests, though a formal settlement agreement is not created.²⁷⁴

In *Schooner Exchange v. M'Faddon*,²⁷⁵ the first sovereign immunity case in United States law, the government argued that claims against foreign states may be presented solely by the government, not by private individuals. Chief Justice Marshall, clearly perceived the interplay between private seizure of foreign sovereign property in the United States and public settlement of claims in the diplomatic arena.²⁷⁶

In yet another landmark case, *Ex Parte Peru*,²⁷⁷ the mingling of a State Department suggestion of immunity and a claims settlement agreement was all but forgotten. In that case, sensitive to the same concerns as in *The Schooner Exchange v. M'Faddon*, the Supreme Court expressly addressed the issue and stated:

Claims against [a friendly sovereign state] are normally presented and settled in the course of foreign affairs by the President and by the Department of State. When the Secretary of State elects to settle claims by diplomatic negotiations between the two countries rather than by continued litigation in the courts, it is of public importance that the action of the political arm of the government be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court.²⁷⁸

273. See, e.g., *Gray v. United States*, 21 Ct. Cl. 340 (1886) (French spoliation claims); *Pink v. United States*, 315 U.S. 302 (1942) (Litvinov Assignment).

274. It can be argued that all suggestions of foreign sovereign immunity constitute an international exchange of favors, although they are not always clear and tangible to an uninformed observer. Thus, Professor Reisman noted that Justice Marshall's opinion in *M'Faddon* was prompted by political considerations favoring an alliance with France against Britain in the War of 1812. Formation of such an alliance could have been hindered by non-recognition of French sovereignty over the ship. See Reisman, *International Incidents: Introduction to a New Genre of International Law*, 10 YALE J. INT'L L. 15 (1984).

275. 11 U.S. (7 Cranch) 116 (1812).

276. *Id.* at 146.

277. 318 U.S. 578 (1942).

278. *Id.* at 587. A similar situation was present in *Stephen v. Zivnostenska Banka*, 199 N.Y.S. 2d, 23 Misc. 2d 243 (Sup. Ct.), *aff'd*, 222 N.Y.S.2d 128, 15 A.D.2d 111 (1961) in which

As perceptively observed by Richard Lillich, "by intervening in sovereign immunity and act of state cases when negotiations are pending or have even not begun, the Department of State attempts, very successfully one may add, to impose the *Pink* rationale on American courts in the absence of an overriding executive agreement."²⁷⁹ Phrased differently, the executive's immunization and release of foreign property subject to claims of American citizens helps consummate a claims settlement agreement with a foreign state.

In essence, executive authority to immunize foreign sovereign property is indispensable to settle claims between nations, whether by means of a formal claims settlement agreement, such as the one with Iran, or by means of informal negotiations leading to the resolution of a dispute between two nations. Consequently, denial of executive control over determination of foreign sovereign immunity from execution undercuts the executive claims settlement power.²⁸⁰

B. *Executive Conduct During the Iranian Crisis*

The status of foreign state property in the United States and the settlement of private claims were inextricably linked during the Iranian crisis. The basic objective of the executive branch, intent on enforcing the agreements with Iran, was the termination of domestic litigation so that American commercial claims could be adjudicated in the new claims tribunal and Iranian property could be returned to Iran. Prevailing doctrines of claims settlement, in both domestic and international law, show how these goals could be achieved without infringing on federal court jurisdiction.

Upon entering a formal claims settlement, the government "transforms" a private claim into one that is public (to follow traditional legal doctrine), or simply takes control of the claim away from private claimants. In either formulation, the legal impact is the same: the claim is no longer cognizable in domestic courts, and an action may be dismissed.²⁸¹

the court refused to grant immunity at the State Department's suggestion, notwithstanding the adverse impact of its decision on ongoing claims settlement negotiations. The court based its refusal on the determination that the property in question did not belong to the foreign state involved.

279. R. LILlich, *supra* note 30, at 199-200.

280. The linkage between the right to make suggestions of foreign sovereign immunity from execution and claims settlement power is recognized in modern scholarship. Executive interference with execution is advocated as a necessary element of claims settlement agreements. *See, e.g.,* Bouchez, *supra* note 255, at 30 ("Intervention by the forum state may also occur in the form of settling the claim of a private person against a foreign state, and dealing with this claim through direct negotiations or other means for the international settlements of disputes.")

281. *See American Int'l Group v. Islamic Republic of Iran*, 657 F.2d 430, 441-42 (D.C.

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The validity of executive termination of domestic lawsuits, in the context of claims settlement, becomes clearer once a common misunderstanding about the Iranian agreement is dispelled. The settlement agreement did not preserve private claims and simply transfer them to a new forum. Instead, the agreement provided for an arbitral tribunal as a means of settling claims between the United States and Iran. Other mechanisms of compensation, such as a lump sum award with domestic valuation, were possible. The form of settlement is not critical.²⁸² In fact, the executive might have waived claims entirely without securing any compensation whatsoever,²⁸³ and without incurring liability to American claimants.²⁸⁴

While this accounts for the claims settlement aspect of the Iranian agreements, the transfer of Iranian property still requires clarification. The Court in *Dames & Moore* relied on IEEPA as a foundation for executive authority to withdraw licenses permitting encumbrance of Iranian property, thereby nullifying judicial attachments.²⁸⁵ The nullification applied to all Iranian property that had been attached under government licenses issued pursuant to the presidential freeze order.²⁸⁶

Under the Court's reasoning, Congress conferred power on the executive to exercise such control over foreign assets during national emergen-

Cir. 1981) (holding that the President's action took away a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(6)). See also *Security Pac. Nat'l Bank v. Gov't and State of Iran*, 513 F. Supp. 864 (C.D. Cal. 1981). In *Security Pacific*, Judge Kelleher convincingly demonstrated that the FSIA did not limit the President's "independent, and well-established, power under the Constitution, to settle a particular set of outstanding claims against a foreign government." *Id.* at 881. He concluded that executive settlement did not take away federal jurisdiction but simply rendered the controversy before it "moot." *Id.* Although this decision does not examine the theoretical background of claims settlement, it closely approaches the analysis of independent executive power and claims settlement presented in this Article.

282. See *supra* notes 123-26 and accompanying text.

283. Interestingly, American officials may have considered the possibility of waiving private claims, since they regarded success under international law as unlikely. They saw the establishment of a claims tribunal as a positive step for American claimants. See *1981 Hearings*, *supra* note 31, at 54, 57-58, 60-61 (testimony of Warren Christopher).

284. See *supra* note 95. Some critics were also uneasy because the termination was implemented in a heavy-handed manner that put courts in a needlessly awkward position. Courts that were otherwise deferential to the executive's claims settlement authority, and seemingly untroubled by their alleged loss of jurisdiction, balked at enforcing the suspension order. See, e.g., *American Int'l Group*, 657 F.2d at 445; *Security Pac. Nat'l Bank*, 518 F. Supp. at 881-82. As one court observed, "[a]lthough it is within the powers of the President . . . to settle international claims, it is manifestly not within the President's powers to order this Court to implement such . . . settlements in any particular manner." *Id.* at 881. Direct enforcement of the President's suspension order, which virtually dictated a holding to courts, would have subordinated the judiciary to the executive's will. To achieve the same purpose, the executive simply could have intervened in litigation and called on courts to dismiss the suits, thereby upholding the executive agreements.

285. 453 U.S. at 572-74.

286. See *supra* note 2.

cies. The Court posited no theory of independent executive authority to immunize foreign property from judicial encumbrance, either in a national emergency or otherwise.²⁸⁷

The absence of an adequate legal theory became critical in *Electronic Data Systems Corp. v. Iran Social Sec. Organization*,²⁸⁸ in which unlike *Dames & Moore* and all other cases arising out of the claims settlement agreement, the plaintiffs had (1) received a judgment prior to the signing of the settlement agreement and (2) attached Iranian property prior to the executive freeze order. Thus, they regarded their remedy as independent of and unaffected by the President's orders. The executive sought a vacation of the attachments to effect the transfer of state property under the hostage release agreements, but two courts turned its request down. The district court sweepingly rejected both executive authority to terminate lawsuits as an unconstitutional violation of its jurisdiction, and executive authority to vacate valid judicial attachments.²⁸⁹ After *Dames & Moore* was decided, the Court of Appeals for the Fifth Circuit vacated the lower court's judgment with respect to claims suspension yet upheld the order preserving attachments on Iranian property.²⁹⁰ It appeared that the executive's authority to dislodge a foreign state's property was contingent on the timing of the attachment and on the interpretation of the IEEPA, enacted only four years before the Iranian crisis.

The executive in *Electronic Data Systems*, instead of asserting its independent authority to block execution against a foreign state's property, relied on a new, untested statute. Had the theory of independent authority been presented, the court would have had to confront the executive's discretion to immunize a foreign state's property from execution when international relations required it. This did not happen. The district court instead found the IEEPA inadequate to warrant executive interference, tying the executive's hands, when in fact the President retained the authority to grant Iranian property immunity from execution.

In contrast, the proper result was reached in *Hawaiian Agronomics Co. v. Iran*.²⁹¹ There a foreign claimant sought to block action by the United States and Iran seeking a dismissal of its suit and vacation of attachments. The court did not dismiss the private action, holding that the plaintiff, as a foreign national, was not bound by the claims settlement

287. See *supra* note 29.

288. 508 F. Supp. 1350 (N.D. Tex.), *vacated in part, aff'd in part*, 651 F.2d 1007 (5th Cir. 1981).

289. 508 F. Supp. at 1364-65.

290. 651 F.2d at 1011.

291. 518 F. Supp. 596 (C.D. Cal. 1981).

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agreement, but it did vacate the attachments. Thus, the plaintiff could proceed with the litigation but obtain, at best, an unsecured judgment. The case reveals that the executive may exercise its power to remove (immunize) foreign state property without infringing on the courts' jurisdiction over foreign states.

Conclusion

Although the Iranian hostage crisis was one of the most trying episodes in recent American diplomacy—a situation normally warranting broad executive discretion—substantial opposition and doctrinal uncertainty emerged immediately after the President decisively exercised his authority in obtaining the hostages' release. This Article has attempted to show that the opposition was unfounded and that the doctrinal support is clear. The executive has independent authority to settle claims and to block execution against a foreign state's property. These two powers together equip the President to deal swiftly and surely in a foreign policy crisis. Their exercise will normally work to the benefit of private citizens injured by foreign states and will not threaten either the independence of courts or the prerogatives of Congress.